



November 29, 2000

Mr. Jeffrey L. Schrader
Assistant Criminal District Attorney
Bexar County Justice Center
300 Dolores, Fifth Floor
San Antonio, Texas 78205-3030

OR2000-4555

Dear Mr. Schrader:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID #141177.

Bexar County (the "county") received a request for the winning proposal submitted in response to request for proposal RFP # 2000-35. This request for proposal was issued for the purchase of case management software for the county district attorney's office. The county submitted the responsive information to this office for review but did not assert any exception to disclosure to the responsive proposal. The county suggests that the property and privacy rights of a third party, Graphical Computer Solutions ("GCS"), may be implicated by the release of the requested information. The county states that it notified GCS of the request for information, as required by section 552.305 of the Government Code. This section permits an interested third party to submit to the attorney general reasons why the requested information should not be released. *See* 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 Act in certain circumstances).

GCS provided comment to this office claiming that pages 10 to 23 (Response to RFP), pages 25 to 27 (Statement of Work), and pages 29 and 30 (Best and Final Offer letter of May 16, 2000) of its proposal are excepted from disclosure under section 552.110 of the Government Code.

The information at issue here is a proposal submitted for award of a contract for a county purchase that will require an expenditure exceeding \$25,000. With exceptions that do not apply here, such proposals are subject to chapter 262, subchapter C of the Local Government Code, the "County Purchasing Act." *See* Loc. Gov't Code § 262.021 *et seq.* This act

specifies three separate purchasing procedures which counties may implement, where applicable, at their discretion. *See* Loc. Gov't Code §§ 262.026, .0295, .030. The county has not provided sufficient information to this office for us to determine which of these statutory procedures the county used to purchase the case management software for the district attorney's office. Therefore, we will discuss each procedure and explain what information must be released under each provision. The county must release information in accordance with the purchasing procedure that it utilized for the purchase at issue.

Section 262.026 of the Local Government Code requires that all "bids" for purchases by a county shall be opened at the same time, and that "[o]pened bids shall be kept on file and available for inspection by anyone desiring to see them." Loc. Gov't Code § 262.026.

Section 262.0295 provides an "Alternative Multistep Competitive Proposal Procedure" for purchases by counties with populations of 125,000 or more, where the commissioners court determines that it is impractical to prepare detailed specifications for the required purchase. Loc. Gov't Code § 262.0295. Under this purchasing procedure, "all proposals and bids that have been submitted shall be available and open for public inspection after the contract is awarded." Loc. Gov't Code § 262.0295(d).

As a general rule, exceptions to required public disclosure provided in the Public Information Act are inapplicable to information that statutes other than the Act expressly make public. Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989), 451 (1986); *cf. Houston Chronicle Publ'g Co. v. Woods*, 949 S.W. 2d 492 (Tex. App.—Beaumont 1997, orig. proceeding). Here, as the contract for purchase has been awarded we assume that the county has opened all items submitted to it in response to the request for proposal. Therefore, if the county awarded the contract under section 262.026, then GCS's bid is public and must be made available for inspection. Loc. Gov't Code § 262.026. If the county awarded the contract under section 262.0295, then the county must release GCS's proposal and bid. Loc. Gov't Code § 262.0295. Thus, GCS's bid is made public by statute and the county may not withhold it under section 552.110. Likewise, section 552.110 does not except GCS's proposal that is required to be released under section 552.0295. However, section 552.110 may protect a proposal submitted to the county in compliance with section 262.026 because section 262.026 does not require disclosure of a proposal.

Furthermore, section 552.110 of the Government Code may protect information in a proposal that was submitted to the county in compliance with section 262.030 of the Local Government Code. This section provides an "Alternative Competitive Proposal Procedure for Insurance, High Technology Items, and Special Services," for specified purchases, including the purchase of high technology items. Gov't Code § 262.030(a). All proposals

that have been submitted under this section “shall be available and open for public inspection after the contract is awarded, *except for trade secrets and confidential information contained in the proposals and identified as such.*” Loc. Gov’t Code § 262.030(c) (emphasis added).

Thus, section 262.030 provides the opportunity for a submitting company to assert protection for information in a proposal submitted under section 552.110. We note that the mere designation of information as confidential or as a trade secret in a proposal submitted under section 262.030 does not in itself establish that the information may be withheld. *See* Open Records Decision No. 565 (1990) (information held by governmental body is public unless excepted from disclosure by one or more of Public Information Act’s specific exceptions). An exception must therefore be established before the information may be withheld.

We now address the argument GCS asserts under section 552.110 of the Government Code, for proposals submitted under sections 262.026 or 262.030. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Section 552.110(a) excepts trade secrets from disclosure. 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ 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 exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Section 552.110(b) excepts 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 is excepted from the requirements of Section 552.021. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Based on the arguments of GCS, and our review of the submitted information, we conclude that GCS has establish a *prima facie* case that pages 10 to 23 (Response to RFP), as well as pages 25 to 27 (Statement of Work), must be withheld as trade secret information under section 552.110(a) of the Government Code. However, pages 29 and 30 (Best and Final Offer letter of May 16, 2000) consist of pricing information that may not be withheld under either prong of section 552.110 of the Government Code once a contract has been awarded. *See* Open Records Decision No. 319 (1982) (stating that pricing proposals are entitled to protection only during bid submission process); Freedom of Information Act Guide & Privacy Act Overview 136-138, 140-141, 151-152 (1995) (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors).

In conclusion, if the county conducted its purchase of case management software for the county district attorney's office in compliance with sections 262.026 or 262.030 of the Local Government Code, then the county must withhold pages 10 to 23 (Response to RFP), as well as pages 25 to 27 (Statement of Work) in GCS'S proposal submitted in response to RFP# 2000-35 as confidential trade secrets under section 552.110 of the Government Code.

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 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).

All other responsive information must be released because it is not excepted under section 552.110. Otherwise, the county must release information in accordance with the purchasing procedure it utilized in awarding the contract for RFP# 2000-35.

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).

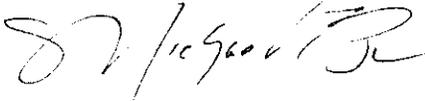
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 141177

Encl: Submitted documents

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