



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 24, 2005

Mr. Clyde A. Pine, Jr.  
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OR2005-04523

Dear Mr. Pine:

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# 224797.

The El Paso Independent School District (the "district"), which you represent, received a request for bid proposals related to the procurement of construction services at Magoffin Middle School.<sup>1</sup> You state that the district will release some of the requested information. You indicate that the submitted information may be excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Further, you state that the request may involve third party interests. Accordingly, you indicate and provide documentation showing that, pursuant to section 552.305 of the Government Code, you notified a number of third parties of the request for information and of their right to submit arguments explaining why the information concerning them should not be released.<sup>2</sup> See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also 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 in certain circumstances). We have considered the submitted arguments and reviewed the information you have submitted. We have also received and considered comments submitted by an attorney representing the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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<sup>1</sup> As you failed to submit a copy of the request for information to this office, we take our description from your brief and from comments submitted by third parties.

<sup>2</sup> The submitted information reflects that you notified El Paso Machine & Steel, Inc. ("El Paso"), V.M. Interiors, Inc. ("V.M."), Roberts Steel Co., Inc. ("Roberts"), Met-Tech, Inc. ("Met-Tech"), Classic Millwork & Products, Inc. ("Classic"), Area Iron & Steel Works, Inc. ("Area Iron & Steel"), Vistacon, Inc. ("Vistacon"), Alliance Riggers & Constructors, Inc. ("Alliance"), and Steel Specialists, Inc. ("Steel Specialists").

Initially, we must address the district's obligations under the Act. 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, however, submit to this office a copy of the written request for information or a responsive bid proposal related to V.M. As such, you failed to comply with the procedural requirements of section 552.301.

The district's failure to comply with section 552.301 results in the presumption that the requested information is public. *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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). A compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Section 552.104 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 subject to waiver)*. Your assertion of section 552.104 does not provide a compelling reason for non-disclosure under section 552.302. In failing to comply with section 552.301, you have waived this exception. *See Open Records Decision No. 663 at 5 (1999) (failure to comply with Gov't Code § 552.301 resulted in waiver of discretionary exceptions)*. Therefore, the district may not withhold any of the submitted information under section 552.104. Further, because you have not submitted V.M.'s bid proposal, you have not shown a compelling interest to overcome the presumption that V.M.'s bid proposal is public. Because you have not submitted this information, we have no basis for finding that release of this information would implicate the interests of V.M. Thus, we have no choice but to order V.M.'s bid proposal released per section 552.302, to the extent such information exists. If you believe this information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. However, because the request for information implicates the interests of other third parties, we will consider whether any of the submitted information must be withheld to protect any of these other third parties' interests.

We note, however, 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 requested information relating to it should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, this office has not received comments from El Paso, Roberts, Met-Tech, or Alliance explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of these companies, and the district may not withhold any portion of the submitted information on that basis. *See*

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).

Next, we note that Steel Specialists seeks to withhold information that the district has not submitted to this office for review.<sup>3</sup> We do not reach Steel Specialists' arguments with regard to information that has not been submitted for our review by the district. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

Classic, Vistacon, Area Iron & Steel, and Steel Specialists contend that their information is excepted from disclosure 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: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110(a), (b).

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. 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). There are six factors to be assessed in determining whether information qualifies as a trade secret:

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<sup>3</sup> Specifically, Steel Specialists seeks to withhold its "experience summary." The district did not submit this information from Steel Specialists.

- (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 must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

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 exception to disclosure 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of Classic’s, Vistacon’s, Area Iron & Steel’s, and Steel Specialists’ arguments and our review of the information at issue, we find that none of these companies has demonstrated that any of their information falls within the definition of a trade secret. Therefore, none of Classic’s, Vistacon’s, Area Iron & Steel’s, and Steel Specialists’ information may be withheld under section 552.110(a).

We find that Classic, Area Iron & Steel, and Steel Specialists have established that the release of some of their information would cause these companies substantial competitive injury; therefore, the district must withhold this information, which we have marked, under section 552.110(b). However, we find that Classic, Area Iron & Steel, and Steel Specialists

have made only conclusory allegations that release of the remaining information at issue would cause these companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Further, we find that Vistacon has not sufficiently demonstrated that substantial competitive injury would likely result from the release of its information at issue. We note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors), 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 to section 552.110). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Thus, none of the remaining information at issue may be withheld pursuant to section 552.110(b).

Classic, Vistacon, and Steel Specialists also raise section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131

is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). Because Classic, Vistacon, Area Iron & Steel, and Steel Specialists have not demonstrated that their information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor made the specific factual or evidentiary showing required under section 552.110(b) that the release of the remainder of their information would result in substantial competitive harm, we also conclude that the district may not withhold any of the remaining information pursuant to section 552.131(a). Furthermore, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Accordingly, none of Classic's, Vistacon's, Area Iron & Steel's, or Steel Specialists' information is excepted under section 552.131(b) of the Government Code.

In summary, the district must withhold the information we have marked under section 552.110(b). The 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); *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,



Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 224797

Enc. Submitted documents

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