



August 16, 2002

Mr. Norbert J. Hart  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2002-4530

Dear Mr. Hart:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167176.

The City of San Antonio (the “city”) received a request for the following information:

- (1) a copy of the executed contract for ERM consulting between the city and Deloitte Consulting (“Deloitte”);
- (2) the total consideration paid to Deloitte and anticipated future payments, including information on the hourly fees and the estimated time for each task or phase of Deloitte’s ERM services;
- (3) evidence of compliance with SBEDA goals by Deloitte;
- (4) communications relating to the ERP and CRM projects involving SAP, city employees, or Deloitte;
- (5) communications since May 1, 2001, relating to the implementation process of the ERM project in the possession of the city or Deloitte; and
- (6) a tape recording of the city’s pre-bid meeting on January 7, 2002.

You state that the city does not have information responsive to category six of the request. Likewise, you state that the city does not have information responsive to the portion of category two of the request seeking a breakdown of hourly fees and estimated time for Deloitte's services. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You also indicate that the city has asked the requestor to clarify and narrow category four of his request. If what information is requested is unclear, the governmental body may ask the requestor to clarify the request. See Gov't Code § 552.222(b). In addition, if a large amount of information has been requested, the governmental body may request that the requestor narrow the scope of his request. Although you indicate that the city has sought a clarification and narrowing, the requestor apparently has not responded to the city's request. Because the requestor has not responded to the request for a clarification and narrowing, the city need not respond to category four of the request at this time. Should the requestor submit such a response, the city must seek a ruling from this office before withholding any responsive information from the requestor. See also Open Records Decision No. 663 (1999) (providing for tolling of ten business day time limit to request attorney general decision while governmental body awaits clarification). With respect to the information responsive to the remainder of the requestor's request, you claim that a portion of the information is excepted from disclosure under section 552.107 of the Government Code. You also indicate that the release of some of the requested information may implicate the proprietary rights of two third parties—Deloitte and Hansen Information Technologies ("Hansen"). Consequently, you notified Deloitte and Hansen of the request pursuant to section 552.305 of the Government Code. In turn, both Deloitte and Hansen have submitted arguments to this office in favor of withholding portions of the requested information under section 552.110 of the Government Code. We have considered all of the submitted arguments and reviewed the submitted information.<sup>1</sup>

We begin by noting that some of the submitted information did not come into existence until after the city received the instant request for information. The Act does not apply to information that did not exist at the time a governmental body received a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Therefore, we do not address whether the information that came into existence after the date of the request, which we have marked, is subject to disclosure under the Act.

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<sup>1</sup>You indicate that a portion of the submitted information consists of "representative copies." We assume that the "representative copies" of records submitted to this office are truly representative of the requested records at issue. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, we turn to your argument that portions of Exhibit B are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). You contend that portions of Exhibit B consist of legal advice and opinion communicated to the client by an attorney or between the city attorney and outside counsel for the city. Based on your arguments and our review of Exhibit B, we agree that the city may withhold the highlighted portions of Exhibit B as well as the interlineations and strikeouts in Exhibit B, Part 1, under section 552.107 of the Government Code.

With respect to the remainder of the submitted information, we address Deloitte's and Hansen's arguments under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision 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. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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 single or ephemeral events 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt.

b (1939).<sup>2</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

On the other hand, the commercial and financial information prong of section 552.110 requires 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* Open Records Decision No. 661 (1999).

Deloitte contends that portions of the information it has provided to the city in connection with the ERM, ERP, and CRM projects are excepted under both prongs of section 552.110. Specifically, Deloitte argues that the following categories of information should be withheld: (1) Deloitte's project management and systems methodologies; (2) Deloitte's knowledge experience, and deliverables; (3) Deloitte's pricing; and (4) Deloitte's staffing approach and personnel information. We note that the submitted documents do not contain all of the information Deloitte seeks to withhold. Nevertheless, we find that Deloitte has made a *prima facie* showing that the deliverables, work plan activities, and staffing approach information contained in the submitted documents are trade secrets. *See* Open Records Decision No. 552 at 5-6 (1990). Furthermore, we have received no arguments that rebut Deloitte's trade secret claim as a matter of law. Therefore, the city must withhold Deloitte's deliverables, work plan activities, and staffing approach information, which we have marked, under section 552.110(a) of the Government Code. With respect to its pricing information, Deloitte contends that the information would be valuable to its competitors both in the current bid process for Phase III of the ERM project and future competitive situations. According to Deloitte, release of its pricing information would allow competitors to back-calculate from the pricing for the ERM project to Deloitte's formula that it uses as a basis for most of its enterprise management pricing. However, Deloitte does not explain, nor is it apparent, how the submitted pricing information could be used to obtain Deloitte's pricing formulas and

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<sup>2</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 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 [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).

thus obtain information that is continually used in Deloitte's business. Consequently, we find that Deloitte has not adequately demonstrated that its pricing information constitutes a trade secret under section 552.110(a). Likewise, Deloitte has not adequately demonstrated that its pricing information, which relates to contracts that have already been approved by the city, is excepted under section 552.110(b). *See* Open Records Decision Nos. 494 (1988) (requiring balancing of public interest in disclosure of pricing information with competitive injury to company), 319 (1982) (pricing proposals may only be withheld under the predecessor to section 552.110 during the bid submission process). Therefore, the city must release Deloitte's pricing information.

Hansen also contends that portions of the requested information are excepted under section 552.110(a) and (b). Specifically, Hansen argues that the following categories of information must be withheld: (1) Hansen's project planning, development, and management information; (2) Hansen's technical product description information; (3) Hansen's pricing information; and (4) Hansen's staffing approach and personnel information. While the submitted documents contain some information pertaining to Hansen, including portions of Deloitte's proprietary information, the submitted documents do not contain any of the information Hansen seeks to withhold. Hansen has not provided this office with any arguments for withholding the information submitted to this office. Therefore, except to the extent we determined that the information pertaining to Hansen was excepted under section 552.110 as part of Deloitte's proprietary materials, we find that the city must release the information pertaining to Hansen contained in the submitted documents.

We note that the submitted information contains an e-mail address that is excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]."<sup>3</sup> Therefore, unless the relevant individual has affirmatively consented to the release of her e-mail address, the city must withhold the e-mail address in the submitted information that we have marked under section 552.137.

In summary, the city need not release the portions of the submitted information that did not come into existence until after the city received the instant request. The city may withhold the remaining highlighted portions of Exhibit B as well as the interlineations and strikeouts in Exhibit B, Part 1, under section 552.107 of the Government Code. The city must withhold the portions of the submitted information that we have marked under section 552.110(a). The city must also withhold the e-mail address that we have marked under section 552.137 of the Government Code, unless the individual to whom the e-mail address belongs has consented to its release. The city must release the remainder of the submitted information.

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<sup>3</sup>The identical exception has been added as section 552.136 of the Government Code.

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); *Tex. Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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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Open Records Division

NEB/sdk

Ref: ID# 167176

Enc: Submitted documents

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