



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2009

Ms. Dolle K. Shane, TRMC
City Secretary
City of Lancaster
211 North Henry Street
Lancaster, Texas 75146

OR2009-12566

Dear Ms. Shane:

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# 354796.

The City of Lancaster (the "city") received a request for bid summaries, evaluations, and proposal submissions for all competitors related to RFQ 09-044 for IT Consulting Services. You state you have released the bid tabulations, evaluations, and portions of the requested proposals. You claim that portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code. You also indicate that the release of the submitted information may implicate the proprietary interests of the following third parties: Accretive Solutions, Advanced Concepts, Inc., The Azimuth Group, Inc., Datamax of Texas, RCM Technologies Inc., and Weaver and Tidwell, L.L.P. ("Weaver"). Accordingly, you state you have notified the third parties of the city's receipt of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Weaver. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Section 552.301 of the Government Code prescribes the 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). In addition, pursuant to section 552.301(e), within fifteen business days of receiving the request, the governmental body must submit to this office (1) 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. *Id.* § 552.301(e)(1)(A)-(D).

We note that the city received the initial request for information on May 29, 2009 and that the city asked the requestor to clarify the request on that date. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). In Open Records Decision No. 663 (1999), this office determined that during the interval in which a governmental body and a requestor communicate in good faith to narrow or clarify a request, the Act permits a tolling of the statutory ten-business-day deadline imposed by section 552.301: ORD 663 at 5 (ten-day deadline is tolled during process but resumes, upon receipt of clarification or narrowing response, on day that clarification is received). Thus, the ten-business-day time period to request a decision from this office under section 552.301(b) was tolled on the date that the city sought clarification of the request. *See* Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (clarification does not trigger new ten-business-day time interval, but merely tolls ten-business-day deadline during clarification or narrowing process, which resumes upon receipt of clarified or narrowed response). We note the city received the clarification on June 2, 2009. Accordingly, we conclude that the ten-business-day time period for requesting a decision from our office resumed on June 3, 2009. Thus, the ten-business-day deadline was June 16, 2009, and the fifteen-business-day deadline was June 23, 2009. However, the city did not request a ruling from this office or submit the responsive information until July 2, 2009. Consequently, we conclude that the city failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

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 the requested information is public and must be released unless a compelling reason exists 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). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the

governmental body. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (untimely request for a decision resulted in waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Accordingly, the city may not withhold any portion of the information at issue under section 552.104 of the Government Code. However, because third party interests may be at stake, we will consider whether the submitted information must be withheld on the basis of the third parties' proprietary interests.

We note 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, only Weaver has submitted to this office reasons explaining why its information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in the submitted proposals. *See* 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). Therefore, the city may not withhold any portion of the submitted information on the basis of any proprietary interest that the remaining third parties may have in this information.

Next, we address Weaver's arguments under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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." Gov't Code § 552.110(a)-(b).

The Supreme Court of Texas 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 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 [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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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* ORD 552 at 5. 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. *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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Weaver contends that portions of its proposal, including its methodology, customer information, and pricing structure, constitute trade secrets under section 552.110(a). Having considered Weaver's arguments and reviewed the information at issue, we find that Weaver has established a *prima facie* case that portions of its methodology and customer information, which we have marked, constitute trade secret information and must be withheld under section 552.110(a). We note, however, that Weaver has published the identities of some of its customers on its website. Thus, Weaver has failed to demonstrate that the information it has published on its website is a trade secret. We also 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*

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

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, we conclude that Weaver has failed to demonstrate any portion of its remaining information constitutes a trade secret, and none of the remaining information at issue may be withheld under section 552.110(a).

Weaver also seeks to withhold portions of its remaining information under section 552.110(b). Upon review, we determine Weaver has established that the release of certain pricing information would cause the company substantial competitive harm. Therefore, the city must withhold the information we have marked under section 552.110(b) of the Government Code. However, Weaver has made only conclusory allegations that release of the remaining information it seeks to withhold would cause it substantial competitive harm. *See* Gov't Code § 552.110; ORD 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, we conclude that none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Next, we note that a portion of the remaining submitted information is excepted under section 552.136 of the Government Code.² Section 552.136 states 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.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

As you acknowledge, some of the submitted 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. 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 information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released to the requestor in accordance with copyright law.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

Ref: ID# 354796

Enc. Submitted documents

c: Requestor
(w/o enclosures)