



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 24, 2012

Ms. Mariví Gambini
Paralegal
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2012-05824

Dear Ms. Gambini:

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# 451506.

The City of Irving (the "city") received two requests for information. The first request seeks (1) the final contract awarded for a specified request for proposals, (2) the proposals submitted in response to the request for proposals, and (3) information relating to the evaluation and award process. The second request seeks (1) the final contract, (2) the proposal submitted by Motorola Solutions, Inc. ("Motorola"), (3) information relating to the evaluation and award process, and (4) the request for proposals issued by the city. You state you have released information responsive to part 3 of each request and part 4 of the second request. You claim the contract responsive to part 1 of each request is subject to a previous determination issued by this office. You claim portions of the submitted proposals responsive to part 2 of each request are excepted from disclosure under sections 552.101 and 552.139 of the Government Code. In addition, you state release of the submitted proposals may implicate the proprietary interests of Motorola, Harris Corporation RF, and CES Network Services, Inc. Accordingly, you provide documentation showing you have notified these third parties of the request and 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). We have considered the claimed exceptions and reviewed the submitted information.

We first note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice 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 ruling, we have not received comments from any of the interested third parties. Thus, we have no basis to conclude any of the third parties has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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. Accordingly, the city may not withhold any of the information at issue on the basis of any proprietary interest any of the third parties may have in the information.

Next, you inform us the submitted contract responsive to item 1 of the requests was the subject of two previous requests, in response to which this office issued Open Records Letter No. 2012-03163 (2012). In that ruling, we determined that because the city raised no exceptions to disclosure and because the interested third party had been notified pursuant to section 552.305, but did not submit written comments to this office explaining why the information should be withheld, the contract must be released to the requestors. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude the city must rely on Open Records Letter No. 2012-03163 as a previous determination and release the submitted contract in accordance with it. *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).

You assert that portions of the submitted proposals responsive to part 2 of the request are excepted from disclosure by section 552.101 of the Government Code. Section 552.101 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 protected by other statutes. As part of the Texas Homeland Security Act ("HSA"), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. You assert portions of the proposals at issue are confidential under section 418.181 of the Government Code, which provides "[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism." *Id.* § 418.181. The fact that information may relate to a governmental body's security

concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert, and we agree, the citywide communication systems, which you state are the "foundation to the [c]ity's overall critical infrastructure" and key to the city's "effective and efficient response in the event of a mass tragedy," are critical infrastructure because their function is "vital to the security, governance, public health, safety, and economy of the [c]ity." *See id.* § 421.001 (defining "critical infrastructure" to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation"). You state portions of the proposals reveal "vulnerable infrastructure related to the [c]ity's radio, 911 Public Service Answering Point (PSAP), network, and fiber optic communications systems." You assert that release of such information "would provide the necessary information for a terrorist or other criminal element to disable or sabotage the [c]ity's communication systems," therefore "impact[ing] the [c]ity's ability to deliver public safety services[.]" Based on your arguments and our review of the submitted information, we find that portions of the submitted proposals identify technical details of particular vulnerabilities of the city's communication systems to an act of terrorism. Thus, the information we have marked or indicated must be withheld under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.¹ The remaining information includes general, non-detailed, information about the city's communication systems. The remaining information also describes proposals that you do not explain were adopted by the city as described. We note that while you seek to withhold the names of some existing sites, those names are revealed in the contract that has been previously publicly released. We find you have failed to demonstrate that the remaining information reveals technical details of particular vulnerabilities of the city's critical infrastructure, and it may not be withheld under section 552.101 on that basis.

You also raise section 552.101 of the Government Code in conjunction with section 421.002 of the Government Code. For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision's structure. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as

¹Because our ruling as to this information is dispositive, we do not address your remaining arguments against its disclosure.

general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). You quote the following portions of section 421.002:

(b) The governor's homeland security strategy shall coordinate homeland security activities among and between local, state, and federal agencies and the private sector and must include specific plans for:

...

(4) protecting critical infrastructure; [and]

...

(6) detecting, deterring, and defending against terrorism, including cyber-terrorism and biological, chemical, and nuclear terrorism[.]

Gov't Code § 421.002(b). Section 421.002 only provides the elements that must be addressed by the governor's homeland security strategy. It does not itself explicitly make any information confidential. Therefore, none of the remaining information may be withheld under section 552.101 on that basis.

You next raise section 552.101 of the Government Code in conjunction with section 2054.077 of the Government Code. Section 2054 provides, in relevant part:

(b) The information resources manager of a state agency may prepare or have prepared a report, including an executive summary of the findings of the report, assessing the extent to which a computer, a computer program, a computer network, a computer system, an interface to a computer system, computer software, or data processing of the agency or of a contractor of the agency is vulnerable to unauthorized access or harm, including the extent to which the agency's or contractor's electronically stored information is vulnerable to alteration, damage, erasure, or inappropriate use.

(c) Except as provided by this section, a vulnerability report and any information or communication prepared or maintained for use in the preparation of a vulnerability report is confidential and is not subject to disclosure under Chapter 552.

Id. § 2054.077(b)-(c). Upon review, we find that the city has not demonstrated that any portion of the remaining information constitutes a vulnerability report prepared under section 2054.077, or any information or communication prepared or maintained for use in the preparation of such a report. Accordingly, the city may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 2054.077 of the Government Code.

Section 552.139 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Id. § 552.139. Section 2059.055 of the Government Code provides in turn, in relevant part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You generally state the remaining information you seek to withhold contains details regarding the city's communication systems. However, as noted above, the remaining information consists of general information about the city's communication system or information concerning communication systems being offered to the city. You have not demonstrated how the remaining information relates to the city's computer network security, or to the design, operation, or defense of the city's computer network as contemplated in section 552.139(a). Further, we find you have failed to explain how the remaining information consists of a computer network vulnerability report or assessment as

contemplated by section 552.139(b). Accordingly, the city may not withhold any of the remaining information under section 552.139 of the Government Code.

We note some of the remaining information is protected by section 552.136 of the Government Code.² Section 552.136 of the Government Code provides that “[n]otwithstanding 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.” *Id.* § 552.136(b); *see also id.* § 552.136(a) (defining “access device number”). This office has determined an insurance policy number is an access device for purposes of section 552.136. Therefore, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note portions of the submitted information are protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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 copyright law and the risk of a copyright infringement suit.

In summary, the city must rely on Open Records Letter No. 2012-03163 as a previous determination and release the submitted contract in accordance with it. The city must withhold the information we marked or indicated in the submitted proposals under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The city must also withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released to its respective requestor, but any information protected by copyright may only be released in accordance with copyright law.

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

²The 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).

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 451506

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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