



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 11, 2008

Mr. Charles Wallace
Assistant City Attorney
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78130

OR2008-12574

Dear Mr. Wallace:

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# 321487.

The City of New Braunfels (the "city") received a request for the bids submitted in response to RFP 2007-037. You state that you have released a portion of the requested information. You state that the submitted information is excepted from disclosure under section 552.104. You also indicate that the submitted information may be excepted under section 552.110 of the Government Code, but take no position as to whether this information is excepted under that section. You state, and provide documentation showing, that you have notified Tyler Technologies ("Tyler") and Woolpert, Inc. ("Woolpert") of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *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 the applicability of exception to disclose under Act in certain circumstances). A representative from Tyler has submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.

The city asserts that the submitted information is excepted from disclosure under section 552.104. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *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). Accordingly, section 552.104 requires a showing by the governmental body of some actual or specific harm to its interests in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990), *see also* Gov't Code § 552.301(e)(1)(A) (governmental body has the burden of proving that the requested information must be withheld under the stated exception). In this instance, the city has provided no arguments explaining how section 552.104 is applicable to the information at issue. Thus, no portion of the submitted information may be withheld on this basis.

Next, 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Woolpert explaining why its information should not be released. Therefore, we have no basis to conclude that Woolpert has protected proprietary interests in any of its information. *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, we conclude that the city may not withhold any of Woolpert's information based on any proprietary interest that company may have in its submitted records.

Tyler asserts that portions of its proposal are confidential 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: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 1958); *see also* ORD 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); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We also note that pricing information pertaining to a particular contract 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; *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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* ORD 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing the arguments and the information at issue, we conclude that Tyler has demonstrated that the release of its pricing information, which we have marked, would cause them substantial competitive harm. Thus, the city must withhold the pricing information that we have marked pursuant to section 552.110(b) of the Government Code. Tyler also asserts that the information in its "Requirements Checklist" is excepted under section 552.110(a) and 552.110(b). However, we note that the Requirements Checklist is specific to the project at issue, and thus, does not constitute a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt.

¹The following are the six factors that the Restatement gives 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 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 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

b (1939) (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”). Accordingly, we find that Tyler has failed to demonstrate that the Requirements Checklist meets the definition of a trade secret. Further, upon review, we find that Tyler failed to establish that release of the Requirements Checklist would cause the company substantial competitive harm under section 552.110(b). *See* ORD 661 at 5-6 (section 552.110(b) requires specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of information). Therefore, the city may not withhold the Requirements Checklist under section 552.110.

Next, we note that Tyler’s proposal contains insurance policy numbers.² Section 552.136(b) of the Government Code provides that “[n]otwithstanding 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.” The city must withhold the insurance policy numbers in Tyler’s proposal we have marked under section 552.136.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990).

In summary, the city must withhold the pricing information we have marked in Tyler’s proposal under section 552.110(b). The city must withhold the insurance policy numbers that we have marked under section 552.136. The city must release the remaining information, but any copyrighted information may only be released in accordance 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

²The Office of the Attorney General will raise a mandatory exception, such as 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).

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 321487

Enc. Submitted documents

c: Mr. Nathan Hershkowitz
Director of Sales & Marketing
CRW Systems
16980 Via Tazon, Suite 320
San Diego, California 92127
(w/o enclosures)

Woolpert Inc.
7140 Waldemar Drive
Indianapolis, Indiana 46268-4192
(w/o enclosures)

Ms. Heather A. Cayer
Contracts Specialist
Tyler Technologies, Inc.
370 US Route One
Falmouth, Maine 04105
(w/o enclosures)