



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2010

Ms. Camila W. Kunau
Assistant City Attorney
City of San Antonio
P.O. Box 839966
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OR2010-08446

Dear Ms. Kunau:

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# 381894 (COSA ID No. 10-0481).

The City of San Antonio (the "city") received a request for five categories of information pertaining to request for proposal ("RFP") number 10-018. You state the city will release some information to the requestor. Although you take no position with respect to the public availability of the submitted information, you state that its release may implicate the proprietary interests of certain third parties.¹ Accordingly, you state that you have notified these third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *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). We have received comments from Booth, EBJ, and I/O. We have considered the submitted comments and information.

First, we note interested third parties are allowed ten business days after the date of their receipt of the governmental body's notice under section 552.305(d) to submit their 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 CPS or Morris explaining why their portions of the submitted information should not be released. Therefore, we have no basis to conclude that CPS or Morris have

¹The interested third parties are as follows: Booth Research Group ("Booth"); CPS Human Resource Services ("CPS"); EB Jacobs, LLC ("EBJ"); I/O Solutions ("I/O"); and Morris and McDaniel, Inc. ("Morris").

protected proprietary interests 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 (1990). Consequently, the city may not withhold CPS's or Morris's submitted proposals on the basis of any proprietary interests these companies may have in the information.

Next, I/O claims its information is confidential under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, I/O has not directed our attention to any law, nor are we aware of any law, that makes I/O's information confidential. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold I/O's information under section 552.101 of the Government Code.

I/O appears to raise section 552.103 of the Government Code for the litigation disclosure portion of its information. Additionally, I/O and EBJ both raise section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder," and Booth raises section 552.122 of the Government Code, which excepts from required public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code §§ 552.104, 552.122. We note, however, that sections 552.103, 552.104, and 552.122 are discretionary exceptions that protect only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103), 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), 522 (1989) (discretionary exceptions in general). As the city does not seek to withhold any information pursuant to these exceptions, no portion of the submitted information may be withheld on the basis of sections 552.103, 552.104, or 552.122 of the Government Code.

EBJ raises sections 552.102 and 552.117 of the Government Code for its information.² 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

²Although EBJ appears to assert section 552.11754 of the Government Code, this section does not exist. However, based on its arguments, we understand EBJ to claim section 552.117 of the Government Code instead.

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). Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117. In this instance, the information at issue is related to a private entity, EBJ. Therefore, the city may not withhold any portion of EBJ's information under sections 552.102 or 552.117 of the Government Code.

I/O, EBJ, and Booth claim portions of their proposals are excepted from disclosure 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: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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).

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 trade secret as well as the Restatement's list of six trade

secret factors.³ 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 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) of the Government Code 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.*; *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).

We understand I/O, EBJ, and Booth to claim portions of their proposals are trade secrets that should be protected by section 552.110(a). Having reviewed I/O’s, EBJ’s, and Booth’s arguments, we find they have demonstrated that some of their respective client information constitutes trade secrets. We have marked the client information in I/O’s, EBJ’s, and Booth’s proposals that the city must withhold under section 552.110(a) of the Government Code. However, I/O and Booth have made the remaining listed clients publicly available on their websites, and have failed to demonstrate how information they have published on their websites is a trade secret. *See* ORD 402. Accordingly, I/O and Booth may not withhold these clients under section 552.110(a). Booth also asserts portions of the “Executive Summary” and “Proposed Plan” sections of its proposal should be withheld as trade secrets. Booth explains this information describes the company’s specialized methodology, which provides an advantage over competitors who do not know how to use it. Upon review, we agree the information we have marked in Booth’s “Executive Summary” and “Proposed Plan” sections reveals methodologies that are trade secrets. Thus, the city must withhold this information under section 552.110(a). However, Booth does not explain how the remaining portions it has highlighted meet the definition of a trade secret, and thus may not withhold this information under section 552.110(a). *See* ORD 402; Restatement of Torts § 757 cmt. b. Although EBJ and Booth argue the pricing information in their proposals should be withheld as a trade secret, pricing information pertaining to a particular solicitation or contract is

³The 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).

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; ORD 319 at 3, 306 at 3. Thus, no pricing information may be withheld under section 552.110(a). Furthermore, we find I/O and EBJ have not demonstrated how the remaining information they seek to withhold in their proposals meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (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). Consequently, the city may not withhold any of I/O’s, EBJ’s, or Booth’s remaining information under section 552.110(a) of the Government Code.

We also understand I/O, EBJ, and Booth to raise section 552.110(b) for portions of the remaining information in their respective proposals. Upon review, we find EBJ has established its pricing information constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Thus, the city must withhold the pricing information in EBJ’s proposal, which we have marked, under section 552.110(b). We note, however, that pricing information of a winning bidder is generally not excepted under section 552.110(b), because 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, as Booth was the winning bidder in this instance, the city may not withhold any of Booth’s pricing information under section 552.110(b). Further, I/O, EBJ, and Booth have made only conclusory allegations that release of their remaining information would result in substantial damage to the companies’ competitive position. Thus, I/O, EBJ, and Booth have not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORD Nos. 661 at 5-6, 509 at 5. Accordingly, the city may not withhold any of I/O’s, EBJ’s, or Booth’s remaining information under section 552.110(b).

I/O claims its information is subject to section 552.128 of the Government Code. Section 552.128 is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). However, I/O does not indicate it submitted its proposal in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on

a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, I/O submitted its proposal to the city in connection with a specific proposed contractual relationship with the city. We therefore conclude that the city may not withhold any portion of I/O's proposal under section 552.128 of the Government Code.

EBJ indicates that certain e-mail addresses in its proposal are confidential. Section 552.137 of the Government Code provides in relevant part the following:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . .[.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses EBJ seeks to withhold were provided to the city by EBJ in response to an RFP. *See id.* § 552.137(c)(3). Thus, the city may not withhold any of the e-mail addresses at issue under section 552.137.

We note portions of the submitted information are subject to section 552.136 of the Government Code. Section 552.136(b) states "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b). The city must withhold the submitted account number and policy numbers we have marked under section 552.136 of the Government Code.⁴

⁴We 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 certain policy and account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

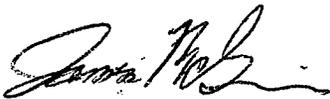
Finally, we note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection 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 portions of I/O's, EBJ's, and Booth's information we have marked under section 552.110(a) of the Government Code. The city must withhold the portions of EBJ's information we have marked 552.110(b) of the Government Code. The city must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released to the requestor, but only in accordance with copyright law.⁵

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,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

⁵We note the information being released contains confidential information to which the requestor has a right of access. Accordingly, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.

Ref: ID# 381894

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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