



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 6, 2009

Ms. Bertha A. Ontiveros
Assistant City Attorney
The City of El Paso
Office of the City Attorney
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2009-09245

Dear Ms. Ontiveros:

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# 348153.

The City of El Paso (the "city") received a request for "the entire bid package" for a specified bid submitted to the city in response to Solicitation No. 2008-062. You state that the city will release some responsive information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You also explain that the submitted information may contain a third party's proprietary information subject to exception under the Act. Accordingly, you have notified Otto Environmental Systems North America, Inc., ("Otto") of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); 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 exceptions you claim and reviewed the submitted information. We have also considered comments received from Otto.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code

§ 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990).

The submitted information relates to a solicitation by the city for bids to provide the city with plastic refuse carts. However, you state that “the bid was never awarded [and] was allowed to expire without further action.” Based on this representation, we find that you have not established that the submitted information relates to an ongoing competitive bidding situation. Accordingly, you also have failed to establish that release of the submitted information would harm the city’s interests in a competitive bidding situation. Thus, the city may not withhold the information at issue under section 552.104 of the Government Code.

You also raise sections 552.101 and 552.110 of the Government Code as exceptions against disclosure of the information at issue. However, you have not submitted any arguments explaining why these exceptions apply to the information at issue. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Furthermore, we note that section 552.110 is designed to protect the interests of third parties, as opposed to the interests of governmental bodies. Therefore, the city may not withhold any of the information at issue on the basis of the city’s claims under sections 552.101 and 552.110.

We next consider the arguments submitted by Otto. Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to 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.” *Id.* § 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 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 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" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person 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). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

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 information at issue. *See* 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).

Upon review of Otto's arguments and the information at issue, we find that the city must withhold Otto's customer list, which we have marked, under section 552.110(a). However, we conclude that Otto has failed to establish a *prima facie* case that any of the remaining information at issue is a trade secret protected by section 552.110(a). *See* ORD 402. Thus, the city may not withhold any of the remaining information at issue under section 552.110(a).

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 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Otto also seeks to withhold portions of the submitted information under section 552.110(b). After reviewing Otto's arguments and the information at issue, we agree that the city must withhold the pricing information we have marked under section 552.110(b). However, we find that Otto has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Accordingly, the city may not withhold any of the remaining information at issue under section 552.110(b).

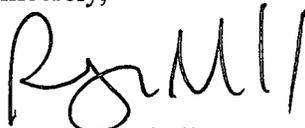
Finally, we note that some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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 information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The city must release the remainder of the submitted information, but must comply with copyright law in so doing.

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, 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,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 348153

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Stephen Stradtman
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