



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 8, 2004

Ms. Zandra L. Narvaez  
Legal Services Division  
City Public Service of San Antonio  
P.O. Box 1771  
San Antonio, Texas 78296-1771

OR2004-0170

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 193993.

The City Public Service of San Antonio ("CPS") received a request for information concerning the pricing of CableCURE products or services by UTILX or Wire DynamiX, a division of UTILX, (collectively, "UTILX") from 1996 to the present. You claim that release of the requested information may implicate the proprietary interests of UTILX under section 552.110 of the Government Code, although you take no position as to whether the information is so excepted. UTILX has submitted arguments as to why portions of the requested information should not be released. *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 act in certain circumstances). The requestor has also submitted written comments stating why the information at issue should be released. *See* Gov't Code § 552.304.<sup>1</sup> We have considered all arguments and reviewed the submitted information.

Initially, we note that the submitted documents include information that is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022(a)(3) provides that information in an account, voucher, or contract relating to the receipt or

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<sup>1</sup> UTILX submitted a second brief in which it challenged the requestor's legal arguments.

expenditure of public or other funds by a governmental body is not excepted from required disclosure unless it is made expressly confidential under other law. The submitted information includes purchase requisitions and executed contracts relating to the receipt or expenditure of public funds, as contemplated by section 552.022(a)(3), and these documents are therefore public information that must be released unless they are confidential under other law. As UTILX raises section 552.110 of the Government Code, which is considered “other law” for the purposes of section 552.022, we will address this exception.

UTILX claims that the pricing and scope of work terms contained in Attachments A and B of the contracts between UTILX and CPS, as well as any documents containing the same or similar information, including the total dollar value of the contract, are excepted from disclosure under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “[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(a).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds that 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. 1958); Open Records Decision Nos. 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 No. 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. *See* 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects certain commercial or financial information. 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. *See* Gov't Code § 552.110(b); *see also* *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

UTILX argues that portions of its information are excepted under section 552.110(a) and (b). Upon review of the comments and information submitted, we determine that UTILX has demonstrated that information in the documents pertaining to scope of work, which we have marked, is excepted from disclosure under section 552.110(b). However, we find that UTILX has not adequately demonstrated that the remainder of the information at issue, which relates to pricing, is excepted from disclosure under section 552.110. UTILX indicates, and the submitted documents reflect, that the pricing terms differ for each UTILX contract. UTILX has not demonstrated how the release of pricing terms for past or current contracts would cause it to suffer substantial competitive harm. The pricing information is therefore not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market

studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see also* Open Records Decision Nos. 661 (1999), 541 at 8 (1990) (general terms of contract with governmental body are usually not excepted from disclosure), 509 at 5 (1988) (stating that 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); *see generally* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 184 (1978); *cf.* 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). Moreover, UTILX has not established that any of the remaining information meets the definition of a trade secret for the purposes of section 552.110(a). We note that pricing information is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp.*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Therefore, the remaining information must be released.

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,



Steven W. Bartels  
Assistant Attorney General  
Open Records Division

SWB/seg

Ref: ID# 193993

Enc. Submitted documents

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