



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 3, 2008

Mr. David M. Swope
Assistant City Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2008-13604

Dear Mr. Swope:

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# 323667.

The Office of the Harris County Purchasing Agent (the "county") received two requests from different requestors for information pertaining to the award of RFP #07-0442. You state that the county has released some of the requested information. You claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also believe that these requests for information implicate the proprietary interests of BI, Inc. ("BI") and Sentinel Offender Services ("Sentinel"). Accordingly, you notified these companies of these requests for information and of their right to submit arguments to this office as to why the submitted 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 the applicability of exception to disclosure under the Act in certain circumstances. We have received correspondence from BI and Sentinel. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the submitted information is not responsive to the instant requests for information because it was created after the date of the requests. We have marked the non-responsive information. This ruling does not address the public availability

of any information that is not responsive to the requests and the county is not required to release that information in response to the requests.

In its brief to this office, Sentinel argues to withhold from public disclosure information that the county did not submit. This ruling does not address information that was not submitted by the county and is limited to the information submitted as responsive by the county. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). We note that the county submitted correspondence from Sentinel, addressed to the county, wherein Sentinel requests the county protect specified information in Sentinel's proposal from public disclosure. The county has submitted only the specified information for our review.

Next, we must address the county's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(a), (b). Pursuant to section 552.301(e), the governmental body must, within fifteen business days of receiving the request, submit to this office (1) 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. *Id.* § 552.301(e)(1)(A)-(D). You state that the county received the requests for information on April 20, 2008 and May 7, 2008. However, you did not request a ruling from this office or submit the requested information for our review until July 30, 2008. Thus, the county failed to comply with the procedural requirements mandated by section 552.301.

We understand you to argue that the county did not ask this office for a ruling because pursuant to section 262.030(c) of the Local Government Code, the county was not required to respond to the requests for information. Section 262.030(c) of the Local Government Code provides:

If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such.

Loc. Gov't Code § 262.030(c). Section 262.030(c) does not relieve a governmental body from complying with the procedural requirements of the Act in requesting a ruling from this office to withhold information; section 262.030(c) only requires a governmental body to take

adequate precautions to protect bid proposals from competing bidders. *See id.* § 262.030(c). Thus, withholding the information at issue and requesting an open records ruling from this office would constitute such a precaution. *See id.* § 262.030(c). Accordingly, we will address the arguments submitted to this office by the county, BI, and Sentinel under sections 552.101 and 552.110 of the Government Code for withholding the submitted information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because sections 552.101 and 552.110 of the Government Code and third party interests are all compelling reasons to withhold information from disclosure, we will address these arguments.

Next, we address BI's and Sentinel's assertions that portions of their proposals are marked as containing confidential information. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See Attorney General Opinion JM-672* (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Therefore, unless BI's or Sentinel's information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See Open Records Decision Nos.* 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Although Sentinel contends that portions of the submitted information contain confidential information, Sentinel has not directed our attention to any law under which any of the submitted information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the county may not withhold any of Sentinel's information under section 552.101 of the Government Code.

The county also asserts that some of the submitted information may be excepted from disclosure under section 552.101 of the Government Code on the basis of federal copyright law. However, copyright law does not make information confidential for purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). Thus, the county may not withhold the submitted information under section 552.101 of the Government Code in conjunction with copyright law.

Sentinel claims portions of its proposal are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure information that, if released, would give an advantage to a competitor or bidder. Gov't Code § 552.104. 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 submitted information to the government), 522 (1989) (discretionary exceptions in general). Because the county did not assert section 552.104, the county may not withhold Sentinel's information pursuant to section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

Sentinel and the county claim that portions of the submitted information are excepted from public disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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.

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.); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ 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. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) applies 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) excepts from disclosure “[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). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 661 (1999).

In this instance, the county and Sentinel do not explain how the submitted information meets the Restatement definition of a trade secret. Nor does the county or Sentinel address the six factors that are relevant to the question of whether a private party has made a *prima facie* case under section 757 of the Restatements. *See* RESTATEMENT OF TORTS § 757 cmt. b. We therefore conclude that the county and Sentinel have not demonstrated that any of the information in question constitutes a protected trade secret under section 552.110(a) of the Government Code. We further find that the county and Sentinel have failed to provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the submitted information. Thus, we conclude that the county and Sentinel have not adequately demonstrated that any of the submitted information either consists of trade secrets or would harm Sentinel’s competitive interests if released.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (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 [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).

Consequently, the submitted information is not excepted from disclosure under section 552.110. As no further exceptions to disclosure have been raised, the submitted 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 322667

Enc. Submitted documents

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