



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2003

Mr. Robert R. Ray
Assistant City Attorney
City of Longview
P.O. Box 1952
Longview, Texas 75606-1952

OR2003-6083

Dear Mr. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186617.

The City of Longview (the "city") received a request for information that was submitted to the city in response to its request for proposals for a utility billing management software system. The city takes no position as to whether the requested information is excepted from public disclosure. You believe, however, that this request for information implicates the proprietary interests of the private parties that responded to the request for proposals. You notified nine interested parties of this request for information and of their right to submit arguments to this office as to why the information should not be released.¹ You also submitted the private parties' proposals. We also received correspondence from Conversant, Inc. ("Conversant"), Hansen Information Technologies, Inc. ("Hansen"), IMSofTech, Inc. ("IMSofTech"), and New World Systems, Inc. ("New World"). We have considered all of the submitted arguments and have reviewed the submitted information.

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Capital Software, Inc., Eden Systems, Harris Computer Systems, MMI Networking, or Stw, Inc. Thus, none of those parties has demonstrated that any of the

¹*See Gov't Code* § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

submitted information is proprietary for purposes of section 552.110 of the Government Code. *See Gov't Code § 552.110(a)-(b)*; Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the city's failure to request this decision within the time prescribed by section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the tenth business day after the date of receiving the written request [for information]." Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

You state that the city received this request for information on May 27, 2003. The city requested this decision by letter dated June 20, 2003. You concede that the city's request for this decision was not timely under section 552.301(b) and that the city has not complied with section 552.301. Therefore, the requested information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). *Conversant*, *Hansen*, *IMSoftTech*, and *New World* have submitted briefs in which each of the private parties raises section 552.110 of the Government Code. As section 552.110 can provide a compelling reason for non-disclosure under section 552.302, we will consider the parties' arguments.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret 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. *See Gov't Code § 552.110(a)-(b)*.

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, 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 also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) of the Government Code 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 also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Before considering the parties' claims under section 552.110, we address the assertions of Conversant, IMSofTech, and New World that their proposals were designated as containing confidential and/or proprietary information. Conversant also informs us that it provides such information to clients only under a confidentiality agreement.³ Likewise, Hansen's proposal

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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).

³Conversant also asserts that this request for information was improperly submitted to the city. We note that a request need not necessarily be submitted to any particular official or employee of a governmental body, as long as the communication can reasonably be identified as a request for public information. *See* Open Records Decision No. 497 at 2-3 (1988).

is designated as being proprietary and confidential. We note, however, that information is not confidential under chapter 552 of the Government Code simply because the party submitting the information anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of chapter 552. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to chapter 552] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, we consider the parties' claims under section 552.110. Conversant, Hansen, IMSofTech, and New World contend that parts of their respective proposals are excepted from disclosure under both aspects of section 552.110.⁴ Having considered each of the parties' arguments and reviewed the information at issue, we find that Conversant, Hansen and New World have established a *prima facie* case that some of their information qualifies as a trade secret under section 552.110(a). We have received no arguments that rebut the trade secret claims of Conversant, Hansen and New World as a matter of law. We therefore conclude that the city must withhold the information relating to Conversant, Hansen and New World that constitutes a trade secret under section 552.110(a). We have marked that information. We also conclude that Conversant, Hansen, and IMSofTech have demonstrated that some of their information is excepted from disclosure under section 552.110(b). We also have marked the information relating to Conversant, Hansen, and IMSofTech that the city must withhold under section 552.110(b). Otherwise, we conclude that Conversant, Hansen, IMSofTech, and New World have not shown that any of the remaining information at issue either qualifies as a trade secret under section 552.110(a) or is protected by section 552.110(b). Thus, none of that information is excepted from disclosure under section 552.110. *See also* Open Records Decision Nos. 509 at 5 (1988) (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 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

We note that the proposals of Hansen and STW/MMI Internetworking contain e-mail addresses that are confidential under section 552.137 of the Government Code. This exception provides as follows:

⁴We note that the city did not submit some of the information that Conversant claims is protected by section 552.110. This decision addresses only the information that the city submitted to this office. *See* Gov't Code § 552.301(e)(1)(D).

(a) An 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 this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 is applicable only to personal e-mail addresses. This exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked confidential e-mail addresses in the proposals of Hansen and STW/MMI Internetworking. The city does not inform us that the individuals to whom these e-mail addresses belong have affirmatively consented to their public disclosure. Therefore, the city must withhold the marked e-mail addresses under section 552.137.

Lastly, we note that some of the submitted information is protected by copyright. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she 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 at 8-9 (1990).

In summary, the city must withhold the marked portions of the proposals of Conversant, Hansen, IMSofTech, and New World that are excepted from disclosure under section 552.110. The city also must withhold the personal e-mail addresses in the proposals of Hansen and STW/MMI Internetworking that are confidential under section 552.137. The city must release the rest of the submitted information, complying with copyright law in doing so.

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).

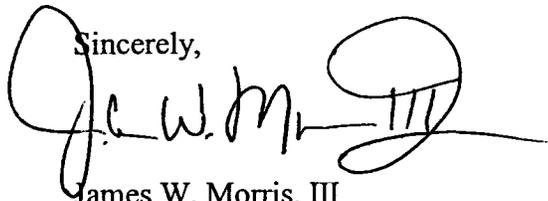
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 186617

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