



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2011

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
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OR2011-05201

Dear Mr. Ramirez:

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# 414599.

The Lower Colorado River Authority (the "authority") received a request for five categories of information pertaining to Request for Proposals for Communication Services, including two specified contracts, specified score sheets, and any documents relevant to selection of the winning bidders. As you have not submitted any arguments against disclosure, we understand you to take no position as to whether the submitted information is excepted under the Act. You state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified The Eleven, Inc.; Emmis Austin Radio Broadcasting Co. L.P.; Fortitude Marketing and Media, L.L.C.; Gromique; Hahn, Texas; Jar Graphic Design; Montemayor Advertising, L.L.C.; Sacred Cow Advertising, L.L.C.; and The Wolf Group 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. *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 Gromique. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the authority's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). In this instance, you state the authority received the request for information on January 24, 2011. However, you did not request a ruling from this office until February 8, 2011. Consequently, we find the authority failed to comply with the requirements of section 552.301 in requesting this decision from our office.

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 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. 630 (1994). 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). Because third party interests can provide a compelling reason to withhold information, we will consider whether any of the submitted information is excepted under the Act.

Next, we note that you have not submitted for our review any information responsive to the request for two specified contracts, specified score sheets, or documents relevant to selection of the winning bidders. Thus, to the extent any additional responsive information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We note that 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 not received comments from the remaining third parties explaining why their submitted information should not be released. Therefore, we have no basis to conclude that 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 authority may not withhold any portion of the submitted information based upon the proprietary interests of The Eleven, Inc.; Emmis Austin Radio Broadcasting Co. L.P.; Fortitude Marketing and Media, L.L.C.; Hahn, Texas; Jar Graphic Design; Montemayor Advertising, L.L.C.; Sacred Cow Advertising, L.L.C.; or The Wolf Group.

Next, we note Gromique seeks to withhold customer contact information and financial information. The authority has not submitted any such information for our review. This ruling does not address information beyond what the authority has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the authority submitted as responsive to the request for information. *See id.*

Gromique asserts that some of its information is excepted 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." *Id.* § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Gromique has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. Therefore, we conclude that the authority may not withhold Gromique's submitted information under that section.

Gromique raises section 552.104 of the Government Code as an exception to disclosure for its proposal. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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 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 authority does not seek to withhold any information pursuant to section 552.104, no portion of Gromique's information may be withheld on this basis.

Next, we consider Gromique's arguments against disclosure of its information under section 552.110 of the Government Code. 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by

excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (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* ORD 232. This office must accept a claim that information subject to the Act is exempted 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. Open Records Decision No. 552 at 2 (1990). 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) 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.* § 552.110(b); ORD 661.

Gromique also indicates the release of its information could deter vendors such as Gromique from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, Gromique appears to rely on the test pertaining 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, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that 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) of the Government Code 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 Gromique’s interests in its information.

Having considered Gromique’s arguments under section 552.110(a), we determine that Gromique has failed to demonstrate that any portion of its submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the authority may not withhold any of Gromique’s submitted information on the basis of section 552.110(a) of the Government Code.

Upon review of Gromique's arguments under section 552.110(b), we find that Gromique has made only conclusory allegations that the release of any of its information would result in substantial damage to the company's competitive position. Thus, Gromique has not demonstrated that substantial competitive injury would result from the release of any of its information at issue. *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 costs, 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). Accordingly, the authority may not withhold any of Gromique's submitted information under section 552.110(b).

Gromique raises section 552.131(a) of the Government Code. Section 552.131(a) provides:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

Gov't Code § 552.131(a). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5, 661 at 5-6. As previously stated, Gromique has failed to demonstrate any portion of the information at issue meets the definition of a trade secret, and Gromique has provided no specific factual or evidentiary showing release of the information at issue would cause the company substantial competitive injury. Consequently, we conclude the authority may not withhold any portion of Gromique's submitted information under section 552.131(a).

Gromique asserts some of its 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. Open Records Decision No. 180 at 3 (1977). A

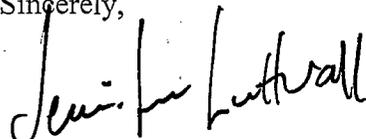
governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the submitted information must be released, but any information protected by copyright may only be released in accordance with 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, 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 414599

Enc. Submitted documents

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(w/o enclosures)

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