



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2009

Ms. LeAnn M. Quinn
City Secretary
600 North Bell Boulevard
Cedar Park, Texas 78613

OR2009-06131

Dear Ms. Quinn:

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# 342547.

The City of Cedar Park (the "city") received a request for the proposals for a skate park from three companies. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code.¹ In addition, you believe the request for information may implicate the privacy or proprietary interests of SPA Skateparks ("SPA"), California Skateparks, Inc. ("California"), and Grindline Skateparks, Inc. ("Grindline"). You state and provide documentation showing that you have notified the third parties of the request for information and of their 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 received arguments from California, Grindline, and SPA. We have considered the submitted arguments and reviewed the submitted information.

¹ Although you also raise sections 552.101 and 552.114 of the Government Code, you have provided no arguments in support of withholding the submitted information under these exceptions. Therefore, we do not address the applicability of these sections to the submitted information. *See Gov't Code §§ 552.301(e)(1)(A), .302.*

Initially, you inform us that the submitted information was subject of two previous requests for information, in response to which this office issued Open Records Letter No. 2009-02889 (2009). In the prior ruling, this office determined that the city may withhold the submitted information under section 552.104. You inform us that the facts and circumstances have changed since the issuance of our previous ruling. In the previous request, the city asserted that at the time the city received the requests a contract had not yet been awarded and executed. In response to the present request, you state the "Cedar Park Council affirmed the determination of SPA Skateparks as the best value and authorized the City manager to execute a design-build agreement for the Cedar Park Skate Park Project. This was done at the February 12, 2009 Council meeting." Therefore, as relevant facts have changed since the issuance of Open Records Letter Ruling No. 2009-02889, we conclude that the city may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (describing the four criteria for a "previous determination"). Accordingly, we will consider the applicability of the submitted arguments.

SPA and Grindline each raise section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). Significantly, the purpose of this exception is to protect the interests of a governmental body, and not those of a third party, with respect to competitive bidding situations. *See* Open Records Decision No. 592 (1991). Thus, we consider only the city's arguments with respect to this section.

The purpose of section 552.104 is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990). The governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

As noted above, the city council authorized the execution of a design build agreement with SPA at the February 12, 2009 city council meeting. Thus, you indicate the contract has been awarded. Additionally, you have provided this office with no arguments explaining how the release of the submitted information would cause harm to the city's interest in a particular bidding situation. Therefore, the city may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, Grindline argues that portions of its information are excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). This office has found

that section 552.102 only applies to information in the personnel files of governmental employees. The information Grindline seeks to withhold is not contained in the personnel file of a city employee; therefore, section 552.102 is not applicable to Grindline's information and the city may not withhold any of the submitted information on that ground.

California, Grindline, and SPA argue portions of their proposals are excepted from disclosure 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: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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. 1957); *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); *see also Huffines*, 314 S.W.2d at 776. 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a

² The following are the six factors that the Restatement gives 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

claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *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. 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* Open Records Decision No. 661 at 5 (1999).

After reviewing the submitted information and arguments, we find that California and SPA have made a *prima facie* case that some of their customer lists, which we have marked, are protected as trade secret information. However, we note that California, Grindline, and SPA have made some of the information they seek to withhold publicly available on their websites, including customer information. Because California, Grindline, and SPA have published this information, they have failed to demonstrate that this information is a trade secret. Accordingly, we determine that California, Grindline, and SPA have failed to demonstrate that any portion of the remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). The city must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code.

California, Grindline, and SPA also seek to withhold portions of the remaining information under section 552.110(b). Upon review of the submitted arguments and the information at issue, we find that Grindline has established that release of its pricing information would result in substantial competitive harm to the company. Therefore, the city must withhold the information we have marked in Grindline’s proposal under section 552.110(b). However, California, Grindline, and SPA have failed to demonstrate that any portion of the remaining information is excepted 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

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).

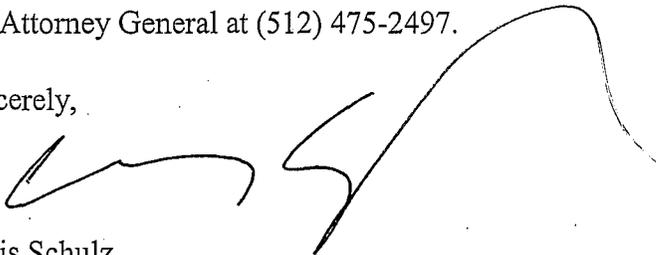
injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note that the pricing information of a winning bidder, in this case SPA, 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 city may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

In summary, the city must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released.

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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 342547

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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