



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 11, 2003

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2003-2473

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179242.

The City of Lubbock (the "city") received a request for "the commercial and technical responses prepared by the Wood Group and others." The requestor subsequently amended his request to state:

What we would really like to know is the following and specifically to the Wood Group.

1. Please review our GE proposal and the Wood Group Proposal and let us know if there are any identical or very similar looking photos of the proposed systems. I do not need to see the photos just know if they are the same. We have found some of our archived proprietary information on competitors['] websites and when requested our competitors have removed it. We have a burden to police the inappropriate use of our copyrighted and proprietary materials.
2. The use of Woodward ATLAS control system is restricted to GE Global Controls Services for use on GE Technology machines. We would like to know if any of the bidders offered this hardware. Again we have an obligation to police the use of this hardware.

3. A list of the bid prices relative to our bid on a percentage basis would be helpful and we do not need the other bidders identified on this list. The bids could be labeled for our purposes GE-0, Company A plus 5%, Company B minus 2%, etc.

4. A list of companies that actually supplied bids.

As responsive to this request, you have submitted the proposal of the Wood Group. You state, and provide documentation showing, that you notified the Wood Group of the request and of its right to submit arguments to this office as to why the requested information should not be released. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). You raise no exception to disclosure on behalf of the city and make no arguments regarding the proprietary nature of the third parties' information. In its correspondence with this office, the Wood Group claims that the submitted information is excepted under sections 552.101, 552.104, and 552.110 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted information.

We first note that the request appears to ask the city to perform research, answer factual questions, and prepare new information. However, a governmental body need not create new information in response to a request or furnish information not in its possession. *See Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). Further, this office has stated on numerous occasions that the Public Information Act (the "Act") does not require a governmental body to answer factual questions or perform legal research. *See, e.g.*, Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). A governmental body must only make a good faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at 8 (1990). We assume that the city has made a good faith effort to relate the entire request, including the questions, to information maintained by the city and that the city has identified and released any responsive information that it has not submitted for our review, to the extent that such information exists. If not, then it must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

We next address the city's obligations under chapter 552 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the

¹The Wood Group also claims that the submitted information is excepted from disclosure under section 552.305 of the Government Code. However, that section pertains to procedural issues that arise when a request seeks a third party's information and does not function as an exception to disclosure.

reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

Although you state that the city received this request on January 30, 2003, the submitted copy of the request for information indicates that it was initially received and responded to by the city on January 23, 2003. The fifteenth business day following January 23 was February 13, 2003. However, you did not submit a copy of the requested information until February 14, 2003. Although the requestor modified his request on January 30, you do not allege, nor do the documents reflect, that the city requested any clarification or narrowing of the request. *See* Gov't Code § 552.222(b) (governmental body may seek to clarify request if it is unclear what information is being requested or to seek to narrow request if large amount of information has been requested). Thus, the city's deadline for requesting a ruling and submitting necessary information was not tolled. *See* Open Records Decision No. 663 (1999) (discussing requests for clarification and their effects on deadlines). Furthermore, you do not allege that the city was closed for any of the business days between January 23 and February 14. Consequently, we find that the city failed to provide the information required by section 552.301(e) within the mandatory fifteen-business-day period.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because the interests of a third party are at issue, we will address the Wood Group's arguments.

The Wood Group points to its "Proprietary Statement," which it says the city accepted, as a reason its information should be excepted from disclosure. Information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

The Wood Group raises section 552.101 of the Government Code as a possible exception to disclosure. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that is considered to be confidential under other law. See Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (information made confidential by statute) 611 at 1 (1992) (common law privacy). However, the Wood Group has not directed our attention to any law under which any of the submitted information is deemed to be confidential for purposes of section 552.101, nor are we aware of any such law. Furthermore, we note that only individuals, and not corporations, have a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); see Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings). Therefore, none of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

The Wood Group contends that some of the information contained in its proposal is excepted from disclosure under section 552.104 of the Government Code. However, the purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* Because the city does not raise section 552.104, this exception is not applicable to the Wood Group's proposal, and it may not be withheld on that basis. *Id.* (predecessor to section 552.104 may be waived by governmental body).

The Wood Group also contends that portions of its proposal are excepted from disclosure under section 552.110 of the Government Code. This section 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.

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).² 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).

Section 552.110(b) of the Government Code exempts 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[.]” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having carefully considered the Wood Group’s arguments we conclude that the company has failed to make a *prima facie* case that any of the information at issue constitutes trade secrets. Further, we find that the company has made only conclusory allegations and has made no specific factual or evidentiary showing that release of its information would likely cause it substantial commercial harm. We therefore conclude that the Wood Group has failed to

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 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).

establish that any of its information is protected under section 552.110, and none of it may be withheld on that basis.

We note, however, that the submitted information includes e-mail addresses of members of the public. Section 552.137 of the Government Code 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 Public Information Act].” We note that section 552.137 does not apply to a government employee’s work e-mail address or a business’s general e-mail address or website address. Unless the individual members of the public have affirmatively consented to release of their e-mail addresses, the city must withhold the types of e-mail addresses that we have marked. *See* Gov’t Code § 552.137(b).

Finally, we note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, pursuant to section 552.137, the city must withhold the types of e-mail addresses that we have marked. The remaining submitted information must be released in accordance with applicable copyright laws.

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).

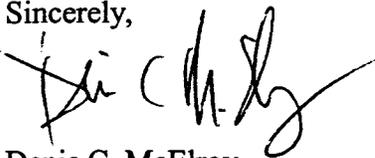
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 179242

Enc. Submitted documents

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