



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 11, 2009

Ms. Jacqueline Cullom Murphy  
Assistant Criminal District Attorney  
Bexar County Criminal District Attorney's Office  
300 Dolorosa, Fifth Floor  
San Antonio, Texas 78205-3030

OR2009-01819

Dear Ms. Murphy:

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# 334734.

The Bexar County Infrastructure Services Department (the "county") received a request for the proposal evaluation report and the winning proposal, including the awarded price, related to the Environmental Assessment of Bexar County Greenhouse Gas Emissions Study. The county takes no position on whether the submitted information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of a third party, Tetra Tech, Inc. ("Tetra Tech"). Accordingly, you inform us, and provide documentation showing, that you notified the Tetra Tech of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the arguments that we received from Tetra Tech and reviewed the submitted information.

Initially, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of this request. The

county need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, we must address the county's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). The county received the request for information on November 4, 2008. Accordingly, the county's ten-business-day deadline was November 19, 2008. However, you did not submit your request for a decision to this office until December 3, 2008. Thus, the county did not request a decision from this office within the ten-business-day period prescribed by subsection 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the 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 id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because the proprietary interests of Tetra Tech are at stake, we will address Tetra Tech's arguments against disclosure of the submitted information.

We note that Tetra Tech does not argue against the disclosure of the submitted proposal evaluation form or the Engineering Services Agreement, which we have marked. As no arguments are made against the disclosure of this information, it must be released to the requestor.

We also note that Tetra Tech seeks to withhold portions of its Attachment A. Attachment A was not submitted by the county to this office for our review. Because such information was not submitted by the county, this ruling does not address that information and is limited to the information submitted as responsive by the county. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). However, we will address Tetra Tech's other arguments against disclosure of information that was submitted by the county.

Tetra Tech argues that portions of its proposal are excepted from disclosure 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 Id.* § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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. 1957); *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); *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 a trade secret as well as the Restatement's list of six trade secret factors.<sup>1</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable

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<sup>1</sup>The 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).

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. *Id.* § 552.110(b); *see also* 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).

Tetra Tech argues that its pricing information, the financial information in section 4.0 of its proposal, and its technical proposal are “protected by the exemptions in section 552.110” of the Government Code. Upon review of Tetra Tech’s arguments and the responsive information we find that Tetra Tech has failed to demonstrate that any of the information in its proposal fits within the definition of a trade secret. Tetra Tech has also not established any of the trade secret factors with respect to the information in its proposal. We note that pricing information pertaining to a particular proposal or 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, none of the information at issue may be withheld under section 552.110(a) of the Government Code.

We further find that Tetra Tech has failed to provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of any particular portion of the responsive information for purposes of section 552.110(b). *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (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 is too speculative). Furthermore, we note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, we determine that none of the marked information in Tetra

Tech's information is excepted from disclosure under section 552.110(b) of the Government Code.

Thus, we conclude that Tetra Tech has not adequately demonstrated that the responsive information either consists of trade secrets or would harm Tetra Tech's competitive interests if released. Consequently, the responsive information is not excepted from disclosure under section 552.110. As no further exceptions against the disclosure of the responsive information are raised, the county must release the responsive information to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/jb

Ref: ID# 334734

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

Ms. Kellie Warriner  
TetraTech, Inc.  
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San Antonio, Texas 78205  
(w/o enclosures)