



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 23, 2004

Ms. Julia M. Vasquez
Senior Assistant City Attorney
City of Wichita Falls
P.O. Box 1431
Wichita Falls, Texas 76307

OR2004-9993

Dear Ms. Vasquez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 213458.

The City of Wichita Falls (the "city") received two requests for information relating to the bidding for and award of a contract for a police and fire department computer-assisted dispatch and records management system. You inform us that the city will release most of the requested information, including the city's executed contract with the winning bidder, Intergraph Public Safety, Inc. ("Intergraph"). You claim that some of the remaining information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. You also contend that the remaining information implicates the proprietary interests of Intergraph under sections 552.104 and 552.110.¹ We also received

¹You inform us that all of the companies that submitted responses to the city's request for proposals were notified of the request for their information and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). You state that Tiburon, Inc., and SBC Communications, Inc., have informed the city that they consent to the release of their information and do not seek to have any of the requested information withheld from the public. You also inform us that the city has received no indication that any other private party seeks to have any of the requested information withheld.

correspondence from Intergraph.² We have considered all of the submitted arguments and have reviewed the information you submitted.

We first note that you have failed to submit some of the information that the city seeks to withhold under section 552.108. Section 552.301 of the Government Code 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(e)(D) requires the governmental body to submit to this office, not later than the fifteenth business day after the date of its receipt of the request, the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See* Gov't Code § 552.301(e)(1)(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be public and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302. In this instance, you seek to withhold information located at pages 2:59-60 and 2:192-193 of Intergraph's proposal under section 552.108. However, the submitted documents do not include a page 2:193. Thus, as you have failed to submit that information, it is presumed to be public under section 552.302. Section 552.108 is a discretionary exception to disclosure that a governmental body may waive. *See id.* § 552.007; Open Records Decision No. 177 at 3 (1977). The city's claim under section 552.108 is not a compelling reason for non-disclosure of the missing information under section 552.302. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982); *but see* Open Records Decision No. 586 (1991). Therefore, the information that you have failed to submit in requesting this decision may not be withheld under section 552.108.

Next, we address the claimed exceptions to disclosure. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Neither the city nor Intergraph has asserted any law, and this office is not otherwise aware of any law, under which any of the submitted information is deemed to be confidential for purposes of section 552.101. Therefore, the city may not withhold any of the submitted information under this exception.

Intergraph asserts that specified portions of the submitted information are excepted from disclosure under section 552.104. This section excepts from public disclosure "information

²We also received correspondence from Siemens VDO Automotive Corporation ("Siemens"), objecting to the release of Siemens' pricing information. You inform us, however, that the city no longer holds any of the pricing information that Siemens submitted during the bidding process. Accordingly, we need not address Siemens' arguments. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989) (governmental body that receives a request for information need not take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds information on behalf of governmental body that receives request).

that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). Section 552.104 protects the interests of governmental bodies in public bidding and other competitive situations, not the proprietary interests of private parties such as Intergraph. *See* Open Records Decision No. 592 at 8-9 (1991) (addressing statutory predecessor). Furthermore, section 552.104 does not protect information relating to a competitive bidding situation once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978). In this instance, the city informs us that it joins in Integraph’s arguments under section 552.104. The city also states, however, that the bidding process has been concluded and that the city has awarded the contract to Intergraph. We therefore conclude that the city may not withhold any of the submitted information under section 552.104.

The city seeks to withhold a small amount of the submitted information under section 552.108. This section excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if “release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (disclosure of certain information would hamper Department of Public Safety’s efforts to detect forgeries of drivers’ licenses), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). The statutory predecessor was not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

A governmental body that relies on section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See* Gov’t Code § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov’t Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). You inform us that portions of the submitted information relate to the connectivity and cabling that will be utilized to install the new computer-assisted dispatch and records management system. You contend that

[t]he release of this information may permit unlawful interference by third parties, thus compromising criminal investigations. Specifically, if the information is released regarding the connectivity between the Police Department, Fire Department and Communications Center, knowledgeable persons could use this information to interfere with, disrupt, or disable emergency services communications.

Based on your representations and our review of the submitted information that you seek to withhold under section 552.108, we find that you have demonstrated that section 552.108(b)(1) is applicable in this instance. We have marked the information that the city may withhold under section 552.108.

Section 552.110 protects the proprietary interests of private parties with respect to 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). If the governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts

the claim as a matter of law.³ *See* Open Records Decision No. 552 at 5 (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. *See* Open Records Decision No. 402 (1983).

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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Intergraph contends that specified portions of the submitted information are proprietary and confidential. Having considered Intergraph's arguments and reviewed the information at issue, we conclude that the city must withhold Intergraph's customer information under section 552.110(a). We have marked that information accordingly. Otherwise, we find that Intergraph has not established that any of the remaining information at issue qualifies as a trade secret under section 552.110(a). Likewise, Intergraph has not made the demonstration required by section 552.110(b) that the release of any of the remaining information would be likely to cause Intergraph any substantial competitive harm. In this regard, we note that section 552.110(b) is generally not applicable to the pricing information of a winning bidder such as Intergraph. We therefore conclude that, except for the marked customer information, the city may not withhold any of the submitted information under section 552.110. *See* 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); *see generally* Freedom of Information Act Guide & Privacy Act Overview at 219 (2000) (citing federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government).

³The 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).

In summary: (1) the city may withhold the information that we have marked under section 552.108(b)(1); (2) the city must withhold the information that we have marked under section 552.110(a); and (3) the rest of the submitted information must be released.

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).

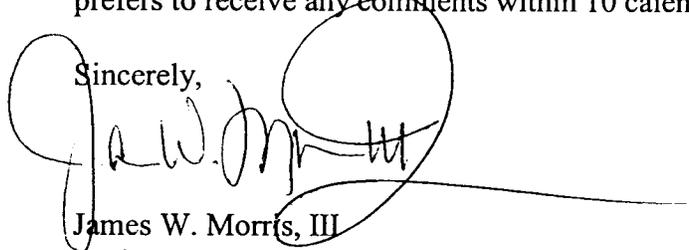
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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', is written over a large, light-colored circular stamp or watermark. The signature is fluid and cursive.

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

JWM/sdk

Ref: ID# 213458

Enc: Submitted documents

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