



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2010

Ms. Cynthia S. Martinez
Legal/ Records Manager
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2010-05645

Dear Ms. Martinez:

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# 376575.

The Capital Metropolitan Transportation Authority (the "authority") received a request for the winning proposal pertaining to a specified RFP, the evaluation's panel scores, and other related information pertaining to the authority. You state you will release some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.104, 552.110, and 552.136 of the Government Code.¹ In addition, you state the requested information may implicate the proprietary interests of a third party. Accordingly, you inform us, and provide documentation showing, you have notified Gilbert Tweed & Associates, Inc. ("Gilbert Tweed") of the request and of its right to submit comments to this office as to why the requested information should not be released to the requestor. *See Gov't Code § 552.305(d); 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 under the Act in certain circumstances). We have received comments from Gilbert Tweed. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Gilbert Tweed seeks to withhold a document titled Addendum to Volume 2, Tab B, Stakeholder Communication and Collaboration. However, the authority

¹Although you also claim portions of the submitted information are excepted under section 552.305 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.305 requires a governmental body to notify third parties whose proprietary interests may be implicated by a request for information of the request and of the parties' right to submit comments to this office explaining why the requested information should be withheld from disclosure. *See Gov't Code § 552.305(d).*

has not submitted this document for our review. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from the Attorney General must submit a copy of specific information requested). Therefore, this ruling does not address this document, and is limited to the information submitted as responsive by the authority.

The authority asserts the submitted information 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." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision Nos. 592 (1991). Moreover, section 552.104 requires a showing by the governmental body of some actual or specific harm to its interests in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990), *see also* Gov't Code § 552.301(e)(1)(A) (governmental body has the burden of proving that the requested information must be withheld under the stated exception). In this instance, the authority has provided no arguments explaining how section 552.104 is applicable to the information at issue. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why claimed exceptions to disclosure apply). Thus, no portion of the submitted information may be withheld under section 552.104.

The authority also asserts that a portion of the submitted information may contain information subject to section 552.136 of the Government Code. Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Upon review, we find no portion of the submitted information constitutes a credit card, debit card, charge card, or access device number for the purposes of section 552.136 of the Government Code. Accordingly, no portion of the submitted information may be withheld under section 552.136.

We understand Gilbert Tweed to assert that a portion of its information is confidential because the information at issue was submitted with the expectation of confidentiality. 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.

Gilbert Tweed asserts the submitted information is excepted from disclosure under section 552.110 of the Government Code. Although the authority also argues that the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the authority's argument under section 552.110. 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 it was obtained. *Id.* § 552.110. 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

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).

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 note that information pertaining to a particular contract is generally not a trade 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." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Gilbert Tweed contends that portions of its submitted information constitute trade secrets as well as commercial or financial information excepted from disclosure under section 552.110. We note that Gilbert Tweed has listed some of its clients in other portions of its proposal that it does not seek to withhold. We also note Gilbert Tweed publishes the identities of some of its clients on its website. In light of Gilbert Tweed's publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. Upon review of the submitted information and Gilbert Tweed's arguments, we conclude that Gilbert Tweed has failed to establish a *prima facie* case that any of the submitted information is a trade secret protected by section 552.110(a), and it may not be withheld on that basis. *See* ORD 402. We note that pricing information pertaining to a particular proposal or contract is generally not a trade 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). Moreover, we find that Gilbert Tweed has made only conclusory allegations that release of the submitted information would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* ORD 319 at 3 (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, or qualifications and experience). Furthermore, we note that the submitted contract was awarded to Gilbert Tweed by the authority. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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 authority may not withhold any of the submitted information under section 552.110(b). As you raise no further exceptions to disclosure of this information, it must be released in its entirety.

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_ori.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, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 376575

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Ms. Stephanie L. Pinson
President
Gilbert Tweed Associates, Inc.
415 Madison Avenue
New York, New York 10017
(w/o enclosures)