



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 22, 2009

Mr. Trenton Hood
Naman, Howell, Smith & Lee, L.L.P.
P.O. Box 1470
Waco, Texas 76703

OR2009-00878

Dear Mr. Hood:

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# 332784.

Bell County (the "county"), which you represent, received two requests for information regarding a request for proposals for inmate healthcare services, including the proposals submitted in response to the request for proposals, the corresponding evaluation sheets, and the final signed contract. You state the final signed contract did not exist at the time these requests were received.¹ You claim the requested winning proposal and evaluation sheets are excepted from disclosure under section 552.104 of the Government Code. You also state that the release of the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you have notified Correctional Health Management, Inc. ("CHM"); NaphCare, Inc. ("NaphCare"); Physicians Network Association ("PNA"); and Prison Health Services, Inc. ("PHS"); of the requests and of their right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). CHM has submitted comments to this office. We have considered the submitted arguments and reviewed the submitted information.²

¹The 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. at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

²To the extent any additional responsive information existed on the date the county received this request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Initially, we must address the county's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). In addition, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D).

You inform us that the county received the two requests on October 21, 2008 and October 24, 2008. The October 21 request seeks "all proposal documents from all companies" who responded to the county's request for proposals for inmate healthcare services. The October 24 request seeks the evaluation sheets and a copy of CHM's winning proposal for the same request for proposals. We note that CHM's winning proposal is requested in both requests. In correspondence with our office dated November 6, the county seeks to withhold CHM's winning proposal under section 552.104 of the Government Code. However, we note that, with respect to CHM's winning proposal, the county did not timely raise section 552.104 of the Government Code. We next note that the county did not submit some of the information responsive to both requests, including the requested evaluation sheets, until November 19, 2008, which is beyond the 552.301(e) deadline of either request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 interest exists when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for a decision resulted in waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Accordingly, the county may not withhold any portion of the information at issue under section 552.104 of the Government Code. Because third party interests are at stake, we will consider whether any of the submitted information must be withheld on those grounds.

An interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from NaphCare, PNA, or PHS. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of these companies. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the county may not withhold any portion of the submitted information on the basis of any proprietary interests that NaphCare, PNA, or PHS may have in the information.

CHM asserts some of its information is excepted from disclosure under section 552.110(b) of the Government Code, which protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also* ORD 661 at 5-6.

Upon review of CHM's arguments and the submitted information, we find CHM has established the release of the customer information it seeks to withhold would cause the company substantial competitive injury. Therefore, the county must withhold this information, which we have marked, under section 552.110(b). However, we find that CHM has made only conclusory allegations that release of its remaining information, including pricing and personnel information, would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government).

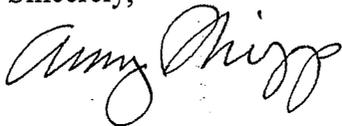
Therefore, the county may not withhold any of CHM's remaining information under section 552.110(b) of the Government Code.

In summary, the county must withhold the information we have marked pursuant to section 552.110 of the Government Code. The remaining information must be released to the requestors.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 332784

Enc. Submitted documents

cc: 2 Requestors
(w/o enclosures)

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