



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2004

Ms. Jennifer Hall
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2004-6670

Dear Ms. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206656.

The San Antonio Independent School District (the "district"), which you represent, received a request for information regarding bid tabulations and other data related to the evaluation of bids for RFP #04-049. You assert that some information responsive to the request may be excepted from disclosure under section 552.110 of the Government Code but take no position and make no arguments regarding this exception. In addition, pursuant to section 552.305 of the Government Code, you notified one company, Dell Computer Corporation ("Dell"), whose proprietary interests may be implicated by the request. *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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). Dell claims that its proposal contains information excepted from release under sections 552.104 and 552.110 of the Government Code. We have considered Dell's arguments and reviewed the submitted information.

As a preliminary matter, we note that Dell seeks to withhold information from its bid proposal that is not at issue in this case. We do not reach Dell's arguments pertaining to the information from its bid proposal that the district has not identified as responsive to the instant request. *See Gov't Code § 552.301(e)(1)(D)* (governmental body seeking attorney general's opinion under the Public Information Act must submit a copy or representative

samples of the specific information requested). With respect to the information at issue, we will address Dell's arguments.

Initially, Dell argues that section 552.104 of the Government Code excepts from disclosure the submitted information related to Dell. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the district does not raise section 552.104, this section is not applicable to the submitted information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Accordingly, the submitted information may not be withheld under section 552.104.

We next address Dell's claim that the portions of the submitted information related to Dell are proprietary information. 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.

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).¹ 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). However, we cannot conclude that section 552.110(a) applies 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. See Open Records Decision No. 402 (1983).

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." Gov't Code § 552.110(b). 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). Normally, an 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 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).

In this instance, the submitted information which Dell seeks to withhold is pricing information. Although Dell claims section 552.110 for its pricing information, Dell failed to provide arguments establishing a *prima facie* case that the information it seeks to withhold is a trade secret. See Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We further find that Dell failed to explain how release of its pricing information would result in substantial competitive harm to the company. 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,

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 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).

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 predecessor to Gov't Code § 552.110 and that pricing proposals are entitled to protection only during bid submission process); *see also* Gov't Code § 552.022(a)(3) (information in account, voucher, or contract relating to receipt or expenditure of public funds by governmental body is public information). Therefore, Dell's pricing information may not be withheld from disclosure under section 552.110 of the Government Code and thus it must be released to the requestor.

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. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 206656

Enc. Submitted documents

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