

CAUSE NO. GN303459

GETRONICSWANG CO., L.L.C.,
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 200th JUDICIAL DISTRICT

FILED
05 MAY 23 AM 8:41
District Clerk
Travis County, Texas

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. By their motion, Plaintiff Getronics Wang Co., L.L.C. (Getronics) and Defendant Greg Abbott, Attorney General of Texas, announce to the Court that all matters of fact and things in controversy between them have been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Stan Bilski, was sent reasonable notice of this setting and of the parties' agreement that some of the information at issue must be withheld by the City of Houston; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Getronics' customer names (in Bates Nos. 000001-2) and partnership information (in Bates Nos. 000002-3) in its proposal to the City of Houston, as marked by the Attorney General, Attachment E to the contract (Bates No. 000027), and Getronics' Presentation (Bates Nos. 000040-42 only), are a trade secret and, therefore, are excepted from disclosure by Tex. Gov't Code §

552.110(a).

2. The City of Houston must withhold from the requestor the information described in Paragraph 1 of this Judgment.

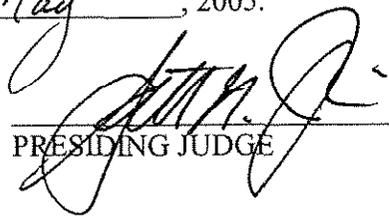
3. Getronics does not contest the disclosure of the remaining information at issue in this lawsuit. The City of Houston must release to the requestor all information pertaining to Getronics that is responsive to the request for information and that was not held excepted from disclosure in Letter Ruling 2003-5805 or by this Judgment.

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

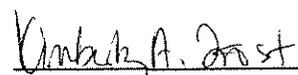
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 23rd day of May, 2005.



PRESIDING JUDGE

APPROVED:



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August 19, 2003

Ms. Michele Austin
Assistant City Attorney
City of Houston - Legal Department
P. O. Box 1562
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OR2003-5805

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186137.

The City of Houston (the "city") received a request for information relating to GetronicsWang Co. LLC's ("Getronics") original proposal to the city, including all attachments and exhibits, the complete contract between the city and Getronics, and the Letter of Credit and any attachments or exhibits submitted by or on behalf of Getronics. Although the city does not take a position with regard to the release of the requested information, you claim the requested information may be excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Pursuant to section 552.305(d) of the Government Code, the city notified Getronics, the interested third party whose information is at issue, of the city's receipt of the request and of Getronics's right to submit arguments to this office as to why information relating to Getronics should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). We have considered arguments presented by Getronics and have reviewed the submitted information. We have also considered comments submitted by InterNetwork Experts, Inc. ("INX"). *See* Gov't Code § 552.304 (permitting interested third party to submit comments explaining why information should or should not be released).

Initially, we note that the requested information has been designated as "Confidential and Proprietary Information." However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General

Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov’t Code § 552.022(a)(3). The submitted information contains a contract relating to the expenditure of funds by a governmental body. Thus, pursuant to section 552.022(a)(3), the city may only withhold the submitted contract if it is confidential under other law. Section 552.110 of the Government Code is considered “other law” under which information is made confidential for the purpose of section 552.022. Therefore, because Getronics raises section 552.110 with respect to portions of the submitted information, we will consider Getronics’s arguments under that exception.

Section 552.110 of the Government Code 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov’t Code § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for

the production of an article. It may, however, 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 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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).

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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

After reviewing the submitted arguments, we agree that some of the information Getronics has highlighted consists of trade secret information. Getronics has established a *prima facie* case for the exemption of trade secret information, and this office received no arguments that rebut the claims of Getronics as a matter of law. *See* Open Records Decision Nos. 552 (1990); 437 (1986); 306 (1982); 255 (1980) (customer lists may be withheld under predecessor to section 552.110). However, we conclude that Getronics has not demonstrated that the remainder of the information it seeks to withhold qualifies as a trade secret for purposes of section 552.110(a) of the Government Code. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We note that federal cases applying the analogous Freedom of Information Act exemption to prices in awarded government contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152. Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contracts with governmental body expressly made public); *see also* Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

Likewise, we find that Getronics has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of its information would likely result in substantial competitive harm to them. *See also* Open Records Decision No. 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 was entirely too speculative). Therefore, the city must withhold only the information we have marked under section 552.110 of the Government Code. The remainder of the information Getronics seeks to withhold may not be withheld under section 552.110.

We now turn to INX's arguments for the document entitled "City of Houston Migration Plan," labeled as Attachment D to Exhibit A to the submitted contract. INX argues this document is excepted from disclosure under section 552.110 of the Government Code. After reviewing INX's arguments and the Migration Plan, we agree that this document constitutes a trade secret and conclude the city may withhold this document under section 552.110(a) of the Government Code. We have marked this document accordingly.

Finally, we note that the submitted information contains e-mail addresses of members of the public that may be excepted from disclosure. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Section 552.137 does not apply to a business's general e-mail address or web address. Accordingly, unless consent to release has been granted, the city must withhold the types of individuals e-mail addresses we have marked under section 552.137 of the Government Code.

To summarize, the city must withhold the information we have marked under sections 552.110 and 552.137. The city must release the remaining submitted information.

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 186137

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