



April 7, 1999

Mr. John Steiner
Division Chief
City of Austin
Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR99-99-0931

Dear Mr. Steiner:

You ask this office to reconsider Open Records Letter No. 98-3104 (1998). Your request for reconsideration was assigned ID# 123197.

The City of Austin (the "city") received a request for a copy of all responses to the city's Request for Proposal No. VC98300023. In Open Records Letter No. 98-3104 (1998), we held that ChemWare, Inc. ("ChemWare") did not establish the applicability of section 552.110 of the Government Code to its bid proposal. Thus, we concluded that the city must release ChemWare's proposal to the requestor. On behalf of ChemWare, you ask that we reconsider the applicability of section 552.110 to ChemWare's bid proposal. ChemWare has submitted additional arguments against disclosure to this office. Because a third party's proprietary interests are compelling, we will consider ChemWare's new arguments under section 552.110. *See* Open Records Decision Nos. 552 (1990), 150 (1977) (third party interests are generally compelling and overcome presumption that information is public).

ChemWare contends that its entire proposal, with the exception of Attachment G, is excepted from disclosure under section 552.110. Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. ChemWare has made arguments against disclosure under both prongs of section 552.110.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).¹

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts’ interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government’s ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 at 4 (1996). To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

ChemWare does not object to the release of Attachment G of its proposal. Therefore, the city should release Attachment G to the requestor. Furthermore, any section of the bid proposal that is incorporated into the city’s contract with ChemWare is not excepted from

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(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 (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

disclosure under section 552.110 and must be released to the requestor. *See* Open Records Decision Nos. 514 (1988) (not clear whether general terms of contract with state agency could ever constitute trade secret), 494 (1988) (application of commercial or financial information prong of section 552.110 requires balancing of public interest in disclosure with competitive injury to company in question); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). For example, if Attachment D, entitled "Price Schedule," is incorporated into the city's contract with ChemWare, it must be released to the requestor.

Attachment H and the marked paragraphs on pages 2-8 through 2-10 and 2-77 through 2-79 are not excepted from disclosure under section 552.110. Attachment H consists of signed copies of forms required to be submitted with all bid proposals. The marked information on pages 2-8 through 2-10 and 2-77 through 2-79 consists of historical information about ChemWare and information about the qualifications and experience of ChemWare's employees. ChemWare has not demonstrated that either prong of section 552.110 applies to Attachment H or the marked information. *See* Open Records Decision No. 319 (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information). The city must, therefore, release Attachment H and the marked information to the requestor. ChemWare has established that the release of the remaining portions of its bid proposal would cause it to suffer substantial competitive harm. Thus, with the exception of the marked information, any information incorporated in the city's contract with ChemWare, and Attachments G and H, the city must withhold the bid proposal from disclosure under section 552.110 as commercial or financial information.² Open Records Letter No. 98-3104 (1998) is overruled to the extent it conflicts with this ruling.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

²Because we conclude that the city must withhold this information from disclosure as commercial or financial information, we do not reach the issue of whether this information also constitutes a trade secret.

Ref: ID# 123197

Enclosures: Marked documents

cc: Mr. James F. McDowell
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