



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2004

Ms. Ruth Reyes
Assistant City Attorney
Office of the City Attorney
2 Civic Center Plaza-9th Floor
El Paso, Texas 79901

OR2004-2941

Dear Ms. Reyes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199218.

The City of El Paso (the "city") received a request for all bids submitted in response to a particular Request For Proposals. You state that you have released some of the information. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also indicate that release of the requested information would implicate the proprietary interests of certain third parties: namely Alltel, AT&T Wireless ("AT&T"), Verizon Wireless ("Verizon"), Nextel Communications ("Nextel"), and Sprint. We have considered the submitted arguments and reviewed the representative sample of records.¹

Initially, we note that the city failed to fully comply with section 552.301 of the Government Code. Specifically, you did not submit written comments explaining the applicability of your claimed exceptions to disclosure as required by section 552.301(e) of the Government Code. *See Gov't Code § 552.301(e)* (indicating types of information a governmental body must submit to the Office of the Attorney General when seeking an open records decision).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.104 of the Government Code is a discretionary exception that is waived by a governmental body's failure to comply with the procedural requirements of the Public Information Act (the "Act"). *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to Gov't Code § 552.104 designed to protect interests of a governmental body in a competitive situation and may be waived by the governmental body), 522 (1989) (discretionary exceptions in general). Therefore, you may not withhold the requested information from disclosure under section 552.104 of the Government Code. Since section 552.101 of the Government Code is a mandatory exception, a governmental body does not waive its protections by failing to comply with the procedural requirements of the Act. In this instance, however, you do not cite us to a law, nor are we aware of one, that makes the requested information confidential. Therefore, section 552.101 of the Government Code is not applicable to the requested information. However, you contend that the requested information affects third party interests. Therefore, we will consider whether section 552.110 applies to the requested information.

Pursuant to section 552.305 of the Government Code, you state and provide documentation showing that you notified Alltel, AT&T, Verizon, Nextel, and Sprint of the request for information and of their opportunity to submit arguments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances).

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, Alltel, AT&T, Verizon, and Sprint have not submitted any comments to this office explaining how release of their proposals would implicate their proprietary interests. Therefore, these companies have provided us with no basis to conclude that they have protected proprietary interests in their proposals. *See* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990), 542 at 3 (1990). Therefore, Alltel's, AT&T's, Verizon's, and Sprint's proposals must be released.

Nextel, however, responded to your notice by claiming that portions of its proposal and supplemental proposal are excepted under section 552.110 of the Government Code. Nextel has identified four categories of information it wishes to except from disclosure: maps and information describing cellular service coverage areas, descriptions of its billing system, the project implementation strategy, and maps of transmitter locations. We note that the city did not submit the supplemental proposal to this office for review. Therefore, this ruling only addresses the information Nextel seeks to withhold in the proposal.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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 single or ephemeral events 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (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).

establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Nextel contends that release of certain portions of its proposal would violate its trade secrets. After reviewing the arguments and the information, we conclude that Nextel has not established a *prima facie* case that the information it seeks to withhold is a trade secret. See Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, section 552.110(a) of the Government Code is not applicable to this information.

Next, section 552.110(b), which protects certain financial or commercial information, 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 also 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).

Nextel states that disclosure of the coverage maps would cause substantial competitive harm to Nextel because “disclosure would give Nextel’s competitors, including the Requestor, information about areas in which Nextel’s coverage was relatively weak or non-existent.” Further, “Nextel’s competitors could use information about Nextel’s coverage weaknesses to target and exploit those deficiencies in marketing strategies and materials.” Thus, we find that the coverage maps are commercial or financial information as contemplated by section 552.110(b) of the Government Code. We have marked the information that must be withheld from disclosure.

However, after reviewing the remaining information that Nextel claims is subject to section 552.110(b), we find that Nextel has not provided a specific factual or evidentiary showing that release of this information would likely cause the company to suffer substantial competitive injury. Therefore, the remaining information may not be withheld from disclosure under section 552.110(b) of the Government Code.

In summary, you must withhold the marked portion of Nextel’s proposal under section 552.110(b). The remaining information must be released to the requestor.

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).

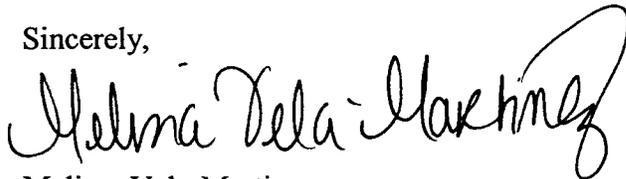
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 199218

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