ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 5, 2010

Ms. Beth Moroney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2010-04741

Dear Ms. Moroney:

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# 374736 (COSA File No. 10–0079).

The City of San Antonio (the "city") received a request for copies of proposals submitted in response to BVB-09-050-TC/A1478-10.[1] Although you take no position on whether the submitted proposals are excepted from disclosure, you state release of this information may implicate the proprietary interests of Elite Line Services, Inc., ERMC Facility Asset Services; Material Handling Systems, Inc.; and VanDerLande Industries ("VanDerLande"). Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why their 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

[1]We note that the submitted information was the subject of a previous request for information in response to which this office issued Open Records Letter No. 2010-02925 (2010). However, we also note that the circumstances on which this prior ruling was based have changed, thus the city may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Therefore, we will address the arguments we have received for the submitted information.

third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received correspondence from VanDerLande. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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, this office has only received comments from VanDerLande. None of the remaining third parties have submitted comments explaining why their proposals should not be released. Therefore, we have no basis to conclude these third parties have a protected proprietary interest in the submitted 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. Accordingly, the city may not withhold any portion of the submitted proposals based upon the proprietary interests of the remaining third parties.

Next, you inform us that the requestor has agreed to the redaction of tax identification numbers, personal addresses, and personal e-mail addresses. In addition, we note that some of the submitted information, which we have marked, does not consist of the proposals specified in the request. Therefore, this information is not responsive to the instant request for information. The city need not release non-responsive information in response to this request, and this ruling will not address that information.

VanDerLande asserts portions of its proposal are excepted from disclosure under section 552.101 of the Government Code. 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 information protected by other statutes. VanDerLande contends section 106 of title 17 of the United States Code constitutes statutory law that, for purposes of section 552.101, prohibits copying those portions of its proposal that are copyrighted. 17 U.S.C. § 106. Similarly, VanDerLande asserts these records are excepted from disclosure pursuant to section 552.007 of the Government Code, which provides that a governmental body is not prohibited "from voluntarily making part of all of its information available to the public, unless the disclosure is expressly prohibited by law." Gov't Code § 552.007(a). We understand VanDerLande to indicate the city is prohibited from making copyrighted portions of its proposal available to the public pursuant to section 106 of title 17 of the United States Code and section 552.007 of the Government Code. We disagree. Generally, copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow inspection of copyrighted materials unless an exception to required public disclosure applies to the

information. Attorney General Opinion JM-672 (1987) at 2-3. Accordingly, no portion of VanDerLande's proposal may be withheld on the basis of copyright law.

Next, we understand VanDerLande to assert portions of its proposal are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code, which provides as follows:

> (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
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> (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This statutory provision merely duplicates the protection that section 552.110 of the Government Code provides to trade secret and commercial or financial information. Therefore, we will address VanDerLande's arguments with respect to section 252.049 of the Local Government Code under section 552.110 of the Government Code.

VanDerLande raises section 552.102(a) of the Government Code for a portion of its proposal. Section 552.102(a) 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(a) protects information relating to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In this instance, the information at issue is related to a private entity, VanDerLande. Therefore, the city may not withhold any portion of VanDerLande's proposal under section 552.102(a) of the Government Code.

VanDerLande contends portions of its proposal are excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the city does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to VanDerLande's proposal. *See* ORD 592 (governmental body may waive section 552.104). Accordingly,

none of VanDerLande's proposal may be withheld under section 552.104 of the Government Code.

VanDerLande also raises section 552.110 of the Government Code for portions of its proposal. 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) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 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. 1958); *see also* ORD 552 at 2. Section 757 provides 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.[2] 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5. However, we cannot conclude section 552.110(a) applies unless it has been shown 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

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

(1983). We note 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 (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3.

Section 552.110(b) of the Government Code 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." Gov't Code § 552.110(b). 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 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

VanDerLande argues portions of its proposal constitute its proprietary plan developed for the city's project. After reviewing VanDerLande's arguments and the information at issue, we conclude VanDerLande has failed to demonstrate any portion of its proposal constitutes a trade secret for purposes of section 552.110(a). RESTATEMENT OF TORTS § 757 cmt. b (1939) ("A trade secret is a process or device for *continuous* use in the operation of the business") (emphasis added). Accordingly, no portion of VanDerLande's proposal may be withheld under section 552.110(a).

VanDerLande also claims portions of its proposal are excepted from disclosure under section 552.110(b). Upon review of Vanderlande's arguments and the information at issue, we find VanDerLande has failed to provide specific factual evidence demonstrating that release of any of its information would result in substantial competitive harm to the company. *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 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder, such as VanDerLande, 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, the city may not withhold any portion of VanDerLande's proposal pursuant to section 552.110(b) of the Government Code.

We note portions of the submitted proposals contain insurance policy numbers, bank account numbers, and bank routing numbers. Section 552.136 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."[3] Gov't Code § 552.136. This office has concluded that bank account, bank routing, and insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the city must withhold this information, which we have marked, under section 552.136 of the Government Code.[4]

We also note that portions of the submitted proposals are protected by copyright. As previously discussed, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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 insurance policy numbers, bank account numbers, and bank routing numbers we have marked under section 552.136 of the Government Code. The remaining information must be released; however, in releasing information that is copyrighted, the city must comply with applicable copyright law.

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,

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[3]The 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).

[4]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy, bank account, and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,

Pam Wissemann

Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/cc

Ref: ID# 374736

Enc. Submitted documents

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(w/o enclosures)

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