



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 13, 1996

Ms. Diana L. Granger  
Akin, Gump, Strauss, Hauer & Feld, L.L.P.  
1900 Frost Bank Plaza  
816 Congress Avenue  
Austin, Texas 78701

OR96-2390

Dear Ms. Granger:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102336.

The City of Granbury (the "city"), through its Municipal Electric Department, received a request for copies of "all offers, and any revisions thereto, related to the Request for Proposal concerning the purchase of electric energy submitted by the Granbury Municipal Electric Department in March, 1995." You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.111 of the Government Code. It appears from the documents submitted to this office that the city received the request for information on September 5, 1996. However, the city did not request a decision from this office until September 18, 1996. Consequently, you failed to request a decision within the 10 days required by section 552.301(a) of the Government Code.

Sections 552.301 and 552.302 of the Government Code require a governmental body to release requested information or to request a decision from the attorney general within 10 days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this

presumption. *See id.*<sup>1</sup> As we have stated in a previous opinion, section 552.104 is designed to protect the interests of governmental bodies and not the interests of private parties submitting information to the government. Open Records Decision No. 592 (1991). Therefore, section 552.104 may be waived by a governmental body and is not a compelling reason to overcome the presumption of openness that arises under section 552.302 of the Government Code. Therefore, the city may not withhold any of the requested information under that section.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. However, as section 552.111 is designed to protect a governmental body's interest, we conclude that the city has waived the exception as to the submitted information with the exception of the notes that reflect information that we conclude is protected under

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<sup>1</sup>You claim that the request for information is broad and vague and that such a request "puts an onerous burden on the City to determine what type of information falls within the ambit of the request." Numerous opinions of this office have addressed situations in which a governmental body has received either an "overbroad" written request for information or a written request for information that the governmental body is unable to identify. Open Records Decision No. 561 (1990) at 8-9 states:

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982); 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974).

In response to the request at issue here, the city must make a good-faith effort to relate the request to information in the city's possession and must help the requestor to clarify his request by advising him of the types of information available. We note that if a request for information is unclear, a governmental body may ask the requestor to clarify the request. Gov't Code § 552.222(b)); *see also* Open Records Decision No. 561 (1990) at 8. However, a request for records made pursuant to the Open Records Act may not be disregarded simply because a citizen does not specify the exact documents he desires. Open Records Decision No. 87 (1975). We also note that the "administrative inconvenience" of providing public records is not grounds for refusing to comply with the mandates of the Open Records Act. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

section 552.110. To the extent that the consultant's notes reflect that information, they must be withheld.

You state that the companies who submitted the bids may claim that the information is confidential. Consequently, pursuant to section 552.305 of the Government Code, this office informed the bidders of the request and of their obligation to submit to this office their arguments as to why any claimed exceptions to disclosure apply to their information. We received responses from five of the bidders, West Texas Utilities Company ("WTU"), Brazos Power Marketing Cooperative, Inc. ("BPM"), LG&E Power Marketing, Inc. ("LPM"), Texas Utilities Electric Company ("TU Electric"), and the City of Austin Electric Utility Department ("Austin"). We also address their claimed exceptions to disclosure. We note that the Lower Colorado River Authority did not respond.<sup>2</sup>

Section 552.110 excepts from disclosure (1) trade secrets, and (2) commercial or financial information obtained from a person and confidential by statute or judicial decision. The third-parties argue that portions of their proposals are protected under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

We have reviewed the briefing and documents submitted and conclude that the city must withhold the following information submitted by BPM under the second prong of section 552.110: the second paragraph in the attachment to Item 4, Item 5, Item 7, including the notes on the page to the extent that they reveal the contents of Item 7, and two of the pages in Item 8. We have reviewed WTU's arguments and materials and conclude that WTU has met its burden for the portions of its proposal for which it claimed an exception under the second prong of section 552.110. We also conclude that the city must withhold the marked portions of Austin's proposal under the second prong

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<sup>2</sup>At least one of the third parties states that its information was provided to the city with the expectation that it would be kept confidential. We note that this is not a sufficient basis to make information confidential. *See, e.g.,* Open Records Decision No. 180 (1977).

of section 552.110. The city must withhold portions of LPM's information under the second prong of section 552.110. We have marked the portions of LPM's information that may *not* be withheld under the second prong of section 552.110. Similarly, we conclude that the city must withhold from required public disclosure certain portions of TU Electric's information under the second prong of section 552.110. This exception also applies to any of the consultant's notes that reveal information that we have concluded is protected under this exception. We have marked the original information submitted by the companies that must be withheld under this exception. We have not marked the consultant's notes but they must be withheld only to the extent that they reveal information we have said is confidential under section 552.110.

The only information for which an exception was claimed that we concluded may not be withheld under the second prong of section 552.110 is certain information submitted by LPM and two pages of documents submitted by BPM. We therefore address their trade secret arguments with regard to that information. Section 552.110 excepts from disclosure trade secrets or financial information obtained from a person and confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

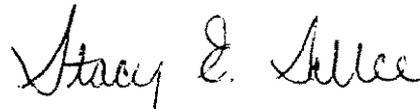
any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552

(1990) at 5.<sup>3</sup> We have reviewed the information submitted by LPM and BPM that is not protected by the second prong of section 552.110 and conclude that the city may not withhold it as a trade secret.<sup>4</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/ch

Ref.: ID# 102336

Enclosures: Submitted documents

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<sup>3</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

<sup>4</sup>We note that the city also claims that section 552.101 of the Government Code, in connection with section 252.049 of the Local Government Code, protects the requested information. We believe that this statute protects the same information that is protected under section 552.110 of the Government Code; therefore, we do not address arguments made under section 252.049 separately.

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