



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 3, 2008

Mr. Richard L. Bilbie  
Assistant City Attorney  
City of Harlingen  
P.O. Box 2207  
Harlingen, Texas 78551

OR2008-13605

Dear Mr. Bilbie:

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# 323653.

The City of Harlingen (the "city") received a request for a copy of the winning proposal and proposals from other vendors who submitted a bid for the Municipal Court Software System. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also indicate that releasing the submitted information may implicate the interests of third parties. Accordingly, you state, and provide documentation showing, that you have notified Tyler Technologies ("Tyler"), PTS Solutions ("PTS"), Justware, and Professional Computer Software Services ("PCSS") of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *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 Act in certain circumstances).* Tyler has provided arguments against disclosure to the city, which you have forwarded to this office. We have considered the submitted arguments and reviewed the submitted information.

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. Gov't

Code § 552.305(d)(2)(B). As of the date of this decision, PTS, Justware, and PCSS have not submitted to this office any reasons explaining why the submitted information should not be released. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to PTS, Justware, or PCSS would implicate their proprietary interests. *See id.* § 552.110; 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). Accordingly, the city may not withhold any portion of the submitted information based on the proprietary interests of PTS, Justware, or PCSS.

Next, we address your assertion that portions of the requested proposals are marked as containing confidential and proprietary information, and that the city “does not believe that it should be put in the position of releasing. . . information of the vendor. . . which may harm the competitive position of the vendor.”<sup>1</sup> 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 the submitted 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,” and includes common-law privacy. Gov’t Code § 552.101. This exception encompasses information protected by other statutes. You assert that the release of the requested proposals would “amount to an invasion of privacy through the disclosure of private facts.” Thus, we understand you to raise common-law privacy. However, we note that the information at issue concerns business entities. Common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). In addition, you have not directed our attention to any other law under which any

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<sup>1</sup>We note the city raises this argument in conjunction with section 552.110 of the Government Code.

of the submitted information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code.

Tyler argues that certain portions of its proposal constitute trade secrets of Tyler. Thus we understand Tyler to raise section 552.110(a) of the Government Code for its proposal, which protects trade secrets. 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.); Open Records Decision Nos. 552 at 2, 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; *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255, 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).

Tyler generally asserts that the company's handbook describes certain types of information considered by the company to be confidential and proprietary, and specifically asserts that nine categories of information in the proposal sent to the city, including its pricing information, qualify as trade secret information under section 552.110(a). Tyler was awarded the contract related to the project at issue. We 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." *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, Tyler's pricing information is not excepted under section 552.110(a). In addition, we note that, although Tyler has set forth nine specific categories of information it seeks to withhold, and generally describes certain other types of information it considers proprietary, Tyler has not submitted a copy of its proposal to this office with markings to indicate the precise information within the proposal at issue that it believes to be confidential. Further, this office is only able to discern a portion of this information within the Tyler proposal submitted to this office by the city. Therefore, upon review, we find that Tyler has established a *prima facie* case that a portion of its submitted information, which we have marked, constitutes a trade secret. The city must withhold this information marked information pursuant to section 552.110(a) of the Government Code. Tyler, however, has failed to demonstrate that any portion of its remaining information at issue constitutes a trade secret. *See* ORD 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Thus, the remaining information at issue may not be withheld under section 552.110(a) of the Government Code.

We note that the remaining submitted information contains an account number. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, 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.”<sup>2</sup> Gov’t Code § 552.136. Accordingly, the city must withhold the account numbers we have marked under section 552.136.

In summary, the city must withhold the information we have marked under section 552.110(a) of the Government Code and the account number we have marked under section 552.136 of the Government Code. 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 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).

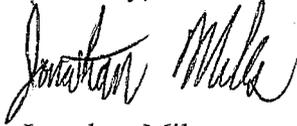
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<sup>2</sup>This office will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/jh

Ref: ID# 323653

Enc. Submitted documents

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