



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2003

Mr. Ken Johnson
Assistant City Attorney
City of Waco
P.O. Box 2570
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OR2003-8013

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190613.

The City of Waco (the "city") received a request for bid proposals received from specified vendors to provide collection services. You assert that the requested information is subject to section 552.305 of the Government Code. You state, and provide documentation showing, that you notified OSI Government Services ("OSI"), Municipal Services Bureau ("MSB"), Progressive Financial Services ("Progressive"), Professional Collection Solutions ("PCS"), GC Services Limited Partnership ("GC Services"), AllianceOne, American Municipal Services Corp. ("AMSC"), Consolidated Recovery Systems ("CRS"), and State Metropolitan & County Services ("SMSC") of the request and of their right to submit arguments to this office as to why the information should not be released.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to

¹Section 552.305 provides in relevant part that in giving notice to a private party whose proprietary interests may be implicated by a request for information, the governmental body must include:

(B) a statement, *in the form prescribed by the attorney general*, that the person is entitled to submit in writing to the attorney general within a reasonable time not later than the 10th business day after the date the person receives the notice:

- (i) each reason the person has as to why the information should be withheld; and
- (ii) a letter, memorandum, or brief in support of that reason.

Gov't Code § 552.305(d)(2)(B) (emphasis added). In the future, the city should use the attorney general's prescribed form, which is available at Appendix C of this office's Public Information Handbook and on the Attorney General's website at www.oag.state.tx.us.

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 in certain circumstances). We have reviewed the submitted information.

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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, OSI, Progressive, PCS, and CRS have not submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. AllianceOne and AMSC submitted comments but failed to assert any specific exceptions to disclosure regarding their information. Therefore, OSI, Progressive, PCS, CRS, AllianceOne, and AMSC have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 551.110(b) (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); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

MSB, GC Services, and SMSC have submitted comments to this office contending that portions of the submitted information are excepted from disclosure. First, GC Services raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that other law makes confidential. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). However, GC Services has not directed our attention to any law, nor are we aware of any law, under which any of the information that GC Services seeks to have withheld is confidential for purposes of section 552.101. Thus, we find GC Services has not demonstrated that section 552.101 applies to any portion of the submitted information.

Next, GC Services and SMSC argue that their proposals should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104, however, is a discretionary exception intended to protect only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the city does not raise section 552.104, this section does not apply to the requested information. *See* Open Records Decision No. 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Therefore, the city may not withhold the proposals of GC Services and SMSC pursuant to section 552.104.

Finally, GC Services and MSB assert section 552.110 of the Government Code.² This section 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;

² MSB submitted their own information, which differs slightly from the proposal submitted by the city. As the city did not submit these materials to this office, this ruling does not address the public nature of such materials. Rather, this ruling only addresses the info submitted by the city.

- (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).

Upon review of the submitted comments, we find that GC Services has not provided this office with any arguments explaining how its information would qualify as a trade secret for purposes of section 552.110(a) or how release of its information would result in substantial competitive injury. Therefore, we are unable to determine that section 552.110 applies to the proposal of GC Services. Accordingly, the city may not withhold any portion of the proposal submitted by GC Services pursuant to section 552.110 of the Government Code.

We find that MSB has established the applicability of section 552.110(a) with regards to the company’s list of current customers, including references involving such customers, and not past customers, whom MSB states are no longer their clients. We further conclude that MSB has established the applicability of section 552.110(a) to certain other aspects of its proposal, and we have marked the proposal accordingly. However, we do not find that MSB has established the applicability of section 552.110(b) to any portion of its proposal. Therefore, the city may not withhold the remaining portions of the MSB proposal under section 552.110.

MSB also asserts that portions of its proposal are personal financial information and therefore excepted from disclosure under section 552.101 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Upon review of the MSB proposal, we find that any financial information concerns a company rather than an individual and is therefore not protected by common-law privacy. *See generally* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (corporation has no right to privacy). Therefore, none of MSB's financial information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

MSB also asserts that a portion of its proposal is excepted from disclosure under section 552.139 of the Government Code.³ Section 552.139 provides in pertinent part:

- (a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

Section 552.139, however, is intended to protect only the interests of a governmental body in its computer network information. As the city does not raise section 552.139 and the information does not involve the city's computer network information, this section does not apply to the requested information. Therefore, the city may not withhold any portion of the MSB proposal under section 552.139.

We also note that several of the submitted proposals contain information that is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

³Although MSB raises section 552.136 of the Government Code concerning information related to security issues for computers, the 78th Legislature recently renumbered that provision as section 552.139. *See* Act of May 21, 2003, 78th Leg., R.S., ch. 1275, § 2(76), 2003 Tex. Sess. Law Serv. 4144 (to be codified at Gov't Code § 552.139).

In summary, we conclude that the city must withhold the marked information in the MSB proposal under section 552.110. All remaining submitted information must be released in compliance with copyright law.

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,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 190613

Enc. Submitted documents

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