



ATTORNEY GENERAL OF TEXAS
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Ms. Alva I. Trevino
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OR2005-06723

Dear Ms. Travino:

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# 229030.

The Metropolitan Transit Authority of Harris County ("Metro") received two requests from two requestors for copies of the proposals that were submitted to Metro in response to Invitation for Proposals Number RP0500010 and the related evaluations. You indicate that Metro has released the evaluations but claim that the requested proposals may implicate the proprietary interests of StrataGen Systems, Inc. ("StrataGen") and Trapeze Group ("Trapeze"). You inform us that you notified StrataGen and Trapeze of the requests and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *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). We have received correspondence from both StrataGen and Trapeze and have reviewed their arguments and the submitted information.

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 party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.¹ *See Open Records Decision No. 552 at 5* (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See Open Records Decision No. 402 at 3* (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).

¹The 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).

StrataGen argues that section 552.110 applies to its (1) technical information on pages 16 - 118 of the proposal, (2) financial and customer information on pages 88 - 96 of the proposal, (3) personnel information on pages 97 - 117, in Appendix A, and in the proposer's questionnaire, and (4) the sample standard reports. After reviewing StrataGen's arguments and the submitted proposal, we agree that most of the customer reference information that the company seeks to withhold is protected under section 552.110(b). We note that the submitted proposal indicates that two of the company's customers have publically been references for StrataGen in presentations these customers made at a transit conference; as such, the names of these two customers may not be withheld under section 552.110(b). Otherwise, Metro must withhold the customer information that we have marked pursuant to section 552.110(b). We find, however, that StrataGen has not established by specific factual evidence that any of the remaining submitted information it seeks to withhold in its proposal is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"); *see also, e.g.*, Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). As such, the remaining information in StrataGen's proposal must be released.

Next, Trapeze also argues that its information is protected as a trade secret and commercial or financial information. After reviewing Trapeze's arguments and its submitted proposal, we agree that some of the company's product functionality and design information is protected as trade secret information under section 552.110(a). We also find that its customer reference information is protected under section 552.110(b). Therefore, Metro must withhold this information, which we have marked in Trapeze's proposal, pursuant to section 552.110(a) and (b). We note, however, that the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). As such, we conclude that Trapeze's pricing information may not be withheld under section 552.110(b). We also find that the company has not established by specific factual evidence that any of the remaining submitted information in its proposal is excepted from disclosure as either trade secret information under section 552.110(a) or commercial

or financial information the release of which would cause the company substantial competitive harm under section 552.110(b).² See RESTATEMENT OF TORTS § 757 cmt. b (1939); see also, e.g., Open Records Decision No. 661 (1999). As such, we conclude that the remaining information in Trapeze's proposal may not be withheld under either section 552.110(a) or section 552.110(b).

However, we also understand Trapeze to assert that its information is confidential under section 552.101 of the Government Code. As such, we will address section 552.101 with respect to the remaining submitted information in Trapeze's proposal. Section 552.101 exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. Gov't Code § 552.101. Specifically, Trapeze contends that its proposal is confidential pursuant to section 252.049 of the Local Government Code and the holding in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

First, section 252.049 of the Local Government Code provides as follows:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This provision merely duplicates the protection section 552.110 of the Government Code provides to trade secret and commercial or financial information. Trapeze has not demonstrated how any of the remaining information in its proposal qualifies as either a trade secret or confidential commercial or financial information for purposes of section 552.110. Thus, Trapeze may not withhold any of the remaining information in its proposal under section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.

With respect to Trapeze's argument based on the holding in *National Parks*, although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Circuit Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former

²Although Trapeze claims that "end user agreements" are protected under section 552.110, we note that the company's submitted proposal does not contain any documents labeled or titled as such. Because Trapeze does not otherwise explain to which part of the submitted proposal it refers, we are unable to apply the company's arguments regarding end user agreements to the submitted information.

section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). As such, none of the remaining submitted information pertaining to Trapeze may be withheld under section 552.101 on the basis of the holding in *National Park*.

In summary, Metro must withhold the information we have marked in the submitted information pursuant to section 552.110 of the Government Code. The remaining submitted information must be released to the appropriate 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 229030

Enc. Submitted documents

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