



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2009

Ms. Griselda Sanchez
Assistant City Attorney
City of San Antonio
9800 Airport Boulevard
San Antonio, Texas 78216

OR2009-09362

Dear Ms. Sanchez:

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# 348219 (City of San Antonio File No. 09-0476).

The City of San Antonio (the "city") received a request for all bid proposal documents submitted by North American Conveyor Corporation ("NACC") and Vanderlande Industries ("Vanderlande") pertaining to a specified project. You state that you do not maintain information responsive to the portion of the request seeking NACC's bid proposal documents pertaining to the specified project.¹ You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.104, and 552.128 of the Government Code. You also state that the release of this information may implicate the proprietary interests of a third party. Accordingly, pursuant to section 552.305 of the Government Code, you have notified Vanderlande of the request and of their right to submit arguments to this office. *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). Pursuant to section 552.305(d), Vanderlande has submitted comments to this office objecting

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

to the release of its information. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that Vanderlande argues against the disclosure of more information than was submitted for review by the city. The city has only submitted to this office the following documents from Vanderlande's bid proposal: 1) a proposal form and affidavit; 2) a composite bid proposal form; 3) a value engineering proposal form; and 4) the portion of the proposal entitled "Exhibit B." This ruling only addresses the responsive information that the city submitted to this office. *See Gov't Code § 552.301(e)(1)(D)*.

We will now address the submitted arguments. First, the city and Vanderlande both represent that some of the submitted information is confidential because Vanderlande marked it as such when it submitted the proposal at issue. 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 section 552.110).* Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

We next address the city's assertion that the submitted information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that section 271.118(i) of the Local Government Code applies in this instance to render the requested information confidential. Section 271.118(i) provides as follows:

The construction manager-at-risk and the governmental entity or its representative shall review all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process to a person not employed by the construction manager-at-risk, engineer, architect or governmental entity. All bids or proposals shall be made public after the award of the contract or not later than the seventh day after the date of final selection of bids or proposals, whichever is later.

Local Gov't Code § 271.118(i). Section 271.118(i) pertains to the manner in which trade contractor or subcontractor bids or proposals must be reviewed during a selection process. However, this provision does not expressly make information confidential for purposes of

section 552.101. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2-3 (1987). Accordingly, the city may not withhold any portion of the information at issue pursuant to section 552.101 in conjunction with section 271.118(i) of the Local Government Code.

The city and Vanderlande both assert that the submitted information is excepted under section 552.104 of the Government Code. We note that this section protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 (1991). Accordingly, we will address the city's arguments under section 552.104, but, because section 552.104 does not protect the interests of third parties, we will not address Vanderlande's arguments under this section. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." 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. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). 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. Open Records Decision No. 593 at 2. In this instance, although the city raises section 552.104, it fails to provide specific arguments explaining how release of any of the requested information would harm the city's interests in a competitive situation. Accordingly, the city may not withhold any of the requested information under section 552.104 of the Government Code.

Next, the city raises section 552.128 of the Government Code, which is applicable to "[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]" Gov't Code § 552.128(a). The city does not indicate that any of the submitted information was submitted to the city in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, the information at issue was submitted by third parties in proposals to the city in connection with a proposed contractual relationship with the city. We therefore conclude that the city may not withhold any of the submitted information under section 552.128 of the Government Code.

Next, Vanderlande asserts that its information is excepted from disclosure under section 552.101 of the Government Code. Vanderlande asserts that section 106 of title 17 of the United States Code constitutes statutory law that, for purposes of section 552.101, prohibits copying those portions of the submitted information that are copyrighted. 17 U.S.C. § 106. Similarly, Vanderlande asserts that these records are excepted from disclosure pursuant to section 552.007 of the Government Code, which provides that a governmental body is not prohibited "from voluntarily making part of all of its information available to the public, unless the disclosure is expressly prohibited by law." Gov't Code § 552.007(a). We understand Vanderlande to indicate that the city is prohibited from making copyrighted portions of the remaining submitted information available to the public pursuant to section 106 of title 17 of the United States Code and section 552.007 of the Government Code. We disagree. Generally, copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow inspection of copyrighted materials unless an exception to required public disclosure applies to the information. Attorney General Opinion JM-672 (1987) at 2-3. If a member of the public wishes to make copies of copyrighted materials, 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).

Next, we understand Vanderlande to assert that its information is excepted from disclosure under section 552.101 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. Therefore, we will address Vanderlande's arguments with respect to section 252.049 of the Local Government Code under section 552.110 of the Government Code.

Vanderlande argues that its information is 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. *Id.* § 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 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). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or

²The 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 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).

ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” Restatement of Torts § 757 cmt. b; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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

Vanderlande claims that portions of its proposal are excepted from disclosure under section 552.110(a). Upon review of Vanderlande’s arguments and the information at issue, we find that Vanderlande has established that the value engineering portions of its proposal qualify as trade secret information under section 552.110(a). Accordingly, the city must withhold the trade secret information we have marked in the submitted information under section 552.110(a) of the Government Code. However, Vanderlande has failed to demonstrate that any portion of their remaining information constitutes a trade secret. Thus, the remaining information may not be withheld under section 552.110(a) of the Government Code.

Vanderlande also claims that portions of its remaining information are excepted from disclosure under section 552.110(b). Upon review of Vanderlande’s arguments and the information at issue, we find that Vanderlande has not demonstrated that substantial competitive injury would likely result from the release of any portion of the remaining information. *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), 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). Accordingly, the city may not withhold any portion of the remaining information in Vanderlande’s proposal under section 552.110(b).

In summary, the city must withhold the information we have marked in Vanderlande’s proposal under section 552.110(a) of the Government Code. The remaining information must be released to the requestor 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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/eeg

Ref: ID# 348219

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Herbert S. Root
Controller & Corporate Secretary
Vanderlande Industries Inc.
1828 West Oak Parkway
Marietta, Georgia 30062
(w/o enclosures)

Mr. Russell E. Owens, Esq
Legal Counsel
Vanderlande Industries Inc.
1828 West Oak Parkway
Marietta, Georgia 30062
(w/o enclosures)