



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 22, 2006

Ms. YuShan Chang
Assistant City Attorney
City of Houston
Legal Department
P. O. Box 368
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OR2006-05378

Dear Ms. Chang:

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# 249655.

The City of Houston (the "city") received twelve requests from the same requestor for copies of numerous winning proposals submitted to the city and for copies of the subsequent contracts entered into with the winning bidders. You inform us that proposals responsive to six of these requests are the same as the proposals that were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2006-02629 (2006).¹ In that ruling, this office concluded that the city must release the requested proposals. As you indicate that there has not been a change in the law, facts, or circumstances on which the prior ruling was based, we conclude that the city must continue to rely on our decision in Open Records Letter No. 2006-02629 with respect to the information that was subject to that ruling. *See* Gov't Code § 552.301(f); Open Records

¹Specifically, the six requests seeking information that you inform us was subject to the prior ruling pertain to project numbers 06-001, 06-002, 06-005, 06-006, 06-007, and 06-016.

Decision No. 673 (2001) (setting forth the four criteria for a "previous determination").² You have submitted the proposals responsive to the remaining six requests. Although you state that this information may be excepted from disclosure under sections 552.101, 552.104, 552.110, 552.113, 552.128, and 552.131 of the Government Code, you make no arguments regarding these exceptions.³ However, you believe that this information may implicate the proprietary interests of the following third-parties: AIA Engineers, Ltd. ("AIA"); Brown & Gay Engineers, Inc. ("Brown"); GUNDA Corporation, Inc. ("GUNDA"); Klotz Associates, Inc. ("Klotz"); PBS&J; Parsons; Othon Consulting Engineers ("Othon"); and Pate Engineers, Inc. ("Pate"). 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 this 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).⁴ We have reviewed the submitted information. We have also received and considered arguments submitted by Othon.⁵

Initially, we note that you have not submitted any of the requested contracts entered into with the winning bidders. To the extent the requested contracts existed on the date the city received the requests for information, we assume such contracts have been released. If not, the city must release this information at this time. *See* Gov't Code §§ 552.301(a), .302; *see*

²The four criteria for this type of "previous determination" are (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

³The remaining six requests seek information pertaining to project numbers 06-003, 06-004, 06-008, 06-009, 06-012, and 06-015.

⁴We note that the city also notified the following other companies of the request: Arcadis G&M, Inc.; Civiltech Engineering, Inc.; Claunch & Miller, Inc. ("C&M"); CLR, Inc.; Dannebaum Engineering Corp.; HNTB Corporation; Huitt-Zollars; Jones & Carter, Inc.; Kuo & Associates, Inc.; Landtech Consultants, Inc.; Nathelyne A. Kennedy & Associates; Omega Engineers, Inc.; R.G. Miller Engineers; Terracon Consultants, Inc.; United Engineers, Inc. However, as mentioned above, the responsive information pertaining to these companies has already been addressed by this office in Open Records Letter No. 2006-02629 and is therefore not addressed in this ruling.

⁵Although C&M has also submitted arguments to this office, C&M's proposal was subject to Open Records Letter No. 2006-02629. Accordingly, C&M's proposal must be released in accordance with that prior ruling.

also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note, and you acknowledge, that the city has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking a ruling from this office. Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. See Open Records Decision No. 150 at 2 (1977). Because the third-party interests at issue here can provide compelling reasons to withhold information, we will address the submitted arguments.

We note, however, 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: AIA; Brown; GUNDA; Klotz; PBS&J; Parsons; and Pate. 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.

Othon has submitted arguments to this office claiming exception to disclosure under section 552.110 of the Government Code. This section 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.⁶ *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).

⁶The 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).

Othon seeks to withhold its proposal's overall format, as well as certain organizational and customer information contained in the proposal. Upon review of the company's arguments and submitted proposal, we find that Othon has demonstrated that the customer information it seeks to withhold is excepted from disclosure under section 552.110(b). We have marked this information in Othon's proposal that the city must withhold. However, we find that Othon has not established that any of its remaining information at issue 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); 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). Thus, none of the Othon's remaining information may be withheld under section 552.110.

Othon also argues that its information should be withheld based on the holding in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). 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 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 information at issue may be withheld based on the holding in *National Parks*.

To conclude, the city must continue to rely on Open Records Letter No. 2006-02629 with respect to the information that was subject to that ruling. The city must withhold the customer information we have marked in Othon's proposal pursuant to section 552.110(b) of the Government Code. The remaining submitted information 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 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*, 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/eb

Ref: ID# 249655

Enc. Submitted documents

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