



January 9, 2002

Mr. Clay T. Grover
Feldman & Rogers, LLP
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2002-0165

Dear Mr. Grover:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157111.

The Fort Bend Independent School District (the "district") received a request for the response by Reliant Energy Solutions ("RES") to RPF No. 76, and any information related to the selection of RES. You state that the district has provided some responsive information to the requestor. You claim that the submitted information may be excepted from disclosure pursuant to sections 552.101, 552.104, and 552.110 of the Government Code. You make no arguments and take no position as to whether the submitted information is excepted from disclosure. You state that RES informed the district that the submitted information is confidential. Information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.*, Open Records Decision No. 180 (1977). You state, and provide documentation showing, that you notified the third party whose proprietary interests may be implicated, RES, of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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). We have considered the claimed exceptions and have reviewed the submitted information.

RES responded to the district's section 552.305 notice by claiming that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.104 and 552.110

of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." As RES fails to make an argument under section 552.101 to withhold the submitted information, and as we know of no law that would make the information confidential, we find that none of the submitted information may be withheld under that provision.

RES claims that the submitted proposal is excepted from disclosure under section 552.104 because release would give advantage to a competitor or bidder. However, we note that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The district has not argued that the release of RES's proposal to the district would harm its interests in a particular competitive situation. Therefore, no portion of the submitted proposal may be withheld from disclosure pursuant to section 552.104 of the Government Code.

Next, RES claims that its proposal to the district is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110(a) protects trade secrets of private parties. 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.¹ See Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) excepts from 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. See Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party 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).

RES argues that the pricing portions of its proposal constitute trade secret information. After careful review, it appears that the “pricing information” at issue relates solely to this particular procurement process. Consequently, we do not find that RES has shown that the release of this information will negatively impact future competitive situations. See Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 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), 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110 and that pricing proposals are entitled to protection only during bid submission process), 184 (1978). Accordingly, information related to pricing may not be withheld under section 552.110.

After reviewing RES’s arguments, we conclude that it has not established how the requested information comes within either branch of section 552.110. Accordingly, the district may not withhold the requested information under section 552.110 of the Government Code, and must release it to the requestor.

¹The 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 Texas Building and Procurement 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,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 157111

Enc. Submitted documents

c: Mr. James Jones
Johnson Control Solutions, Inc.
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Houston, Texas 77040
(w/o enclosures)