



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2004

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

OR2004-10208

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# 213993.

The City of El Paso (the "city") received a request for "complete copies of the original pricing submitted by Stockton Telecom in response to Solicitation Number 2004-039" and "a complete copy of the contract between the City of El Paso and the winning bidder of Solicitation Number 2004-039." You inform us that you have released some of the requested information.¹ You assert that the remaining information may be excepted from disclosure under sections 552.101 and 552.104 of the Government Code but take no position and make no argument regarding these exceptions. In addition, pursuant to section 552.305 of the Government Code, you notified Stockton Telecom, Inc. ("Stockton") whose proprietary interests may be implicated by the request. *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). Stockton claims that portions of its information are excepted from disclosure by sections 552.104 and

¹We note that you have not submitted a copy of the requested contract for our review. *See* Gov't Code § 552.301(e)(1)(D). Therefore, to the extent responsive information exists, we assume that you have released it to the requestor. However, if the information exists and the city has not released such information to the requestor, the city must do so at this time. Gov't Code §§ 552.301, .302.

552.110. We have considered the claimed exceptions and reviewed the submitted information.²

Initially, we note that most of the submitted information is not responsive to the present request. The requestor specifically seeks “complete copies of the original pricing submitted by Stockton Telecom in response to Solicitation Number 2004-039.” You have submitted correspondence between Stockton and the city, Stockton’s product warranty information, Stockton’s product descriptions, Stockton’s corporate profile, and other information relating to Stockton’s proposal for our review, along with the requested pricing information. Accordingly, this ruling only addresses the availability to the requestor of the pricing information specifically referenced in the request. We determine that the remaining submitted information is not responsive to the present request and need not be released.

Stockton argues the applicability of 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.” The purpose of section 552.104 is to protect the interests of a governmental body, not third parties. *See* Open Records Decision No. 592 (1991). Because section 552.104 is designed to protect the interests of governmental bodies and not third parties, and the city has chosen not to make an argument under section 552.104 in this instance, none of the submitted information may be withheld on this basis.

We next turn to Stockton’s claims 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.), *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

²Stockton also argues against the disclosure of its financial information pertaining to ownership, assets, and liabilities; and its corporate profile, certificates, and references. The request, however, was limited to pricing information and the contract awarded. Accordingly, we do not address these arguments.

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).³

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." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Normally, an interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of requested information. *See* Open Records Decision No. 639 at 4 (1996) (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).

³The 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).

Stockton objects to the release of its pricing information and represents to this office that the release of this information will cause competitive harm. We note, however, that pricing information pertaining to a particular contract is generally not a trade secret because 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." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp.*, 314 S.W.2d at 776; *See Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982)*. Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See Gov't Code § 552.022(a)(3)* (contracts with governmental body expressly made public); *see also Open Records Decision No. 541 at 8 (1990)* (public has interest in knowing terms of contract with state agency); *see generally Freedom of Information Act Guide & Privacy Act Overview 213-221 (2000)* (disclosure of prices is cost of doing business with government); *cf. Open Records Decision No. 514 (1988)* (public has interest in knowing prices charged by government contractors).

In addition, after considering Stockton's arguments, we find that the company has not established that the information at issue is excepted under section 552.110 as either a trade secret or as commercial and financial information. Thus, the pricing information that we have marked 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,

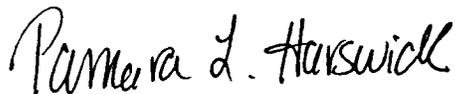
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 213993

Enc. Submitted documents

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