



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 14, 2005

Ms. Victoria Huynh  
Assistant City Attorney  
City of Plano  
P. O. Box 860358  
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OR2005-10217

Dear Ms. Huynh:

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# 236095.

The City of Plano (the "city") received a request for all proposals submitted in response to the RFP for an Automated Traffic Signal Enforcement System, RFP #C015-05, as well as the scoring and evaluation criteria the city used. We note that you did not submit the requested scoring and evaluation criteria. Thus we presume that to the extent this information exists, you have released it. If you have not released these records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). You assert that the submitted proposals may be subject to third party proprietary interests. Pursuant to section 552.305 of the Government Code, you have notified AVIAR, Inc. ("AVIAR"), LaserCraft, Inc. ("LaserCraft"), Mulvihill ICS, Inc. ("Mulvihill"), Peek Traffic Corporation ("Peek"), Redflex Traffic Systems, Inc. ("Redflex"), Siemens Energy & Automation, Inc. ("Siemens"), Traffipax, Inc. ("Traffipax"), and Transol USA Inc. ("Transol") of the request and of each entity's right to submit arguments to this office as to why its information 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 Act in certain circumstances). We have considered all of the submitted arguments and reviewed the submitted proposals.

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 requested information relating to that party 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 AVIAR, Mulvihill, Redflex, Traffipax, or Transol explaining how the release of their proposals will affect their proprietary interests. Thus, we have no basis to conclude that AVIAR, Mulvihill, Redflex, Traffipax, or Transol has a proprietary interest in their respective proposals. *See, e.g.,* Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

Next, we note that Siemens argues that portions of its proposal should be withheld from disclosure under 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." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the city does not seek to withhold any information pursuant to section 552.104, Siemens' proposal may not be withheld pursuant to section 552.104 of the Government Code. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).

Next, Peek refers us to the confidentiality notice affixed to the cover of its proposal. We note that information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, Peek's information must fall within an exception to disclosure in order to be withheld.

Peek and LaserCraft claim that portions of their respective proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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).

Peek seeks to withhold all the information regarding its hardware and software operation, as well as its pricing information as a trade secret. However, Peek has not provided any arguments explaining how the information at issue meets the definition of a trade secret. Furthermore, Peek has not submitted any arguments demonstrating the factors necessary to establish a trade secret claim. Since Peek has not met its burden under section 552.110(a), the city may not withhold any of Peek’s information at issue under section 552.110(a) of the Government Code.

LaserCraft seeks to withhold Sections B through D, its customer reference list, and its project pricing and estimated cost in Sections F and H as trade secrets. After reviewing LaserCraft’s arguments and the submitted information, we find that LaserCraft has made a *prima facie* case that most of the information it seeks to withhold as a trade secret meets the definition of a trade secret and has demonstrated the factors necessary to establish a trade secret claim as a matter of law. However, we note that the organizational information and employee biographies in Section B are not excepted under section 552.110(a). *See* 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). Further, LaserCraft has failed to demonstrate that other portions of Section B meet the definition of a trade secret. Accordingly, we conclude that the city must withhold LaserCraft’s customer reference information, the information we have marked in Section B, and the entirety of Sections C, D, F, and H under section 552.110(a) of the Government Code. We have marked the information in Section B that must be released.

LaserCraft also seeks to withhold its financial information in Attachment III under section 552.110(b) of the Government Code. LaserCraft states that releasing its financial information would allow a competitor to ascertain LaserCraft’s cash-flow position, which

determines its capacity to develop new products and compete for future customers. Further, LaserCraft states that competitors could use the information in future competitive situations to allocate marketing in certain geographic areas and to set prices for competitive proposals. Thus, after reviewing the information at issue and LaserCraft's arguments, we find that LaserCraft has made a specific factual or evidentiary showing that the release of its financial information would cause the company substantial competitive harm. Thus, the city must withhold this information under section 552.110(b) of the Government Code.

Finally, we note that some of the submitted proposals contain information that is 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 protected by copyright. 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 materials protected by copyright, 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 LaserCraft's customer reference information, the information we have marked in Section B, and the entirety of Sections C, D, F, and H under section 552.110(a). The city must also withhold Attachment III of LaserCraft's proposal under section 552.110(b) of the Government Code. The remaining information must be released, subject to federal copyright law.

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 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,



Jaclyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/kr1

Ref: ID# 236095

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