



December 14, 1999

Mr. William E. Wood
Assistant City Attorney
Office of the City Attorney
P.O. Box 83996
San Antonio, Texas 78283-3966

OR99-3635

Dear Mr. Wood:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130234.

The City of San Antonio (the "city") received a request for information relating to the city's purchase of a multisite, 800 MHz Trunked Radio System. You have submitted the following information as responsive to the request: Ericsson, Inc.'s Best and Final Offer, Motorola's Best and Final Offer, the city's contracts with Dailey & Wells Communications, Inc. and RCC Consultants, Inc., and a representative sample of the notes, scoring sheets, and records created by the city during the procurement process. You also assert that the city's contract with Ericsson is also responsive to this request. We note that this contract was the subject of Open Records Letter No. 99-3352 (1999). We presume that the city has already acted in accordance with that ruling. As for the submitted information, you argue that portions of these records are excepted from disclosure under sections 552.106 and 552.110 of the Government Code. We have considered the submitted arguments and have reviewed the information at issue.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, you notified Ericsson, Inc. ("Ericsson"), Dailey & Wells Communications, Inc. ("Dailey & Wells") and RCC Consultants, Inc. ("RCC") of the request for information.¹ See Gov't Code § 552.305 (permitting interested third party to submit to

¹Since Motorola is the requestor, we need not address the proprietary nature of that company's submitted information.

attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Ericsson, Dailey & Wells and RCC responded to the notification by arguing that their information was protected under section 552.110.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial 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.

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 at 5 (1990).² Ericsson

²The 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]

argues that its information is a trade secret of the company. However, the company has made no demonstration of the factors necessary to establish a trade secret claim. *See* Open Records Decision No. 402 (1983). Therefore, we conclude that Ericsson's information may not be withheld under the trade secret prong of section 552.110.

Section 552.110(b) excepts from required public disclosure "[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." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information.

After reviewing the documents and the arguments presented, we conclude that neither Dailey & Wells nor RCC has established that its company's information is excepted from disclosure under section 552.110. Furthermore, we note that the terms of a contract with a governmental body are generally not excepted from disclosure. Gov't Code § 552.022(a)(3)(contracts with governmental body expressly made public), *see also* Open Records Decision No. 541 at 8 (1990) (terms of contract with state agency). *Cf. Open Records Decision No. 514* (1988) (public has interest in knowing prices charged by government contractors). Therefore, information relating to Dailey & Wells and RCC may not be withheld from disclosure.

Ericsson argues that the release of its "pricing information" would cause the company substantial competitive harm. We note that Ericsson does not indicate which portions of the submitted documents contain its "pricing information." Therefore, we have reviewed the documents to determine what information, if any, is protected under section 552.110(b) of the Government Code. After careful review, it appears that the "pricing information" at issue relates solely to this particular procurement process. Consequently, we do not believe that Ericsson has shown that the release of this information will negatively impact future competitive situations. Therefore, none of the responsive information may be withheld from disclosure under section 552.110. *See* Open Records Decision No. 319 (1982) (pricing proposals may only be withheld under predecessor to section 552.110 during bid submission process).

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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

You argue that the remaining submitted information, which consists of documents created by the city during the procurement process, is excepted from disclosure under section 552.106 of the Government Code. Section 552.106 protects drafts and working papers involved in the preparation and enactment of proposed legislation. Open Records Decision No. 429 (1985). The purpose of the exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body and to thereby protect the internal “deliberative” or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). You argue that the purpose of these documents was to present a recommendation to the city council for adoption of an ordinance. We disagree. The documents at issue are typical to any procurement process; we see no evidence to support your argument that they were created in the preparation or enactment of proposed legislation. Consequently, the city may not withhold any of the requested information under section 552.106.

You also assert that these documents are excepted from disclosure under section 552.111. We note that the city did not assert its section 552.111 claim within ten business days of receiving the written request for information. *See* Gov’t Code § 552.301. Section 552.111 is a discretionary exception designed to protect a governmental body’s interest and is, therefore, waived if not timely raised. Open Records Decision No. 470 at 2 (1987) (section 552.111 may be waived by governmental body). You argue that since sections 552.106 and 552.111 are so closely intertwined, the city was essentially raising section 552.111 when it asserted its section 552.106 claim. Although we agree that the purpose of the two exceptions is similar, section 552.106 and 552.111 are distinct exceptions that must be raised independently of each other. Accordingly, since the city did not timely assert its 552.111 claim, we will not address the city’s arguments under that exception. The requested information must, therefore, be released.

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.

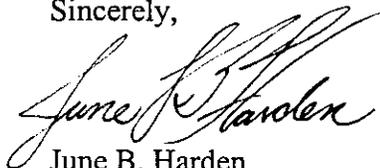
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID# 130234

Encl. Submitted documents

cc: Mr. Larry Mabry
Vice President
Motorola Western Division
9980 Carroll Canyon Road
San Diego, California 92131
(w/o enclosures)

Mr. Gregory A. Munchrath, P.E.
Vice President
RCC Consultants, Inc.
Southern Region
10700 North Freeway, Suite 610
Houston, Texas 77037-1146
(w/o enclosures)

Ericsson
Attn: Kenneth Barclay
Senior Project Manager
Mountain View Road
Lynchburg, Virginia 24502
(w/o enclosures)

Mr. Richard Wells, President
Dailey & Wells Communications
5800 Rittiman Plaza
San Antonio, Texas 78218
(w/o enclosures)