



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2006

Ms. Cindy Krueger
Administrative Services Director
Alamo Area Council of Governments
8700 Tesoro, Suite 700
San Antonio, Texas 78217

OR2006-05911

Dear Ms. Kruegar:

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# 250082.

The Alamo Area Council of Governments (the "AACOG") received a request for the final two bids and proposals for the Orbis Online reverse auction for Ozone and Meteorological Monitoring. You make no arguments and take no position as to whether the responsive information is excepted from disclosure.¹ You, instead, indicate that this information may be subject to third party proprietary interests. Pursuant to section 552.305 of the Government Code, you have notified Dios Dado Environmental, Ltd. ("Dios") of the request and its right to submit arguments to this office as to why the 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 under Act in certain circumstances). We have considered the arguments submitted by Dios and reviewed the submitted information.

Initially, we must address the AACOG's obligations under the Act. Pursuant to section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required

¹We note that although the request is for the two final bids and proposals, only two bids and proposals were submitted by third parties to the AACOG. Since one of the proposals was submitted by the requestor, the responsive information only contains the other proposal submitted.

to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). In this instance, the AACOG did not submit a copy or a representative sample of the requested information by the fifteen business day deadline. Consequently, we find that the AACOG failed to comply with the procedural requirements of section 552.301. However, because we have received comments from Dios arguing that release of the submitted information would affect its proprietary interests and that is a compelling reason to withhold information, we will address those arguments.

Dios claims that release of some of its information will implicate the privacy interests of its employees, and thus, this information is excepted under section 552.101 of the Government Code.² Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note that the information at issue relates to the employees' professional backgrounds and is not intimate or embarrassing information. Therefore, we find that none of the information at issue may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Dios claims that its personnel information is excepted under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102, however, only applies to information in personnel files of governmental employees. As the information at issue does not pertain to government employees, no portion of this information may be withheld under section 552.102 of the Government Code.

Dios has also submitted comments arguing that portions of its proposal should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104 excepts

²We note that Dios also cites to sections 552.117 and 552.131. However, since Dios only makes arguments pursuant to sections 552.101, 552.102, 552.104, and 552.110, we will not address these other exceptions.

from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which 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). As the AACOG does not assert section 552.104, none of the submitted information may be withheld under that exception. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).

Dios claims that portions of its proposal, including its teaming partners, previous projects, references, scope of work, and pricing information, are excepted under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of 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 single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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

- (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).

Dios claims that its teaming partners, previous projects, references, scope of work, and pricing information should be generally withheld under section 552.110(a) as a trade secret. However, we find that Dios has not demonstrated that this information meets the definition of a trade secret. Since Dios has not met its burden under section 552.110(a), the AACOG may not withhold any of the submitted proposal under section 552.110(a) of the Government Code.

Dios also claims that its teaming partners, previous projects, references, scope of work, and pricing information are commercial or financial information excepted under section 552.110(b) of the Government Code. Upon review, we find that release of some of the information Dios seeks to withhold would cause the company substantial competitive harm. Accordingly, the ACCOG must withhold the information we have marked under section 552.110(b) of the Government Code. As to the remaining information, however, we find that Dios has made only a generalized allegation that the release of this information would result in substantial damage to the competitive position of the company. Thus, Dios

has not demonstrated that substantial competitive injury would likely result from the release of the remaining information at issue. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that 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). Accordingly, the ACCOG may not withhold the remaining information under section 552.110(b) of the Government Code.

Dios claims that its proposal contains e-mail addresses. Section 552.137 of the Government Code provides in relevant part the following:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . . [.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses at issue were provided to the ACCOG by Dios in response to a request for bids or proposals. *See id.* § 552.137(c)(3). Thus, none of the e-mail addresses in the submitted information is excepted under section 552.137. *See id.* § 552.137(c).

We note that the submitted proposal contains insurance account numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136.³ We have marked the insurance account numbers that must be withheld pursuant to section 552.136 of the Government Code.

In summary, the ACCOG must withhold the information we have marked under section 552.110(b) of the Government Code. The AACOG must withhold the insurance account numbers we have marked under section 552.136 of the Government Code. The remaining 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, 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

³The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



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Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 250082

Enc. Submitted documents

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