



February 22, 2000

Mr. W. Kent McIlyar
Assistant City Attorney II
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2000-0642

Dear Mr. McIlyar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#132360.

The City of Plano (the "city") received two requests for all written proposals submitted to the city pertaining to its J.D. Edwards One World Project. You assert that some of the requested information should be withheld from disclosure under sections 552.101 and 552.110 because you say it "may contain confidential information, proprietary information or commercial or financial information."¹

Section 552.301(d) provides that a governmental body that requests an attorney general decision must provide to the requestor not later than the 10th business day after the date of receiving the request a written statement that the governmental body wishes to withhold the information and that it has asked for a decision from the attorney general and a copy of the governmental body's written communication to the attorney general asking for a decision. The city received the requests for information on December 1 and 10, 1999, but apparently did not notify the requestors of the city's request for an attorney general opinion until January 7, 2000.

¹ Previously, the city submitted to this office its first request for a decision regarding the information contained in the original proposals it received pertaining to its J.D. Edwards One World Project. This office issued Open Records Letter No. 2000-0169 which addressed the original proposal information. Subsequent to submitting its first request for a decision, the city received six supplemental proposals. This ruling only addresses the information contained in the supplemental proposals.

When a governmental body does not timely notify the requestor within ten business days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). The applicability of section 552.110 may present a compelling reason to overcome the presumption of openness.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, you notified those parties whose information is responsive to the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Section 552.305(d)(1) requires that a governmental body that requests an attorney general decision under section 552.301 must make a good faith attempt to notify third parties of the request for information in writing not later than the 10th business day after the date the governmental body receives the request for the information. We again note that the city received the requests for information December 1 and 10, 1999. However, the city did not notify each of the third parties whose property and privacy interests may be implicated until January 7, 2000.

Notwithstanding, the city's failure to comply with the notice requirements of section 552.305, Sirius Computer Solutions, Inc. ("Sirius") responded to the city's notice by submitting its arguments to this office in a timely manner. Sirius asserts that its proposal contains confidential and proprietary information which should be excepted from disclosure under section 552.110. However, the remaining companies have not submitted arguments for withholding or releasing the information as required under 552.305(d). Therefore, we have no basis to conclude that the remaining companies' proposals are excepted from disclosure by section 552.110. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party 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), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The proposal information for AMX International, Data Systems International, Plutus Enterprises, perotsystems and Deloitte and Touche must, therefore, be released to the requestor.

Sirius argues that the "Methodology Information," "Customer/Employee Information" and the "Third Party Project Information" (the "Proposal Information") in its October 8, 1999

proposal are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision, and (b) 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. Sirius has made arguments against disclosure under both branches of section 552.110.

First, we address whether the Proposal Information is excepted from disclosure under the trade secret branch of section 552.110. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (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). 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.² *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for

² The 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 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).

exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

We have reviewed Sirius' arguments and conclude that Sirius has made a prima facie showing that certain portions of the Proposal Information are trade secret information for purposes of section 552.110(a). We have marked the information that is excepted as a trade secret under section 552.110(a), and therefore, must be withheld from disclosure.

We next address whether any of the Proposal Information that is not excepted as trade secret is excepted from disclosure under the commercial or financial branch of section 552.110. The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999). We have reviewed Sirius' arguments and the remaining Proposal Information at issue. In our opinion, Sirius has not shown, based on specific factual evidence, that disclosure of the remaining Proposal Information would cause "substantial competitive harm" to Sirius. Accordingly, the remaining Proposal Information at issue may not be withheld under section 552.110(b). See Open Records Decision No. 309 (1982). The city must release the remaining Proposal Information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rose -Michel Munguia
Assistant Attorney General
Open Records Division

RMM/jc

Ref: ID# 132360

Encl. Submitted documents

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