



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2005

Ms. Michele Austin
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2005-03651

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 222806.

The City of Houston (the "city") received a request for a copy of the most recent CD from Cingular, a copy of the RFP issued to wireless carriers to serve the city, copies of wireless carrier proposals to the city, and the total amount paid in 2004 or 2005 to ATI Telemanagement and Kendall Hyatt. You state that the city will release some of the requested information to the requestor. You claim that portions of the submitted information may be excepted from disclosure under sections 552.101, 552.103, 552.104, 552.110, 552.111, 552.113, 552.128, 552.131, 552.136, and 552.137 of the Government Code.¹ Although you state that the city will not raise any arguments on behalf of any third parties, you claim that the submitted information may contain proprietary information subject to exception under the Public Information Act (the "Act"). Pursuant to section 552.305(d) of the Government Code, the city notified the interested third parties, AT&T Wireless Services ("AT&T"), Sprint Business Solutions ("Sprint"), Nextel Communications ("Nextel"), Verizon Wireless ("Verizon"), and Cingular Wireless ("Cingular"), of the city's receipt of the instant request for information and of their right to submit arguments to us as to why any

¹Although you raise sections 552.101, 552.103, 552.111, 552.113, 552.128, 552.131, and 552.137 of the Government Code, you have submitted no arguments in support of withholding information under those sections. Thus, you cannot withhold information under those exceptions. See Gov't Code §§ 552.301, .302. We further note that none of the information is subject to section 552.101, 552.128, 552.131, or 552.137.

portion of their proposals should not be released. *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 the Act in certain circumstances). We have considered arguments received from the city, Nextel, and Verizon, and have reviewed the submitted information.

Initially, 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). Because AT&T, Sprint, and Cingular did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that their information is excepted from disclosure. *See* Open Records Decision Nos. 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). The proposals belonging to AT&T, Sprint, and Cingular may not be withheld on the basis of any proprietary interest.

The city asserts that the information submitted as Exhibits 8 and 9 is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You inform this office that if Exhibits 8 and 9 were released before a contract is approved by the city council, the city's "negotiating position would be compromised." Based on your representations and our review of the submitted documents, we conclude that Exhibits 8 and 9 may be withheld from disclosure at this time under section 552.104 of the Government Code. Verizon also argues that section 552.104 excepts its proposal from disclosure. However, section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the city only raises this exception for Exhibits 8 and 9 and not for any third party's proposal, this section is not applicable to Verizon's proposal. *Id.*

We now address the arguments of Nextel and Verizon. Section 552.110 of the Government Code 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 governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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

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).

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) protects "[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). This section 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).

After reviewing Nextel and Verizon's arguments and the information at issue, we conclude that Nextel has established a *prima facie* case that some of the information contained in its proposal is a trade secret. Because we have received no argument to rebut Nextel's claim as a matter of law, you must withhold the information we have marked under section 552.110(a). However, we find that Nextel has neither shown that any of its remaining information meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim for this information. Nor do we find that Verizon has shown that any of its information meets the definition of a trade secret. *See* Open Records Decision No. 552 at 5-6 (1990); *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"). Thus, we are unable to conclude that section 552.110(a) applies to any of the submitted information in Verizon's proposal or any of the remaining submitted information in Nextel's proposal. *See* Open Records Decision No. 402 (1983).

Both Nextel and Verizon argue that their proposals are protected under section 552.110(b) of the Government Code. Upon review, we conclude that both companies have demonstrated that the information we have marked is excepted from disclosure and must be withheld under section 552.110(b). However, we find that Nextel and Verizon have not established that release of the remaining submitted information would cause the companies substantial competitive injury and have not provided specific factual evidence to support this allegation. *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 is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

Some of the submitted information contains insurance policy numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a

credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The city must, therefore, withhold the insurance policy numbers that we have marked under section 552.136.

Lastly, we note that some of the materials at issue may 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 subsections 552.110(a) and 552.110(b) of the Government Code. The city must withhold the insurance policy number we have marked under section 552.136 of the Government Code. The city may withhold Exhibits 8 and 9 under section 552.104 of the Government Code. The remaining information must be released; however, in releasing information that is protected by copyright, the city must comply with federal copyright laws.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 222806

Enc. Submitted documents

c: Mr. David Wise
c/o Michele Austin
City of Houston Legal Department
P.O. Box 1562
Houston, Texas 77251-1562
(w/o enclosures)

Mr. James H. Benson
Counsel
Verizon Wireless
One Verizon Place
Alpharetta, Georgia 30004-8511
(w/o enclosures)

Mr. Scott D. Powers
Counsel to Nextel
Baker Botts, L.L.P.
98 San Jacinto, Suite 1500
Austin, Texas 78701-4287
(w/o enclosures)

Ms. Chris Medlenka
Key Account Executive
Cingular Wireless
1001 West Loop South, Suite 300
Houston, Texas 77027
(w/o enclosures)

Ms. Rena Lempar
Global Account Manager
AT&T Wireless Services
7277 164th Avenue NE, Building 1
Redmond, Washington 98052
(w/o enclosures)

Mr. Stuart Rosen
Account Manager, Public Sector
Sprint Business Solutions
3200 Southwest Freeway, Suite 900
Houston, Texas 77027
(w/o enclosures)