



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 24, 2011

Mr. Allen Smiley  
Paralegal  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2011-04538A

Dear Mr. Smiley:

This office issued Open Records Letter No. 2011-04538 (2011) on April 4, 2011. We have examined this ruling and determined that we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on April 4, 2011. Your request was assigned ID# 426722.

The City of Austin (the "city") received a request for several categories of information pertaining to a specified request for proposals. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Ricoh Professional Services ("Ricoh"). Accordingly, you state, and provide documentation showing, you notified Ricoh of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See id.* § 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 reviewed the submitted information.

Initially, we note you have only submitted one of the categories of requested information, the Statement of Work, for our review. Thus, to the extent any additional information

responsive to the request existed on the date the city received the request, we assume you have released it. If you have not released any such information to the requestor, you must do so at this time. See Gov't Code §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note, and you acknowledge, that you failed to comply with section 552.301 of the Government Code in seeking an open records decision from this office. Gov't Code § 552.301(b), (e). A governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information from disclosure. See *id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); see also Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Accordingly, we will consider whether Ricoh's interests provide a compelling reason to withhold any portion of the submitted information from disclosure.

Ricoh raises 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(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. See Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). As the city does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to the submitted information. See ORD 592 (governmental body may waive section 552.104). Accordingly, none of the submitted information may be withheld under section 552.104 of the Government Code.

Ricoh raises section 552.110 of the Government Code for its submitted information. 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 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. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also Open Records Decision No. 552 (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.<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 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) 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

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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 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).

§ 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) (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).

We understand Ricoh to contend release of its information would discourage private entities from further dealings with the city. In advancing this argument, Ricoh refers to *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied) and appears to assert *Birnbaum* held that “information is confidential within the meaning of the exception if disclosure is likely either: (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Birnbaum*, 994 S.W.2d at 782. However, we note this standard, which pertains to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, was actually announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, we note the *Birnbaum* court overturned this standard, when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum*, 994 S.W.2d 766. Subsequent to *Birnbaum*, section 552.110(b) was amended, and the current exception expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interests of Ricoh in withholding its information.

Upon review, we find Ricoh has failed demonstrate that any of the submitted information it seeks to withhold meets the definition of trade secret, nor has it established a trade secret claim for this information. See Open Records Decision Nos. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 402. Further, the submitted information reflects it was tailored for this particular proposal. We note that information, including 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 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 Record Decision No. 306 at 3

(1982). Therefore, the city may not withhold any of the submitted information at issue under section 552.110(a) of the Government Code.

Additionally, we find that Ricoh has made only conclusory allegations that release of its information at issue would cause the company substantial competitive injury. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue); *see also* ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note that pricing information of a winning bidder, as Ricoh is in this case, 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; thus, the pricing information of a company contracting with a governmental body is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (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 of the submitted information under section 552.110(b) of the Government Code. As the city does not claim any exception to disclosure, the submitted information must be released.

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

Sincerely,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/bs

Ref: ID# 426722

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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