



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2010

Mr. Kyle Verret
Assistant Criminal District Attorney
County of Brazoria
111 East Locust, Suite 408A
Angleton, Texas 77515

OR2010-07478

Dear Mr. Verret:

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# 380467.

The Brazoria County Purchasing Agent (the "county") received a request for (1) all responses to a Request for Statement of Qualifications for a specified energy efficiency grant; (2) responses to a related questionnaire; (3) the evaluation form and tally sheets or documents used to rate the responses; and (4) the award contract and supporting documents. Although you raise no exceptions for the submitted information, we understand you to state that release of this information may implicate the proprietary interest of Camp, Dresser, & McKee, Inc. ("CDM"). You further state you are forwarding CDM's arguments against disclosure of its information. *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.

Initially, we note that the county has not submitted the responses submitted by third parties other than CDM or the requested evaluation documents. To the extent such information existed at the time of the present request for information, we presume the county has released it. If not, the county must do so at this time. *See Gov't Code §§ 552.301, .302.*

Next, we must address the county's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(a), (b). Under section 552.301(e), a governmental body is required to submit to

this office within fifteen business days of receiving an open records request (1) 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 id.* § 552.301(e). In this instance, the county received the request for information on January 13, 2010, but did not request a ruling or submit the requested information for our review until March 17, 2010. Consequently, we find that the county failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records Decision No. 150 (1977). Because the interests of a third party are at stake, we will consider CDM's arguments for the submitted information.

CDM asserts that its information is excepted from disclosure pursuant to federal copyright law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, including federal law. However, we note that generally copyright law does not make information confidential but instead gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. *See* Open Records Decision No. 660 at 5 (1999). A governmental body must allow inspection of copyrighted materials by a member of the public unless an exception to required public disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987) at 2-3. In making copies, however, 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).

Section 552.110 of the Government Code 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. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property 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" 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 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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.¹ *See Open Records Decision No. 402 (1983)*.

Section 552.110(b) of the Government Code excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that

¹The 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 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)*.

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

CDM seeks to withhold portions of the submitted information under section 552.110 of the Government Code. Upon review of the submitted information and arguments, however, we find that CDM has not demonstrated that any of its information constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. Accordingly, we find that none of the submitted information is excepted from public disclosure under section 552.110(a) of the Government Code.

We also find that CDM has failed to provide specific factual evidence demonstrating that release of any of the submitted information would result in substantial competitive harm to the company. *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), 319 at 3 (1982) (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). Thus, we conclude that the county may not withhold any of the submitted information under section 552.110(b) of the Government Code. As no other exceptions to disclosure are raised, the submitted information must be released, but any information protected by copyright 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, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/em

Ref: ID# 380467

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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