



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 11, 2004

Ms. Hadassah Schloss  
Open Records Coordinator  
Texas Building and Procurement Commission  
P.O. Box 13047  
Austin, Texas 78711

OR2004-1867

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197594.

The Council on Competitive Government (the "council") received a request for responses to a specified Request for Proposals regarding mobile police audio and video equipment services for the council. You claim that release of the requested information may implicate the proprietary interests of third parties under section 552.110 of the Government Code, although you take no position as to whether the information is so excepted. You state that you notified Kustom Signals, Inc. ("Kustom Signals"); International Police Technologies, Inc. ("IPT"); Prosecutor of Texas, L.L.C. ("Prosecutor of Texas"); Skaggs Companies, Inc. ("Skaggs"); Mobile Vision, Inc. ("Mobile Vision"); IBM; Alpha Controls, Inc. ("Alpha Controls"); Video Systems Plus, Inc. ("VSP"); McDonald Technologies International, Inc. ("MTI"); and McCoy's Law Line, Inc. ("McCoy's") of the request and of their right to submit arguments to this office as to why the 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 Public Information Act (the "Act") in certain circumstances). We have reviewed the submitted information.

We note that 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, IPT, Prosecutor of Texas, Mobile Vision, IBM, Alpha Controls, VSP, MTI, and McCoy's have not submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, these companies have provided us with no basis to conclude that they have protected proprietary interests 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). Thus, the council may not withhold the submitted information relating to these companies under section 552.110.

Kustom Signals and Skaggs have submitted comments to this office contending that portions of the submitted information are excepted from disclosure. First, Skaggs 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, Skaggs has not directed our attention to any law, nor are we aware of any law, under which any of the information that Skaggs seeks to have withheld is confidential for purposes of section 552.101. Thus, we find Skaggs has not demonstrated that section 552.101 applies to any portion of the submitted information.

Kustom Signals asserts that the employee information included in its proposal is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "[i]nformation in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" This exception is applicable only to information contained in the personnel file of an employee of a governmental body. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). As the Kustom Signals personnel information does not relate to governmental employees, section 552.102 is inapplicable to this information, and it may not be withheld on that basis.

Kustom Signals also seeks to withhold information under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects the interests of governmental bodies, not the proprietary interests of a private party such as Kustom Signals that has submitted information to a governmental body. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to

government). Furthermore, section 552.104 is a discretionary exception to disclosure that a governmental body may waive. *See id.* (governmental body may waive section 552.104). In this instance, the council has not raised section 552.104. Therefore, none of the submitted information may be withheld from disclosure under section 552.104.

Finally, Kustom Signals and Skaggs claim that portions of their proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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. 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. 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); Open Records Decision No. 661 (1999).

Upon review of the submitted comments, we find that Skaggs 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 Skaggs proposal. Accordingly, the council may not withhold any portion of the Skaggs proposal under section 552.110.

Upon review of the arguments submitted by Kustom Signals and its submitted proposal, we find that Kustom Signals has made a *prima facie* case that portions of its proposal are protected as trade secrets. Moreover, we have received no arguments that would rebut this case as a matter of law. We therefore conclude that the council must withhold the information we have marked in the Kustom Signals proposal pursuant to section 552.110(a) of the Government Code. We also find that the company has made a specific factual or evidentiary showing that the release of certain portions of its proposal would cause the company substantial competitive harm. This information, which we have marked, must be

withheld pursuant to section 552.110(b). With respect to the remaining information Kustom Signals seeks to withhold, however, we determine that the company has not demonstrated that this information meets the definition of a trade secret, nor has the company made a *prima facie* case to establish a trade secret claim for this information. We further find that Kustom Signals has only provided conclusory statements that release of the remaining portions of its proposal that it seeks to withhold under section 552.110 would harm its competitive interests, and has not provided specific factual evidence to substantiate the claim that release of this information would result in competitive harm to the company. Accordingly, we determine that none of this information is excepted from disclosure under section 552.110(b) of the Government Code. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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 is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

We note that some of the information in the IPT, Skaggs, Mobile Vision, Alpha Controls, VSP, MTL, and McCoy's proposals is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. 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 materials protected by copyright, 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).

In summary, the information we have marked in the Kustom Signals proposal must be withheld under section 552.110. The copyrighted information in the IPT, Skaggs, Mobile Vision, Alpha Controls, VSP, MTL, and McCoy's proposals must be released in accordance with copyright law. Any 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,



Amy D. Peterson  
Assistant Attorney General  
Open Records Division

ADP/sdk

Ref: ID# 197594

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