



July 31, 2001

Ms. Susan Guinn
Assistant City Attorney
Development and Financial Services
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2001-3319

Dear Ms. Guinn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150056.

The City of San Antonio (the "city") received a request for the bid proposals submitted in response to the city's Request for Proposal #A580-01.¹ Although the city does not raise any exceptions to disclosure, the city advises this office that the requested information may involve the proprietary interests of Southwestern Bell Wireless Services/Cingular Wireless ("Cingular"), AT&T Wireless Services ("AWS"), Sprint PCS Clear Wireless ("Sprint"), and Nextel Communications, Inc. ("Nextel") and, therefore, the city is asking this office for a decision under section 552.305(a) of the Government Code. The city has submitted copies of letters notifying the interested third parties of the request as required by section 552.305(d). *See* Gov't Code § 552.305 (permitting interested third party to submit to 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 exceptions to the Public Information Act in certain circumstances). The city has also submitted copies of the bid proposals responsive to the request. Cingular and AWS each responded to the notice, submitting briefs to this office asserting exceptions to disclosure under sections 552.104 and 552.110 of the Government Code. We have considered the asserted exceptions, and the submitted comments and arguments, and we have reviewed the submitted information.

¹The city originally received two requests for the same information; however, both the city and the requestor Cingular Wireless have informed this office that Cingular has rescinded its request.

We must first address a procedural matter. The city received the request for information on April 17, 2001. The city sent both its request for a decision from this office and its notice of that request for decision to the requestor on May 21, 2001. Pursuant to section 552.301(b) of the Government Code, the city was required to request a decision from this office not later than the 10th business day after the date of the city's receipt of the request. Also, no later than this deadline, the city was required to send notice to the requestor in accordance with section section 552.301(d). The city did not timely comply with these provisions. Accordingly, the requested information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." *Id.* § 552.302; *see also 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has long held that a compelling reason sufficient to overcome the section 552.302 presumption of openness exists where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). Accordingly, we next address the claims raised by Cingular and AWS.

Both AWS and Cingular argue that the submitted information is confidential because they submitted it to the city marked "proprietary and confidential," and because their correspondence with the city indicated an understanding that the information would not be disclosed to third parties. Information that is subject to the Public Information Act (the "Act") may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986)*. Consequently, under the Act, information must fall within an exception to disclosure in order to be withheld.

AWS asserts that its bid proposal information is excepted from public disclosure by section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." However, the purpose of section 552.104 is to protect the interests of *governmental bodies*, not private parties that submit information to governmental bodies. Open Records Decision No. 592 at 8-9 (1991). As the city does not raise section 552.104, this exception is not applicable to the requested information. *Id.* (governmental body may waive section 552.104). Therefore, the AWS bid proposal information may not be withheld under section 552.104.

Both AWS and Cingular assert that their respective bid proposal information is excepted from public disclosure under sections 552.110(a) and (b). Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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.

As to section 552.110(a), a "trade secret:"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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 single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others 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 to [its] competitors;

(5) the amount of effort or money expended by [the company] in developing this information; and

(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 No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no demonstration of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

AWS argues generally that information in its bid package distinguishes it from that of competitors, and that the information in the package is proprietary and maintained in a restricted manner. Although AWS discusses some of the six trade secret factors, we do not believe that AWS has demonstrated that any of its information at issue meets the above-quoted definition of a trade secret. Accordingly, we conclude that the AWS information may not be withheld under section 552.110(a) of the Government Code. Cingular, on the other hand, makes a *prima facie* case through specific arguments and representations that specific portions of its information constitute trade secrets, and this office has received no comments to the contrary. Accordingly, we have marked those portions of the Cingular information that the city must withhold under section 552.110(a).

Section 552.110(b) requires the entity arguing the exception to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Both AWS and Cingular argue that their respective information is excepted under section 552.110(b) ~~because~~ the release of the information might impair the government's ability to obtain such information in the future. This argument, expressing the commercial interests of the city, evidently relies on the test announced in *National Parks* pertaining to the applicability of the impairment prong of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. *See National Parks*, 498 F.2d at 770. Although this office at one time applied this aspect of the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Circuit Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App. - Austin 1999, pet. denied). Moreover, section 552.110(b) now expressly requires *a demonstration, based on specific factual evidence*, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See also* Open Records Decision No. 661 at 5-6 (1999). Thus, the issue of the government's ability to obtain information in the future is not a relevant factor under the current section 552.110(b).

AWS makes generalized arguments under section 552.110(b) that its marketing and pricing proposal is confidential; however, AWS does not sufficiently explain the applicability of that section to any of the submitted information. Thus, we conclude that AWS's information may not be withheld under section 552.110(b). See Open Records Decision No. 319 at 3 (1982). Cingular has demonstrated through specific arguments and factual representations that substantial competitive harm would result from disclosure of certain types and portions of its information. Cingular asserts that its pricing and rate information should be excepted from disclosure under section 552.110. This office has determined that after a contract has been awarded, pricing information is generally not excepted from disclosure under section 552.110. See Open Records Decision Nos. 509 at 5 (1988) (stating that 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 was entirely too speculative); 514 (1988) (public has interest in knowing prices charged by government contractors); 319 (1982) (stating that pricing proposals are entitled to protection *only during bid submission process*). The public has a strong interest in the release of prices in government contracts. See Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Accordingly, we have marked the portions of the Cingular information that the city must withhold as excepted from disclosure under section 552.110(b).

Finally, as of the date of this decision, neither Nextel nor Sprint have submitted to this office any reasons explaining why the requested information should not be released. Therefore, we have no basis to conclude that their information is excepted from disclosure, and it must be released.

In summary, the city must withhold portions of the submitted Cingular information under sections 552.110(a) and (b) of the Government Code. The remaining information must be released to the requestor.

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).

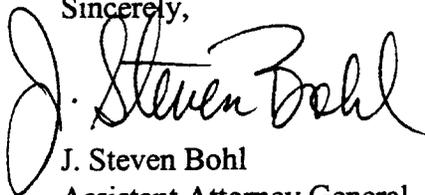
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

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 General Services Commission at 512/475-2497.

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,



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JSB/sdk

Ref: ID# 150056

Enc: Marked documents

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