



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 2, 2004

Ms. Rebecca Brewer
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McKinney, Texas 75070-1210

OR2004-2651

Dear Ms. Brewer:

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# 198717.

The City of Frisco (the "city"), which you represent, received a request for "all proposals that were submitted to [the city]'s Utility Rate Design Study No. 0309-091 [excluding the proposal of] Reed, Stowe & Yanke." You claim that release of the requested information may implicate the proprietary interests of third parties, although the city takes no position as to whether the information is excepted from disclosure. You state, and provide documentation showing, that you notified seven interested third parties of the request and of the right of each party 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 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). We have reviewed the submitted information.

We begin by noting that some of the submitted documents are not responsive to the instant request for information. The city has submitted the proposal of Reed, Stowe & Yanke,

¹The third parties that you indicate were notified pursuant to section 552.305 are the following: Black & Veatch Corp. ("B&V"); C. H. Guernsey & Co. ("Guernsey"); Economists.com, L.L.C. ("Economists"); GDS Associates, Inc. ("GDS"); Malcolm Pirmie, Inc. ("Malcolm Pirmie"); Maximus, Inc. ("Maximus"); and Raftelis Financial Consulting ("RFC").

which the requestor has specifically excluded from his request. Thus, such information is not responsive to the present request and this ruling will not address that information.

We next 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, Economists and Maximus have not submitted any comments to this office explaining how release of the requested information would affect its proprietary interests. Therefore, these companies have provided us with no basis to conclude they have a protected proprietary interest in any of the information at issue. *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). We determine that the portions of the submitted information relating to Economists and Maximus may not be withheld under section 552.110.

Third parties B&V, Malcolm Pirmie, and RFC have submitted comments to this office contending that portions of the information at issue are excepted from disclosure. You have forwarded to this office a letter from Guernsey requesting that its information not be released. We will treat that letter as a response under section 552.305 of the Government Code. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990). This office received correspondence from GDS stating that the company does not object to the release of its information.

Malcolm Pirmie and Guernsey each state that it submitted its proposal to the city with a statement indicating that such information was to remain confidential. However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987, 444 at 6 (1986)). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld. As Guernsey raises no exceptions to disclosure of its information, the city must release it.

Malcolm Pirmie first argues that release of the information submitted in the bidding process should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104 is a discretionary exception that protects 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 section 552.104). Therefore, the city may not withhold any of the information at issue under section 552.104.

B&V asserts that its information is proprietary and is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” However, B&V has not directed our attention to any other law, nor are we aware of any law, under which the information in question is considered to be confidential. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, we will address this claim under section 552.110 below.

B&V, Malcolm Pirnie, and RFC argue that all or portions of their information are excepted under section 552.110 of the Government Code. Section 552.110 of the Government Code 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) “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.” *See* Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (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) 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having considered the submitted arguments, we find that Malcolm Pirnie has neither shown that any of the information at issue meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim. Thus, we are unable to conclude that section 552.110(a) applies to its information. *See* Open Records Decision No. 402 (1983). In addition, we find that both B&V and Malcolm Pirnie have made only conclusory allegations that release of the submitted information would cause either company substantial competitive injury and have provided no specific factual or evidentiary showing to support this allegation. Accordingly, no portion of the submitted information pertaining to B&V or Malcolm Pirnie may be withheld pursuant to section 552.110(b). *See* Open Records Decision No. 661 at 5-6.

Based upon our review of the arguments submitted by RFC and the information at issue, we conclude that the city must withhold portions of the information related to RFC under section 552.110(b). We have marked the information accordingly. We otherwise find that RFC has not established that release of any of its remaining information would cause RFC substantial

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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).

competitive injury as required by section 552.110(b). *See* Open Records Decision Nos. 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), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Lastly, we note that some of the submitted information that is not excepted from disclosure is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must comply with the copyright law, however, and is not required to furnish copies of records that are copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she 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 at 8-9 (1990).

In summary, the city must withhold the marked information that is excepted from disclosure under section 552.110 of the Government Code. The city must release the rest of the submitted information, complying with copyright law in doing so.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 198717
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