



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 23, 2004

Mr. John B. Dahill
General Counsel
Texas Conference of Urban Counties
500 West 13th Street
Austin, Texas 78701

OR2004-1315

Dear Mr. Dahill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196498.

The Texas Conference of Urban Counties (the "conference") received a request for a list of all vendors that submitted responses to the conference in response to a specified request for proposals, the complete proposal and supplements submitted by Sierra Systems Group, Inc. ("Sierra"), and the scoring matrix utilized to evaluate all vendors. You state that the conference has released most of the requested information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.139 of the Government Code.¹ You make no arguments and take no position as to whether the submitted information is excepted from disclosure under section 552.101, 552.104, or 552.110. However, you have notified Sierra, the San Diego Police Department ("SDPD"), and Tarrant County (the "County"), interested third parties, of the request for information pursuant to section 552.305 of the Government Code. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Chapter 552 of Government Code in certain circumstances). The conference has submitted the information

¹Although section 552.136 of the Government Code is asserted concerning information related to security issues for computers, the 78th Legislature recently renumbered that provision as section 552.139. *See* Act of May 21, 2003, 78th Leg., R.S., ch. 1275, § 2(76), 2003 Tex. Sess. Law Serv. 4144 (Vernon).

at issue to this office. We also received correspondence from SDPD and the County. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Sierra has not submitted to this office any reasons explaining why its information should not be released. Therefore, Sierra has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See, e.g.*, Gov't Code § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, except for the portions of Sierra's proposal in which the conference, SDPD, and the County claim exceptions, Sierra's proposal must be released to the requestor. Next, we will address the exceptions asserted by the conference, SDPD, and the County in regard to the remaining submitted information.

SDPD asserts section 552.101 of the Government Code in regard to its information contained in Sierra's proposal. This section excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." SDPD has not directed our attention to any law, nor are we aware of any law, under which any of the information in question is considered to be confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of SDPD's information is excepted from disclosure under section 552.101 of the Government Code.

SDPD also asserts section 552.102 of the Government Code. Section 552.102(a) of the Government Code excepts from disclosure "[i]nformation in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" This exception is applicable only to information contained in the personnel file of an employee of a governmental body. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). As none of SDPD's information consists of information contained in the personnel files of governmental employees, section 552.102 of the Government Code is inapplicable to SDPD's information, and it may not be withheld on this basis.

SDPD also raises section 552.108 of the Government Code, which excepts from required public disclosure four categories of information: 1) information the release of which would interfere with law enforcement or prosecution; 2) information relating to an investigation that

did not result in a conviction or deferred adjudication; 3) information relating to a threat against a police officer collected or disseminated under section 411.048; and 4) information that is prepared by a prosecutor or that reflects the prosecutor's mental impressions or legal reasoning. *See* Gov't Code § 552.108. Although SDPD claims that its information is excepted from disclosure under section 552.108 of the Government Code, SDPD has not submitted any comments to this office stating the reasons why section 552.108 would allow any portion of its information to be withheld from disclosure. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Consequently, SDPD's information may not be withheld under section 552.108 of the Government Code.

Next, the County asserts section 552.110 of the Government Code in regard to its information contained in Sierra's proposal. This section protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 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.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 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 Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Public Information Act ("Act") is exempted 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, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[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). This exception to disclosure 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. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having reviewed the submitted brief, we conclude that the County has failed to make a *prima facie* case that its information constitutes trade secrets. Further, we find that the County has made only conclusory allegations and has made no specific factual or evidentiary showing that release of its information would likely cause them substantial commercial harm. Accordingly, the conference may not withhold the County's information under section 552.110 of the Government Code.

The conference, SDPD, and the County also assert section 552.139 of the Government Code. This section provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Upon review, we determine that the conference, SDPD, and the County have not demonstrated that any portion of the submitted information relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, the conference, SDPD, and the County have not demonstrated that the submitted information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of the remaining submitted information is excepted from disclosure under section 552.139, and it must be released to the requestor.

