



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2008

Ms. Katherine R. Fite
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2008-14115

Dear Ms. Fite:

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# 323414.

The Office of the Governor (the "governor") received a request for a specified contract between the governor and Northrop Grumman as well as a list of all other companies, if any, bidding on the contract. You state that the governor has released the contract. You explain that because the submitted proposal was attached to and referenced in the requested contract, it is also responsive to the request. You claim that the proposal is excepted from disclosure under section 552.110 of the Government Code. You also state that you have notified Northrop Grumman Corporation ("Northrop Grumman") of the governor's receipt of the request for information and its right to submit arguments to this office as to why the proposal should not be released to the requestor. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Northrop Grumman. We have considered the submitted arguments and reviewed the submitted proposal.

First, we will address the governor's assertion that the proposal is confidential because it is marked confidential and it was obtained from Northrop Grumman with the assurance that it would remain confidential. However, information is not made confidential under the Act simply because the party submitting 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), cert. denied 430 U.S. 931 (1977); *see also* Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Consequently, the proposal may not be withheld unless it falls within an

exception to disclosure. Accordingly, we will address the arguments asserted by the governor and Northrop Grumman that the records are excepted under section 552.110 of the Government Code.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure 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.” See Gov’t Code § 552.110(a)-(b). The governor argues that section 552.110(b) is applicable to the entire document. In order to prevail on a claim under section 552.110(b), the governmental body or third party must provide specific factual evidence, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); see also *National Parks Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

The governor argues that release of the proposal could deter vendors such as Northrop Grumman from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. This argument relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks*. See also *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain proposals from private parties is not a relevant consideration under section 552.110(b). *Id.* Accordingly, the governor has not established that the proposal should be withheld in its entirety under section 552.110(b).

Northrop Grumman claims that the “technical solution” and the “pricing solution” should be withheld under section 552.110(b). In order to withhold these portions of the proposal under section 552.110(b), Northrop Grumman must show that release of the information would cause substantial competitive harm based on specific factual evidence. In this instance, Northrop Grumman has only made conclusory assertions of competitive harm. Therefore, Northrop Grumman has failed to demonstrate based on specific factual evidence how the release of the “technical solution” and the “pricing solution” would cause substantial competitive harm to its interests. Furthermore, Northrop Grumman was the winning bidder

for the contract. The pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see 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). Accordingly, the “technical solution” and the “pricing solution” may not be withheld under section 552.110(b).

Northrop Grumman further argues that the Project Approach, Statement of Work, and pricing areas of the proposal are its trade secret. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). 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); *see also* *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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *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.¹ Open Records Decision No. 402 (1983).

¹The 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 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

Northrop Grumman asserts that the Project Statement and the Statement of Work are specifically tailored to suit the needs of this specific project. As we previously stated, in order to meet the definition of a trade secret, Northrop Grumman must demonstrate that the information it seeks to withhold is used in the continuous operation of the business. Restatement of Torts § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776. Based on Northrop Grumman's representation that its information only pertains to this specific project as well as our own review of the documents, we find that the company has failed to demonstrate that the Project Statement and the Statement of Work are trade secrets. Northrop Grumman also claims that its pricing information is a trade secret. However, pricing information pertaining to a particular contract is generally not a trade secret because it deals solely with that specific project. As the pricing information here pertains solely to the contract between the governor and Northrop Grumman, we find that the company has failed to demonstrate that the pricing information is a trade secret. Accordingly, the Project Approach, Statement of Work, and pricing areas of the proposal may not be withheld under section 552.110(a) of the Government Code. As neither the governor nor Northrop Grumman has raised any further exceptions to the disclosure of the submitted proposal, it 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 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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 323414

Enc. Submitted documents

c: Mr. Clay Robinson
Austin Bureau Chief
Houston Chronicle
San Antonio Express-News
c/o Office of the Governor
P.O. Box 12428
Austin, Texas 78711
(w/o enclosures)

c: Mr. John Haines
Northrop Grumman Information Technology, Inc.
7745 Chevy Chase Drive, Building 5
Austin, Texas 78752
(w/o enclosures)