



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 10, 2015

Ms. Lillian Guillen Graham  
Assistant City Attorney  
City of Mesquite  
Office of the City Attorney  
P.O. Box 850137  
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OR2015-11423

Dear Ms. Graham:

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# 566493.

The City of Mesquite (the "city") received a request for all information related 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 the submitted information may implicate the proprietary interests of Spindlemedia, Inc. ("Spindlemedia") and Tyler Technologies, Inc. ("Tyler"). Accordingly, you state, and provide documentation showing, you notified these third parties 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 Spindlemedia and Tyler. We have considered the submitted arguments and reviewed the submitted information.

Spindlemedia asserts it has confidentiality and non-disclosure agreements regarding its information. We note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a

governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Spindlemedia has not identified any law that authorizes the city to enter into an agreement to keep any of the submitted information confidential. Therefore, the city may not withhold Spindlemedia’s information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Spindlemedia raises section 552.104 of the Government Code, which excepts “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the city, not the proprietary interests of private parties such as Spindlemedia. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the city does not raise section 552.104 as an exception to disclosure. Therefore, the city may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, Spindlemedia and Tyler state portions of their information are excepted from disclosure 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. *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, 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 . . . . 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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. 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* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable 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. Open Records Decision No. 402 (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; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.*; *see also* Open Records Decision No. 661 at 5 (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).

Upon review, we conclude Spindlemedia and Tyler have established a *prima facie* case that their customer information, as well as the additional information we have marked, constitute trade secret information for purposes of section 552.110(a). However, to the extent Spindlemedia and Tyler have published any of the customer information at issue on their websites, this information is not confidential under section 552.110(a). Accordingly, the city must withhold the customer information of Spindlemedia and Tyler in the submitted documents under section 552.110(a) of the Government Code provided Spindlemedia and

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

Tyler have not published the information on their websites. The city must also withhold the additional information we have marked under section 552.110(a). However, we conclude Spindlemedia and Tyler have failed to establish a *prima facie* case that any portion of their remaining information meets the definition of a trade secret, and has failed to demonstrate the necessary factors to establish a trade secret claim for their remaining information. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Therefore, none of the remaining information may be withheld under section 552.110(a).

Upon review, we find Tyler has demonstrated its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the city must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Tyler has not demonstrated the release of any of its remaining information would result in substantial harm to its competitive position. *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, none of Tyler's remaining information may be withheld under section 552.110(b).

Section 552.153 of the Government Code reads, in relevant part, as follows:

(a) In this section, "affected jurisdiction," "comprehensive agreement," "contracting person," "interim agreement," "qualifying project," and "responsible governmental entity" have the meanings assigned those terms by Section 2267.001.

(b) Information in the custody of a responsible governmental entity that relates to a proposal for a qualifying project authorized under Chapter 2267 is excepted from the requirements of Section 552.021 if:

(1) the information consists of memoranda, staff evaluations, or other records prepared by the responsible governmental entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under Chapter 2267 for which:

(A) disclosure to the public before or after the execution of an interim or comprehensive agreement would adversely affect the financial interest or bargaining position of the responsible governmental entity; and

(B) the basis for the determination under Paragraph (A) is documented in writing by the responsible governmental entity; or

(2) the records are provided by a proposer to a responsible governmental entity or affected jurisdiction under Chapter 2267 and contain:

(A) trade secrets of the proposer;

(B) financial records of the proposer, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or other means; or

(C) work product related to a competitive bid or proposal submitted by the proposer that, if made public before the execution of an interim or comprehensive agreement, would provide a competing proposer an unjust advantage or adversely affect the financial interest or bargaining position of the responsible governmental entity or the proposer.

Gov't Code § 552.153(a)-(b). Section 2267.001(10) of the Government Code defines a "qualifying project" as the following:

(A) any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing care facility, recreational facility, public building, technology facility, or other similar facility currently available or to be made available to a governmental entity for public use, including any structure, parking area, appurtenance, and other property required to operate the structure or facility and any technology infrastructure installed in the structure or facility that is essential to the project's purpose; or

(B) any improvements necessary or desirable to real property owned by a governmental entity.

*Id.* § 2267.001(10). Further, section 2267.001(11) defines a "responsible governmental entity" as "a governmental entity that has the power to develop or operate an applicable qualifying project." *Id.* § 2267.001(11).

The city does not inform us, nor has Spindlemedia established, either that the city is a responsible governmental entity as defined by section 2267.001(11) of the Government

Code, or that the submitted information relates to a proposal for a qualifying project authorized under chapter 2267 of the Government Code. Accordingly, the city may not withhold any of Spindlemedia's information under section 552.153.

Spindlemedia also claims its pricing information is confidential under section 552.101 of the Government Code in conjunction with section 2267.066(g) of the Government Code.<sup>2</sup> Section 2267.066(g) provides that "[c]ost estimates relating to a proposed procurement transaction prepared by or for a responsible governmental entity are not open to public inspection." *See id.* § 2267.066(g). We note section 2267.066 pertains to a responsible governmental entity's public posting obligations once the responsible governmental entity accepts a proposal for a qualifying project submitted in accordance with section 2267.053(a) or section 2267.053(b). *Id.* §§ 2267.053(a) (private entity or other person may submit proposal requesting approval of qualifying project by responsible governmental entity), .053(b) (responsible governmental entity may request proposals or invite bids for development or operation of qualifying project), .066; *see also id.* § 2267.001(10), (11). As noted above, the city does not inform us, nor has Spindlemedia established, that the city is a responsible governmental entity as defined by section 2267.001(11) of the Government Code. Further, the city does not inform us, nor has Spindlemedia established, the submitted information relates to a proposal for a qualifying project submitted in accordance with section 2267.053(a) or section 2267.053(b). Accordingly, the city may not withhold any of Spindlemedia's information under section 552.101 of the Government Code in conjunction with section 2267.066(g) of the Government Code.

We note some of the materials at issue may 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. 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 city must withhold the customer information of Spindlemedia and Tyler in the submitted documents under section 552.110(a) of the Government Code provided Spindlemedia and Tyler have not published the information on their websites. The city must also withhold the additional information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The remaining information must be released; however, any information that is subject to copyright may be released only in accordance with copyright law.

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<sup>2</sup>Section 552.101 of the Government Code excepts from disclosure, "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See* Gov't Code § 552.101.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra  
Assistant Attorney General  
Open Records Division

NAY/cbz

Ref: ID# 566493

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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