Finally, the County asserts the applicability of section 270.007 of the Local Government Code regarding the costs the County may charge for copies of its information. The cost provisions of the Act are found at subchapter F of chapter 552. *See* Gov't Code § 552.261 *et seq.* The Texas Building and Procurement Commission (the "TBPC") is responsible for the administration and enforcement of these provisions. Section 552.262 directs the TBPC to adopt rules for use by each governmental body in determining charges for providing copies of public information under chapter 552.² However, section 552.262 does not repeal a fee schedule for copies established by another statute. *See* Attorney General Opinion MW-163 (1980) (applying provisions regarding charges for certified copies now found in Government Code section 603.004); *see also, e.g.* Local Gov't Code §§ 118.141(a)(2), .144 (county treasurer may collect one dollar for certified or noncertified copy of each page or part of page of document); *cf.* Gov't Code § 552.266 (charge for copy made by municipal court clerk shall be set by ordinance). The County asserts section 270.007 of the Local Government Code, which provides as follows:

²The rules adopted by the TBPC are found at title 1 of the Texas Administrative Code.

(a) A county may sell or license a computer software application or software system developed by the county for use by the county. A county may sell or license a computer software application or software system developed for the county by a person under contract unless the contract specifically prohibits the county from selling or licensing the application or system.

(b) Notwithstanding the provisions of Subsections (f) and (g), a county may exclusively contract with a person to market the application or system. A contract under this subsection shall be awarded only in compliance with Section 262.030, Local Government Code, concerning the alternative competitive procedure for insurance or high technology items.

(c) The provisions of the open records law, Chapter 552, Government Code, governing the cost of making copies of public records do not apply to a software application or software system subject to this section.

(d) In this section, "computer software application or software system" includes documentation of the application or system, and does not include any hardware or equipment associated with the application or system.

(e) Notwithstanding any other provision of this section, the provisions of this section apply only to (1) the sale or licensure of a software application or software system by a county or (2) a request under Chapter 552, Government Code, for a computer software application or software system itself, and do not apply to the cost of production for public inspection or copying of information collected, assembled, or maintained through the use of such software, including on-line instructions on computer searches or information necessary to obtain records from county computer systems, which cost shall be governed by Subchapter F, Chapter 552, Government Code, without regard to the cost of developing the software. Nothing in this section shall preclude header or record information, necessary for conversion and interpretation of electronic images, being made available for electronic images of public records.

(f) Except as provided by Subsection (b), upon request of any person, a county shall sell or license software under this section for a price negotiated between the county and the person, not to exceed the developmental cost to the county. Developmental cost shall only include costs incurred under a contract to procure the software or direct employee costs incurred to develop the software. This subsection does not apply to any county software that protects county computer systems from unauthorized use or access.

(g) Except as provided by Subsection (b), a county shall sell or license software under Subsection (f) to any person for the same consideration that the county has sold or licensed the software to another person.

(h) The provisions of this section shall not authorize the development by a county of any software application or software system not otherwise authorized by law.

(i) A county may not develop a computer application or software system for the purpose of selling, licensing, or marketing the software application or software system.

The County states that it “has fielded inquiries regarding the licensing and marketing of this system,” and that “section 270.007 prevents the usage of Chapter 552 of the Government Code to purchase the Tarrant County Electronic Case Filing System for the price of copies under the Public Information Act.” Upon review of your arguments and the submitted information, we agree that section 270.007 of the Local Government Code authorizes the County to sell or license its computer software application or software system, and that the fee provisions of chapter 552 of the Government Code and rules adopted under section 552.262 of the Government Code are inapplicable to such information. Therefore, the County may sell or license its software under section 270.007 of the Local Government Code for a price negotiated between the County and the requestor, not to exceed the developmental cost to the County. *See* Loc. Gov’t § 270.007(f).

In summary, we conclude that the conference must release the submitted information to the requestor. However, the County’s computer software application or software system may only be released in accordance with section 270.007 of the Local 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).

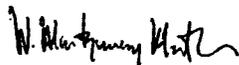
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 196498

Enc: Submitted documents

c: Mr. Randy Steinle
Director of Business Development
Duration Software, Inc.
5407 North IH 35, Suite 406
Austin, Texas 78723
(w/o enclosures)

Mr. Joe Evans
c/o John Dahill
Texas Conference of Urban Counties
500 West 13th Street
Austin, Texas 78701
(w/o enclosures)

Mr. Paul Cooper, Esquire
Assistant to the Chief of Police
The City of San Diego
Office of the Chief of Police
1401 Broadway
San Diego, California 92101-5729
(w/o enclosures)

Mr. Ray Rike
Deputy Chief, Civil Division
Office of the Criminal District Attorney
Tarrant County
401 W. Belknap
Fort Worth, Texas 76196-0201
(w/o enclosures)