



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2009

Mr. Thomas P. Brandt
Fanning, Harper, & Martinson
Two Energy Square
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206

OR2009-00521

Dear Mr. Brandt:

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# 331988.

The Arts of Collin County Commission, Inc. (the "commission"), which you represent, received a request for the guaranteed maximum price ("GMP") that is being compiled by Hunt Construction ("Hunt"). You claim the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. In addition, you state, and provide documentation showing, you notified Hunt and Boora Architects, Inc. ("Boora") of the request for information and of each company's right to submit arguments to this office as to why the requested information should not be released. *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 considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

You claim Exhibit 7 is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. The purpose of section 552.104 is to

protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

You state the commission entered into a contract with Hunt for construction management services. You explain that Hunt's responsibilities include the development of a GMP for the construction of performing and cultural arts facilities. You state the GMP will include bids from subcontractors, which have not been obtained. You contend that public disclosure of Exhibit 7 will provide subcontractors "with knowledge regarding internal estimates of cost as well as issues relating to the development of the GMP." You explain knowledge of this information will allow the subcontractors to raise their bids in order to receive the maximum amount possible. Accordingly, you state the commission would be forced to pay higher than market price for services. Based on your representations, we find that release of the information we have marked in Exhibit 7 will give an advantage to a competitor or a bidder. Thus, the commission may withhold information we have marked in Exhibit 7 under section 552.104 of the Government Code. However, we find the commission has not established that release of the remaining information in Exhibit 7 will give an advantage to a competitor or a bidder; thus, the commission may not withhold any portion of the remaining information in Exhibit 7 under section 552.104.

Next, you claim Exhibit 8 contains the proprietary information of Hunt and Boora. We note 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 Hunt or Boora explaining why the requested information should not be released. On behalf of Hunt and Boora, however, you assert that Exhibit 8 is subject to section 552.110 of the Government Code.

Section 552.110 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. *Id.* § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 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).

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. *Id.* § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

You claim Exhibit 8 is excepted from disclosure under section 552.110(a). Having considered the submitted arguments, we conclude you have failed to demonstrate that any of Exhibit 8 constitutes trade secrets; thus, no portion of Exhibit 8 may be withheld under section 552.110(a) of the Government Code.

You also claim section 552.110(b) for Exhibit 8. Upon review of the submitted arguments and information at issue, we find you have made only conclusory allegations that the release of Exhibit 8 would result in substantial damage to Hunt’s and Boora’s competitive positions. Thus, you have not demonstrated that substantial competitive injury would result from the release of Exhibit 8. Accordingly, the commission may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note portions of the remaining information may be subject to section 552.137 of the Government Code. Section 552.137 provides 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. Upon review, the commission must withhold the e-mail addresses we have marked in the remaining information under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure or section 552.137(c) applies.

You claim portions of the remaining information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials

protected by copyright, the person 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 (1990).

In summary, the commission may withhold the information we have marked in Exhibit 7 under section 552.104 of the Government Code. The commission must withhold the e-mail addresses we have marked in the remaining information under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure or section 552.137(c) applies. The remaining information must be released, but any copyrighted information may only 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 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).

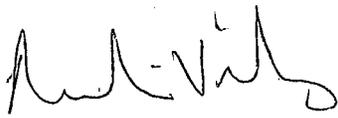
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/eeg

Ref: ID# 331988

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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