



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 8, 2005

Ms. Sarah Irwin Swanson  
Assistant Director of General Law  
Public Utility Commission of Texas  
P. O. Box 13326  
Austin, Texas 78711

OR2005-10093

Dear Ms. Swanson:

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# 235839.

The Public Utility Commission of Texas (the "PUC") received a request for all responses to a request for proposals for a financial advisor for electric utility transition bonds, including responses to a request for best and final offers. Although you make no arguments and take no position as to whether the requested information is excepted from disclosure, pursuant to section 552.305 of the Government Code, you notified Saber Partners, LLC ("Saber"), RBC Capital Markets ("RBC"), and ViaFinance Group, LLC ("ViaFinance") of the request 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 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). We have considered the arguments and reviewed the submitted information.

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, neither RBC nor Saber has 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 proposals submitted by RBC or Saber constitutes proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See Gov't Code § 552.110(a)-(b); 661 at 5-6 (1999)* (to prevent disclosure of commercial or financial information under Gov't Code § 552.110(b), party must show by specific factual evidence, not conclusory or generalized allegations, that

release of information would cause that party substantial competitive harm), 552 at 5 (1990) (if governmental body takes no position under Gov't Code § 552.110(a), third party must establish *prima facie* case that information is trade secret).

ViaFinance responded to the section 552.305 notice by asserting that sections B and C of its proposal are confidential under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. ViaFinance asserts that these sections contain information that is governed by the United States Securities and Exchange Commission ("SEC") and is exempt from the SEC public disclosure and registration requirements under federal law. However, ViaFinance does not cite to any specific federal provision, nor are we aware of one, that makes the information at issue confidential. Accordingly, sections B and C may not be withheld under section 552.101. *See generally* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

ViaFinance also claims section 552.110 of the Government Code, which protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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

- (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).

ViaFinance claims that most of its proposal is a trade secret under section 552.110(a). However, most of the information in the proposal pertains to this specific contract or is general information about the organization and its employees. Thus, ViaFinance has failed to explain how this information meets the definition of a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); Open Records Decision No. 319 at 2 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). For the remaining information, ViaFinance has failed to discuss the factors needed to establish a trade secret claim. We

therefore determine that none of ViaFinance's proposal is excepted from disclosure under section 552.110(a). We do find that ViaFinance has demonstrated that release of its pricing information would result in significant competitive harm to its interests for purposes of section 552.110(b). The company has failed, however, to provide specific factual evidence substantiating its claims that release of the remaining portions of its proposal would result in significant competitive harm. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of Gov't Code § 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue); 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). Accordingly, the PUC must withhold the pricing information in Tab D of ViaFinance's proposal, which we have marked, under section 552.110(b) of the Government Code.

Lastly, we note that Tab J of ViaFinance's proposal and the "Required Certifications" tab of Saber's proposal contain social security numbers. Section 552.147 of the Government Code<sup>1</sup> provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the PUC must withhold the social security numbers contained in the submitted information under section 552.147.<sup>2</sup>

In summary, the PUC must withhold the pricing information in Tab D of ViaFinance's proposal. The PUC must withhold the social security numbers contained in the ViaFinance and Saber proposals under section 552.147. The remaining information must be released.

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

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<sup>1</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, ch. 397, 2005 Tex. Sess. Law Serv. 1091 (Vernon) (to be codified at Tex. Gov't Code § 552.147).

<sup>2</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 Office of the Attorney General 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. 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  
Assistant Attorney General  
Open Records Division

JV/krl

Ref: ID# 235839

Enc. Submitted documents