



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2005

Ms. Cynthia J. Kreider
Attorney
Texas Department of Information Resources
P.O. Box 13564
Austin, Texas 78711-3564

OR2005-08788

Dear Ms. Kreider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 233183.

The Texas Department of Information Resources (the "department") received two requests for the complete proposal submitted by Gartner, Inc. ("Gartner") in response to the department's procurement entitled "DIR-RFO-Assessment" and one request for the final contract. You state that a portion of the requested proposal may be excepted from disclosure under section 552.110 of the Government Code. You make no arguments in support of this exception, but state that releasing this information may implicate the proprietary interests of Gartner. You inform us that you have notified Gartner of the department's receipt of the requests for information and of its right to submit arguments to this office as to why the information at issue 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). Gartner has responded to the notice and argues that some of the requested information is excepted under section 552.110 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.¹

¹We note that we addressed the proposal at issue in Open Records Letter No. 2005-2734 (2005), and Gartner, although notified of that request by the department, did not brief this office in response to that request.

Initially, we note that you have only submitted a portion of the requested proposal for our review. You have not indicated that the remaining requested information does not exist or that you have released it to the requestor. Therefore, to the extent any remaining information responsive to this request existed on the date that the department received the instant request, we assume that the department has released it to the requestor. If the department has not released any such information, the department must release it to the requestor at this time. *See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).*

Gartner contends that some of its information is excepted from disclosure under section 552.110 of the Government Code.² Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110(a), (b).

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). There are six factors to be assessed in determining whether information qualifies as a trade secret:

²Gartner submitted to this office a copy of the information it believed to be responsive to the request for information which differs in some respects from the information submitted by the department. This decision only addresses the information that the department submitted to this office as responsive to the request. *See* Gov't Code § 552.301(e)(1).

- (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 No. 232 (1979). This office must accept a claim that information subject to the Act is excepted 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); Open Records Decision No. 661 (1999).

Gartner claims that the information at issue constitutes trade secrets under section 552.110(a). We note that pricing information is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business.” Restatement of Torts § 757 cmt. B (1939); *see Hyde Corp.*, 314 S.W.2d at 776, *see also* Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Gartner has not established that its pricing information or any of the remaining information at issue meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel,

market studies, professional references, qualifications and experience, and pricing). Therefore, none of this information may be withheld under section 552.110(a).

Gartner also claims that the information at issue is excepted from disclosure under section 552.110(b). We note that pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Gartner has not sufficiently demonstrated that substantial competitive injury would likely result from the release of its pricing information or any of the remaining 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). Thus, the department may not withhold this information under section 552.110(b) of the Government Code.

We note, however, that the proposal contains information that is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must comply with the copyright law, however, and is not required to furnish copies of records that are copyrighted. *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 department must release the submitted information. In releasing information that is protected by copyright, the department must comply with copyright law.

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

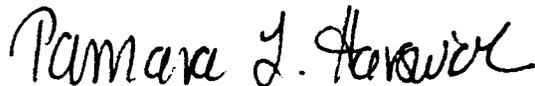
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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); *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 Office of the Attorney General 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. 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 233183

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