



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2006

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston - Legal Department
P. O. Box 1562
Houston, Texas 77251-1562

OR2006-02629

Dear Mr. Gambrell:

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# 244209.

The City of Houston (the "city") received a request for copies of numerous winning proposals submitted to the city. Although you state that the requested information may be excepted from disclosure under sections 552.101, 552.104, 552.110, 552.113, 552.131, and 552.133 of the Government Code, you make no arguments regarding these exceptions. However, you believe that the request may implicate the proprietary interests of the following third-parties: Arcadis G&M, Inc. ("Arcadis"); Carter Burgess; Civiltech Engineering, Inc. ("Civiltech"); Claunch & Miller, Inc. ("C&M"); CLR, Inc. ("CLR"); Dannebaum Engineering Corp. ("Dannebaum"); HNTB Corporation ("HNTB"); Huitt-Zollars; Infrastructure Associates, Inc. ("Infrastructure"); Jones & Carter, Inc. ("J&C"); Kuo & Associates, Inc. ("Kuo"); Landtech Consultants, Inc. ("Landtech"); Nathelyne A. Kennedy & Associates ("Kennedy"); Omega Engineers, Inc. ("Omega"); R.G. Miller Engineers ("Miller"); Terracon Consultants, Inc. ("Terracon"); United Engineers, Inc. ("United"); and Van DeWiele Engineering, Inc. ("Van DeWiele"). Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the city notified these companies of the request for information and of each company's right to submit arguments explaining why its 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 reviewed the submitted information. We have also received and considered arguments submitted by C&M, Kuo, Omega, and Miller.

Initially, we note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the following companies have not submitted comments explaining why their information should be withheld from disclosure: Arcadis; Carter Burgess; Civiltech; CLR; Dannebaum; HNTB; Huitt-Zollars; Infrastructure; J&C; Kennedy; Landtech; Terracon; United; and Van DeWiele. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the city may not withhold any of the submitted information on the basis of any proprietary interests that these companies may have in the information.

We next address the submitted arguments. C&M, Kuo, and Omega each claim exception to disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). In this instance, the city has not made arguments under section 552.104 as an exception to disclosure. Thus, we conclude that none of the information at issue may be withheld under section 552.104.

We next address the claims of Kuo and Miller under section 552.110 of the Government Code. Section 552.110 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 [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 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" 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) 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." 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1999).

Kuo claims that its information consists of trade secrets for purposes of section 552.110(a) of the Government Code. We note that Kuo's information includes pricing information. Pricing information pertaining to particular contracts or proposals is generally not trade

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).

secret information 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. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, we find that Kuo has failed to establish a *prima facie* case that its pricing information pertaining to specific projects is trade secret information under section 552.110(a). Moreover, we find that Kuo has not established a *prima facie* case that any of its remaining information constitutes trade secret information. 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”). We therefore conclude that none of Kuo’s information may be withheld under section 552.110 of the Government Code.

Miller argues that portions of its information are protected under section 552.110(b) of the Government Code. However, upon review of the company’s arguments and the information at issue, we find that Miller has not established by specific factual evidence that any of its information is excepted from disclosure as commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). See Open Records Decision Nos. 661 (1999), 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, we conclude that Miller’s information may not be withheld under section 552.110 of the Government Code.

In conclusion, the city must release all of the submitted information 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 ten 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*, 342 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
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Open Records Division

RBR/krl

Ref: ID# 244209

Enc. Submitted documents

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