



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2004

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

OR2004-10166

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# 213830.

The City of El Paso (the "city"), which you represent, received two requests from the same requestor for information relating to Request for Proposals #2004-193R. You indicate that some of the requested information has been released. You assert that some of the submitted information may be excepted from disclosure under sections 552.101 and 552.104 of the Government Code but make no arguments regarding these exceptions. Instead, pursuant to section 552.305 of the Government Code, you have notified interested third parties Block Vision ("Block"); ING/Employee Benefits ("ING"); Safeguard Health Plans ("Safeguard"); United Concordia Companies, Inc. ("United"); and Unum Provident ("Unum") of the requests and of their opportunity to submit comments 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received comments from Block, Safeguard, and United. We have considered all submitted arguments and reviewed the submitted information.

Initially, we note that the city failed to fully comply with the requirements of section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Public Information Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

With respect to the second request for information, you did not request a decision from this office within the ten business day deadline under section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See* Gov't Code § 552.302; *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). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). We therefore will consider whether any of the submitted information must be withheld to protect third party interests.

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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, ING and Unum have not submitted to this office any reasons explaining why their information should not be released. We thus have no basis for concluding that any portion of the submitted information relating to ING or Unum constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g.*, Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We turn now to the arguments of the third parties who submitted correspondence to this office. Block argues that it submitted its bid "with the expectation that the information included in the Bid package would remain confidential and would not be subject to public

disclosure.” We note that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540S.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. *See Attorney General Opinion JM-672* (1987); *see also 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 in Block’s bid package is encompassed by an exception to disclosure, it must be released to the requestor, notwithstanding any expectation or agreement to the contrary.

Block and Safeguard raise section 552.101 as an exception to disclosure, but they do not cite us to any law, nor are we aware of one, that makes the submitted information pertaining to Block and Safeguard confidential.¹ Accordingly, we do not further address the applicability of section 552.101 with respect to the information pertaining to Block and Safeguard.

In addition, Safeguard raises section 552.104 as exception to disclosure. However, section 552.104 is a discretionary exception that protects the interests of a governmental body and does not protect the interests of a third party. Because the city has not argued that section 552.104 protects any of the information at issue, none of it may be withheld pursuant to this exception.

Block, Safeguard, and United argue that portions of the submitted information are excepted under section 552.110 of the Government Code. 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. 1958); *see also Open Records Decision No. 552 at 2* (1990). Section 757 provides that a trade secret is the following:

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

¹ We note that Block and Safeguard argue that their information is protected as trade secrets under section 552.101. Because section 552.110 specifically deals with such information, we will consider their arguments in the context of that exception.

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.² *Id.* 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). However, we cannot conclude that section 552.110(a) applies 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) excepts 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." 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause

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

- (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).

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

Having reviewed the submitted briefs, we conclude that Block and United have each established that portions of their information are excepted under section 552.110. We have marked the information that the city must withhold. However, we conclude that Block and United have failed to make a *prima facie* case that the remainder of their information constitutes trade secrets. We also find that Safeguard has failed to establish that any of its information constitutes a trade secret. Furthermore, we find that Block, United, and Safeguard have made only conclusory allegations and have made no specific factual or evidentiary showing that release of any of their information would likely cause them substantial commercial harm. *See Open Records Decision Nos. 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). Accordingly, pursuant to section 552.110, the city must withhold only the information we have marked within the proposals of Block and United. The remaining information may not be withheld on this basis.

Finally, we note that some of the submitted information appears to be 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 under sections 552.110 of the Government Code. The remaining submitted information must be released in accordance with applicable copyright laws for any information 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 213830

Enc. Submitted documents

c: Ms. Anna Maynard
Maynard & Associates
6201 Escondido, Suite 15A
El Paso, Texas 79912
(w/o enclosures)

Barry Senterfitt
Akin Gump Strauss Hauer & Feld LLP
300 West 6th Street, Suite 2100
Austin, Texas 78701-2916
(w/o enclosures)

Ms. Lisa Spredemann
ING Employee Benefits
7720 North 16th Street, Suite 150
Phoenix, Arizona 85020
(w/o enclosures)

Ronald I. Brendzel
Senior Vice President and General Counsel
SafeGuard Health Plans, Inc.
95 Enterprise
Aliso Viejo, California 92656-2605
(w/o enclosures)

Karl F. Frantz
United Concordia
Law Department, 1A 408
P.O. Box 890089
Camp Hill, Pennsylvania 17089
(w/o enclosures)

Mr. Marc Hernandez
Unum Provident
701 Wyoming Avenue
El Paso, Texas 79902
(w/o enclosures)