



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 10, 2007

Ms. Julie Y. Fort  
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OR2007-08680

Dear Ms. Fort:

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# 283496.

The City of Frisco (the "city"), which you represent, received a request for information relating to a proposal to host the 2011 Super Bowl. You state that some responsive information has been released to the requestor. You claim that some of the requested information is excepted from disclosure under sections 552.104, 552.110, 552.131, and 552.137 of the Government Code. In addition, you have notified eight interested third parties of the city's receipt of the request for information and of the right of each third party to submit arguments to this office as to why the requested information should not be released to the requestor.<sup>1</sup> *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 in Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>The third parties that received notice pursuant to section 552.305 are the following: the North Texas Super Bowl XLV Bidding Committee, Inc. (the "committee"); the Embassy Suites ("Embassy"); the Sheraton Stonebriar ("Sheraton"); the Westin Stonebriar ("Westin"); Dr. Pepper - Ballpark; Dr. Pepper - Star Center; Holiday Inn Express; and Strikz.

We begin by noting that some of the submitted documents are not responsive to the instant request for information, as they were created after the date that the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

In this instance, although you acknowledge that the bid has been awarded, you assert that the information at issue may also be valuable if a similar opportunity arises in the future, and release of the submitted information could “deter [third parties from] voluntarily disclosing the same information . . . in connection with future bids.” You also argue that release of the submitted information would put the city at a disadvantage to other locations when competing for future Super Bowls or other similar events. However, beyond the possibility of unidentified future opportunities, you have not identified a specific threat of actual harm to the city. Further, you have failed to demonstrate how release of this particular information could be used by a competitor in a specific competitive situation. Thus, after carefully reviewing your arguments and the submitted information, we find that the city has failed to adequately demonstrate that the release of the submitted information would harm the competitive interests of the city for purposes of section 552.104. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body’s interests in competitive bidding situation). Accordingly, we conclude that the city may not withhold any portion of the submitted information under section 552.104 of the Government Code.

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, we have not received comments from Dr. Pepper - Ballpark, Dr. Pepper - Star Center, Holiday Inn Express, or Strikz explaining why the company's requested information should not be released. We thus have no basis for concluding that any portion of the requested information constitutes proprietary information of these companies protected under section 552.110. *See id.* § 552.110; 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). Accordingly, none of the submitted information may be withheld based on the proprietary interest of Dr. Pepper - Ballpark, Dr. Pepper - Star Center, Holiday Inn Express, or Strikz.

The city, the committee, Westin, and Sheraton contend that some or all of the submitted information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code 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* ORD 232. 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. ORD 552. 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). We also note that 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.” 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).

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 the submitted information and the arguments submitted by the city, Sheraton, and Westin, we find that none of the three has made a *prima facie* claim that any

portion of its information qualifies as a trade secret under section 552.110(a). *See* Open Records Decision Nos. 552 at 5-6, 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), 319 at 3 (information relating to organization and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939). Likewise, Embassy's comments do not provide this office with any basis to conclude that any of its information qualifies as a trade secret under section 552.110(a). *Id.* We therefore determine that no portion of the submitted information is excepted from disclosure under section 552.110(a).

We also find that the city, the committee, Sheraton, and Westin have made only conclusory allegations that release of the information at issue would cause substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See* ORD 514 (public has interest in knowing prices charged by government contractors), 319 at 3 (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 also 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). Likewise, Embassy's comments do not provide this office with any basis to conclude that it has any protected proprietary interest in the submitted information. *Id.* Therefore, the city may not withhold any of the submitted information under section 552.110(b) of the Government Code.

The city and the commission also raise section 552.131(b) of the Government Code and contend that the submitted information relates to ongoing economic development negotiations involving the city. Section 552.131 relates to economic development information and provides in pertinent part:

(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(b). In this instance, however, an agreement has been made regarding the location of Super Bowl 2011. We therefore conclude that the city may not withhold any of the submitted information under section 552.131 of the Government Code.

The city claims that section 552.137 of the Government Code is applicable to some of the submitted information. Section 552.137 states in part that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the

owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We agree that the city must withhold the highlighted e-mail addresses under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure. 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).

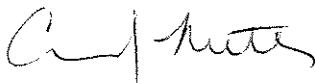
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/mcf

Ref: ID# 283496

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