



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2005

Mr. Rob Atherton
City Attorney
City of Nacogdoches
P. O. Drawer 631248
Nacogdoches, Texas 75963-1248

OR2005-04507

Dear Mr. Atherton:

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# 224742.

The City of Nacogdoches (the "city") received a request for "[i]nformation submitted by Kingham Construction in response to the architect's request after the bid on the Durst Taylor Renovation project." You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. You further assert that the requested information may be excepted from disclosure under section 552.110 of the Government Code, although you make no arguments regarding this exception. Instead, you have notified Kingham Construction ("Kingham") of the request and of its 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). In correspondence with this office, Kingham contends that portions of the information it submitted to the city are excepted from disclosure under section 552.110 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body, usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information

from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Section 552.104 does not except bids from public disclosure after bidding is completed and a contract has been entered into. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

The city informs us that Kingham and Cox Concrete Contractors, Inc. (“Cox”) frequently compete against one another for city contracts, and asserts that “access to Kingham’s actual estimates used in preparing its bid would give Cox a significant advantage as a competitor” and would result in “lessened competition and possibly higher prices for the City.” However, the city states that the “[b]id [was] awarded to Cox” prior to the city’s receipt of this request and does not otherwise indicate how release of the requested information would interfere with this or any other specific, on-going competitive situation. Because the city does not demonstrate how releasing this particular information will cause the city harm in any specific competitive situation, we find that the information may not be withheld pursuant to section 552.104.

We next address whether the submitted information is excepted from disclosure under section 552.110 of the Government Code. This section 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).¹ 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.² See Open Records Decision No. 402 (1983).

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 *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having considered Kingham's arguments and reviewed the information at issue, we find that Kingham has established that a portion of its proposal constitutes commercial or financial information the release of which would cause the company harm; we therefore conclude that

¹The 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).

²Pricing 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. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

such information is excepted from disclosure under section 552.110(b). We have marked this information, which the city must withhold. However, we find that Kingham has made only conclusory allegations that release of the remaining information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Furthermore, we find that Kingham has not shown that any of the information at issue meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim. Thus, none of the remaining information may be withheld on the basis of section 552.110(a) or (b). *See* Open Records Decision No. 402. Accordingly, pursuant to section 552.110, the city must withhold only those portions of the proposal that we have marked. All 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, 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).

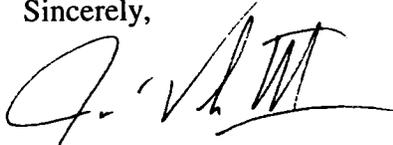
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



José Vela III
Drafting Attorney
Open Records Division

JV/krl

Ref: ID# 224742

Enc. Submitted documents

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