



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 14, 2008

Ms. Pamela Smith
Assistant General Counsel
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P.O. Box 4087
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OR2008-15683

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 327807.

The Texas Department of Public Safety (the "department") received a request for (1) all responses to RFO number 405-IT8-0258, (2) the contract award letter sent to the winning bidder, and (3) any documents reflecting approval by the Public Safety Commission (the "PSC") of the awarded contract.¹ You state you have released the requested contract award letter to the requestor. You also state you have no information responsive to the request for approval by the PSC.² You claim the requested bid proposals are excepted from disclosure under sections 552.101 and 552.104 of the Government Code. Furthermore, because release of the requested bid proposals may implicate the proprietary interests of third parties, the department was required by section 552.305 of the Government Code to notify the companies whose bid proposals are at issue of the request and of their opportunity to submit comments to this office explaining why the requested information should be withheld from disclosure. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability

¹ As you have not submitted a copy of the request, we take our description from your brief.

² The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

of exception to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note Red Hawk's requested bid proposal was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-15081 (2008). In that ruling, we concluded, among other things, the department must withhold the insurance policy numbers we marked in Red Hawk's submitted bid proposal under section 552.136 of the Government Code, and the remaining information in the proposal must be released in accordance with copyright law. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the department must continue to rely on that ruling as a previous determination and withhold or release Red Hawk's bid proposal in accordance with Open Records Letter No. 2008-15081.⁴ See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we must address the department's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request a copy of the written request for information. See Gov't Code § 552.301(e)(1)(B). As of the date of this letter, however, you have not submitted to this office a copy of the written request for information. Consequently, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. See Open Records Decision No. 150 at 2 (1977). Section 552.104 is discretionary in nature, and serves only to

³ We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

⁴ As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

protect a governmental body's interests; as such, it is waived by a governmental body's failure to comply with section 552.301. *See* Open Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). Consequently, the department may not withhold any of the submitted information pursuant to section 552.104 of the Government Code. However, because section 552.101 and third party interests can provide compelling reasons to withhold information, we will consider whether or not the requested information is excepted from disclosure under the Act.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. You contend the requested bid proposals are excepted from disclosure under section 552.101 in conjunction with section 2156.123 of the Government Code, which provides:

(a) The commission or other state agency shall avoid disclosing the contents of each proposal on opening the proposal and during negotiations with competing offerors.

(b) The commission or other state agency shall file each proposal in a register of proposals, which, after a contract is awarded, is open for public inspection unless the register contains information that is excepted from required disclosure under Subchapter C, Chapter 552.

Id. § 2156.123(a),(b). Subchapter C of chapter 2156 of the Government Code prescribes procedures for the use of competitive sealed bid proposals by state agencies. *See id.* § 2156.121. We note section 2156.123 does not contain express language that makes information confidential. This office has held the statutory confidentiality protected by section 552.101 requires express language making certain information confidential or stating information shall not be released to the public. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because section 2156.123 does not expressly make information confidential or expressly state the information shall not be released to the public, the department may not withhold any of the requested bid proposals under section 552.101 in conjunction with section 2156.123 of the Government Code.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the interested third parties explaining why the requested bid proposals should not be released. Therefore, we have no basis to conclude any of the third parties have protected proprietary interests in the requested information. *See id.* § 552.110; Open Records Decision

Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, the requested bid proposals may not be withheld based on proprietary interests any of the interested third parties may have in them.

We note some of the submitted bid proposals contain insurance policy numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136.⁵ We conclude the insurance policy numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the department must withhold the marked insurance policy numbers under section 552.136 of the Government Code.

We note part of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

⁵ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the department must withhold or release Red Hawk's bid proposal in accordance with Open Records Letter No. 2008-15081. The department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released in accordance with copyright law.⁶

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

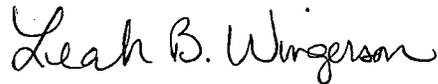
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

⁶ We note the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Leah B. Wingerson
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Open Records Division

LBW/ma

Ref: ID# 327807

Enc. Submitted documents

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