



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2007

Ms. Cary Grace
Assistant City Attorney
City of Austin Law Department
P.O. Box 1088
Austin, Texas 78767-8828

OR2007-04805

Dear Ms. Grace:

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# 276886.

The City of Austin (the "city") received a request for the responses to a request for proposals for telecommunications and internet communications services for Austin Bergstrom International Airport. You state that the city will release some of the requested information. You claim that other responsive information is excepted from disclosure under section 552.101 of the Government Code. You also believe that this request for information implicates the proprietary interests of AT&T and Time Warner Telecom of Texas, L.P. You notified AT&T and Time Warner of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from an attorney for Time Warner. We have considered all of the submitted arguments and have reviewed the information you submitted.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

We first note that the city did not comply with section 552.301 of the Government Code in claiming an exception under section 552.101. *See* Gov't Code §§ 552.301(b), (e). Generally, a violation of section 552.301 results in a statutory presumption that the information at issue is public and must be released, unless the information is confidential by law or third-party interests are at stake. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. – Austin 1990, no writ); Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Thus, because the city claims that some of the submitted information is confidential under section 552.101, we will consider its arguments, along with those that we received from Time Warner.

We begin with Time Warner's claims under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret 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." Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event 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); *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as

a matter of law.² *See* Open Records Decision No. 552 at 5 (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. *See* Open Records Decision No. 402 (1983).

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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Time Warner argues that certain portions of its information qualify as trade secrets under section 552.110(a). Additionally, Time Warner contends that its pricing information is a trade secret under section 552.110(a) and also is protected by section 552.110(b). Having considered these arguments and reviewed the information at issue, we conclude that Time Warner has demonstrated that some of its information must be withheld under section 552.110(a). We have marked that information. We conclude that Time Warner has not demonstrated that any of the remaining information qualifies as a trade secret for the purposes of section 552.110(a). We also conclude that Time Warner has not demonstrated that any of the remaining information is excepted from disclosure under section 552.110(b). Therefore, the city may not withhold any of the remaining information relating to Time Warner under section 552.110. In reaching these conclusions, we note that most of the information in question relates to pricing aspects of a contract that the city has awarded to Time Warner. Pricing 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Likewise, the pricing information of a winning bidder such as Time Warner is generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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).

Information Act Guide & Privacy Act Overview at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

Time Warner also raises section 552.139 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. In this instance, Time Warner has not specifically identified any information that it claims is excepted from disclosure under section 552.139. Likewise, Time Warner has not explained how or why this exception is applicable to any of the company's remaining information. We therefore conclude that the city may not withhold any of Time Warner's information under section 552.139.

Next, we address 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," and encompasses information that another statute makes confidential. *Id.* § 552.101. Both the city and Time Warner raise section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. These provisions make certain information related to terrorism confidential. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181; *see also id.* § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). The fact that information may relate to a governmental body’s security measures does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

Both the city and Time Warner contend that portions of Time Warner’s proposal reveal technical details of the communications network of Austin Bergstrom International Airport. The parties argue that the release of that information could expose critical infrastructure to a terrorist attack and compromise the security of the airport complex. We note that the information that Time Warner seeks to withhold under section 552.110 corresponds generally to the information that is the subject of the parties’ arguments under section 418.181. Having determined that most of that information must be withheld under section 552.110, we need not consider whether it also falls within the scope of section 418.181. Consequently, only a few items of information remain to be addressed under section 418.181. Neither the city nor Time Warner has adequately explained how any of the remaining information reveals technical details of particular vulnerabilities of the airport communications network. We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from AT&T. Thus, AT&T has not demonstrated that any of its information is proprietary for the purposes of the Act, and therefore the city may not withhold any of AT&T’s information on that basis. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We note, however, that section 552.136 of the Government Code is applicable to some of AT&T’s information.³ Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], 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

³Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

§ 552.136(b); *see also id.* § 552.136(a) (defining “access device”). We have marked insurance policy numbers that the city must withhold under section 552.136.

Lastly, we note that some of the information to be released appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) the city must withhold the information that we have marked under section 552.110 of the Government Code; and (2) the city must withhold the marked insurance policy numbers under section 552.136 of the Government Code. The rest of the submitted information must be released. Any information that is protected by copyright must be released in accordance with 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).

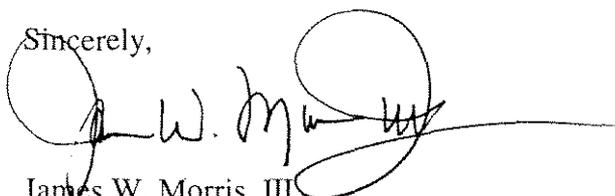
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jb

Ref: ID# 276886

Enc: Submitted documents

c: Ms. Judy Breese
3504 Lost Oasis Hollow
Austin, Texas 78739
(w/o enclosures)

Ms. Jean Ann Knox
AT&T
712 Huntland Drive
Austin, Texas 78752
(w/o enclosures)

Ms. Lisa Meyer
Time Warner Telecom
9229 Waterford Centre B1
Building C, Suite 100
Austin, Texas 78758
(w/o enclosures)

Ms. Valerie P. Kirk
Casey, Gentz & Magness, L.L.P.
98 San Jacinto Boulevard, Suite 1400
Austin, Texas 78701-4286
(w/o enclosures)