



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2009

Mr. Antonio Mendoza
Assistant Criminal District Attorney
Hidalgo County District Attorney's Office
100 North Closner, Room 303
Edinburg, Texas 78539

OR2009-05251A

Dear Mr. Mendoza:

This office issued Open Records Letter No. 2009-05251 (2009) on April 21, 2009. We have examined this ruling and determined that there was an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on April 21, 2009. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 349339.

The Rio South Texas Economic Council (the "council"), which we understand you to represent, received a request for information related to a specified request for proposals. You claim that some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. We also understand you to claim section 552.101 of the Government Code as an exception to disclosure in conjunction with section 252.049 of the Local Government Code. Because release of some of the requested information may implicate the proprietary interests of third parties, pursuant to section 552.305 of the Government Code you were required to notify the interested third parties of the request and of their opportunity to submit comments to this office explaining why their information

should be withheld from disclosure. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 to disclosure in certain circumstances). We have received comments from Avalanche Consulting, Inc. ("Avalanche")¹ and Chabin Concepts/Austin Consulting and Applied Economics ("Chabin"). We have considered the submitted arguments and reviewed the submitted information.

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 council received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the council 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).

We must next address the council's procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving a request (1) general 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. *See* Gov't Code § 552.301(e). You state that the council received the request for information on January 29, 2009. However, you submitted some of the information required by section 552.301(e) to this office on March 27, 2009, well after the expiration of the fifteen-business-day deadline; the requested proposals were not sent until May 12, 2009, also well past the fifteen-business-day deadline. Therefore, we find that the council failed to comply with the procedural requirements of section 552.301 in requesting a ruling from this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982).

¹We note that the Avalanche team also includes Market Street Services and Development Advisors, Inc.

A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because the council failed to comply with the procedural requirements of the Act, the council has waived its claim under section 552.104. *See* Open Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). However, because section 552.101 can provide a compelling reason to withhold information, we will consider your arguments under that section. In addition, because the third-party interests at issue here can provide a compelling reason to overcome the presumption of openness, we will consider whether the submitted proposals are excepted under the Act.

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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from any third party other than Avalanche and Chabin explaining how the release of the requested information will affect its proprietary interests. Thus, none of the remaining third parties has demonstrated that any of the requested information is proprietary for purposes of the Act. *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).

Avalanche asserts that its proposal "contains highly proprietary information about [its] pricing structure, methodology, and sales points that cannot be shared without putting [the company] at a serious disadvantage." Chabin claims that its proposal "does contain intellectual property on [the] company's process for creating economic development strategies and related tools that are part of the deliverable." Thus, we understand both Avalanche and Chabin to contend that their information is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to 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." Gov't Code § 552.110(a)-(b).

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

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). This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.² *See* ORD 552 at 5. 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having considered the arguments of Avalanche and Chabin, we find that these companies have failed to establish that any of the information at issue meets the definition of a trade secret, and neither company has demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* Open Record Decision No. 319 at 2 (1982) (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We note that pricing information pertaining to a particular proposal or contract is generally not a trade

²The 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 other 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).

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). Therefore, we determine that no portion of the submitted information is excepted from disclosure under section 552.110(a) of the Government Code.

Upon review, we find that Avalanche has established that its pricing information constitutes commercial and financial information, the release of which would cause the company substantial competitive harm. Therefore, the council must withhold the information we have marked under section 552.110(b). However, we find that Avalanche and Chabin have failed to provide specific factual evidence demonstrating that release of any of the remaining submitted information would result in substantial competitive harm to these companies. Therefore, none of the remaining information is excepted from disclosure under section 552.110(b). *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 514 (1988) (public has interest in knowing prices charged by government contractors).

The council seeks to withhold the remaining submitted information under section 552.101 of the Government Code³ in conjunction with section 252.049 of the Local Government Code, which provides as follows:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This statutory provision merely duplicates the protection that section 552.110 of the Government Code provides to trade secret and commercial or financial information. None of the interested third parties has established that any of the remaining information qualifies as either a trade secret or confidential commercial or financial information for purposes of section 552.110. *See* Gov't Code § 552.110(a)-(b). Therefore, the council may not withhold any of the remaining information under

³Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 encompasses information that another statute makes confidential.

section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.

Finally, we note that some of the materials at issue appear to be 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).

Accordingly, we have marked the information that the council must withhold under section 552.110 of the Government Code. The remaining responsive information must be released to the requestor. However, any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 349339

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