



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 2, 2016

Ms. Katinka Howell  
Assistant City Attorney  
Department of Aviation  
City of San Antonio  
9800 Airport Boulevard  
San Antonio, Texas 78216-9990

OR2016-09855

Dear Ms. Howell:

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# 607919 (ORR Nos. W113658, W113812, & W112856).

The City of San Antonio (the "city") received three requests from different requestors for information related to request for proposals number 6100006413.<sup>1</sup> You indicate the city will withhold access device numbers pursuant to section 552.136(c) of the Government Code.<sup>2</sup> You state the city will release some of the requested information. 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 AV8 Americas, Inc. ("AV8"); AviaSolutions, Inc. ("AviaSolutions"); GRA Incorporated ("GRA"); ICF SH&E, Inc. ("ICF"); InterVISTAS Consulting, Inc. ("InterVISTAS"); Morton Beyer & Agnew ("MBA"); and Seabury Airline Planning Group, L.L.C. ("Seabury"). Accordingly, you state, and provide documentation showing, you notified AV8, AviaSolutions, GRA, ICF, InterVISTAS, MBA, and Seabury of the request for information and of their right to submit

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<sup>1</sup>You inform us one of the requestors has withdrawn his request for the information at issue.

<sup>2</sup>Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

arguments to this office as to why the submitted information should not be released.<sup>3</sup> *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 GRA and MBA. We have reviewed the submitted information and the submitted arguments.

Initially, you state the requestors have excluded certain information from the scope of their requests. Thus, the types of information a requestor has excluded are not responsive to that requestor's request for information and need not be released to that requestor. Further, this ruling does not address the public availability of any information that is not responsive to any request.

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from AviaSolutions, ICF, or InterVISTAS explaining why the submitted information should not be released. Therefore, we have no basis to conclude AviaSolutions, ICF, or InterVISTAS has 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 the submitted information on the basis of any proprietary interest AviaSolutions, ICF, or InterVISTAS may have in the information.

GRA and MBA assert portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person 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

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<sup>3</sup>You inform us AV8 and Seabury have consented to release of their records. As you do not seek to withhold the information belonging to these third parties, our ruling does not address that information.

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>4</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*

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<sup>4</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)*.

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).

GRA and MBA assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude GRA and MBA have established a *prima facie* case that some of their information constitutes trade secret information. Accordingly, to the extent GRA's and MBA's customer and reference information is not publicly available on their websites, the city must withhold GRA's and MBA's customer and reference information under section 552.110(a) of the Government Code. However, we conclude GRA and MBA have failed to establish a *prima facie* case that any portion of their remaining information meets the definition of a trade secret. We further find GRA and MBA have not demonstrated the necessary factors to establish a trade secret claim for their remaining information. *See* ORD 402. Therefore, the city may not withhold any of GRA's or MBA's remaining information under section 552.110(a).

GRA and MBA further argue some of their information consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find GRA and MBA have demonstrated some of the information at issue, which we have marked, constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the city must withhold the information we marked under section 552.110(b) of the Government Code. However, we find GRA and MBA have failed to demonstrate the release of any of the remaining information would result in substantial harm to their 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), 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), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, the city may not withhold any of GRA's or MBA's remaining information under section 552.110(b).

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, to the extent GRA's and MBA's customer and reference information is not publicly available on their websites, the city must withhold GRA's and MBA's customer and reference information under section 552.110(a) of the Government Code. The city must withhold the information we marked under section 552.110(b) of the Government Code. The city must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.<sup>5</sup>

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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 607919

Enc. Submitted documents

c: 3 Requestors  
(w/o enclosures)

7 Third Parties  
(w/o enclosures)

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<sup>5</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. Gov't Code § 552.147(b). However, we note taxpayer identification numbers and employer identification numbers issued by the Internal Revenue Service are not subject to section 552.147 of the Government Code.

