



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2004

Mr. Frank L. Melton
Assistant City Attorney
City of San Antonio
9800 Airport Boulevard, MO63
San Antonio, Texas 78216-4897

OR2004-3809

Dear Mr. Melton:

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# 201194.

The City of San Antonio (the "city") received two requests from the same requestor for the winning proposal in reference to a specified request for proposals. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code, but have presented no arguments explaining how these exceptions apply. However, you indicate that you have notified Rannoch Corporation ("Rannoch"), the third party whose information is at issue in the current request, pursuant to 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); 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 in Act in certain circumstances). Rannoch has responded to the notice, asserting that portions of its information are excepted by sections 552.101, 552.104, and 552.110 of the Government Code. We have considered Rannoch's arguments and reviewed the information you submitted.

Initially, we note that the city has not complied with the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You state that the city

received the original request for information on October 7, 2003. The city did not request a decision from this office until March 4, 2004. Consequently, the city failed to request a decision within the ten-business-day period mandated by section 552.301(b) of the Government Code.

Additionally, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not submit any of the information required by section 552.301(e) within fifteen business days of receiving the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public under section 552.302 must be released, unless a governmental body demonstrates a compelling reason to withhold the information that overcomes this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information confidential or when third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). As Rannoch has claimed that confidentiality and third-party interests are at stake here, we will consider Rannoch's arguments.

We note that Rannoch argues that the information at issue contains information that is subject to confidentiality agreements Rannoch has with other entities and is therefore confidential under the Act. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't § Code 552.101. Thus, section 552.101 protects information that is deemed to be confidential under other law. See Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Neither the city nor Rannoch has asserted any law, and this office is not aware of any law, under which any of the information that Rannoch has submitted to the city is deemed to be confidential. Therefore, none of Rannoch's information may be withheld from disclosure under section 552.101 of the Government Code.

Rannoch claims that its information is excepted from disclosure pursuant to section 552.104 of the Government Code. We note, however, that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. See Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). We note that the city has not argued that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Accordingly, we conclude that the city may not withhold any portion of Rannoch's information under section 552.104 of the Government Code.

We now turn to Rannoch's arguments under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties 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. See Gov't Code § 552.110(a)-(b). Under section 757 of the Restatement of Torts, 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

The following six factors are relevant to the determination of whether information qualifies as a trade secret under section 757 of the Restatement of Torts:

- (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 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 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).

Section 552.110(b) of the Government Code exempts from disclosure "[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). 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) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial

competitive harm); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Rannoch asserts that certain portions of its proposal are protected under both prongs of section 552.110. Having carefully considered Rannoch's arguments, we conclude that it has established a *prima facie* case for trade secret under section 552.110(a) for the information we have marked. We have received no arguments that rebut Rannoch's trade secret claims as a matter of law. Otherwise, we conclude that Rannoch has failed to demonstrate that any remaining information qualifies as a trade secret under section 552.110(a) or that any of the remaining submitted information would cause Rannoch substantial competitive harm for purposes of 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) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if 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").

Finally, we note that some of the information submitted by the city 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 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).

In summary, the city must withhold the information we have marked in Rannoch's proposal under section 552.110. The city must release the remaining information in Rannoch's proposal to the requestor in accordance with federal copyright law, to the extent that the remaining information is protected by copyright.

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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 201194

Enc: Submitted documents

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