



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2010

Ms. Beth Maroney
Paralegal
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2010-08506

Dear Ms. Maroney:

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# 382374 (CO SA File No. ORR 10-0448).

The City of San Antonio (the "city") received a request for all contractor responses to the Requests for Proposals numbered 40-00175, 04-4000108, and 20-00006 for Construction Manager-at-Risk services. Although you take no position as to the public availability of the submitted proposals, you state their release may implicate the proprietary interests of Guido Brothers Construction Company, Inc. ("Guido"), C.A. Landry Partners ("Landry"), Bartlett Cocke, L.P. ("Cocke"), F.A. Nunnelly Company ("Nunnelly"), and SpawGlass Contractors, Inc. ("SpawGlass"). Thus, pursuant to section 552.305 of the Government Code, you notified Guido, Landry, Cocke, Nunnelly, and SpawGlass of the request and of the companies' right to submit arguments to this office as to why their information should not be released. 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 in certain circumstances). We have received comments submitted by an attorney representing Guido. We have reviewed the submitted information.

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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Landry, Cocke, Nunnelly, or SpawGlass explaining why any portion of those companies' submitted information should not be released. Therefore, we have no basis to conclude Landry, Cocke, Nunnelly, or SpawGlass have any protected proprietary interest in their submitted information. *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. Consequently, the city may not withhold any portion of the proposals pertaining to Landry, Cocke, Nunnelly, or SpawGlass on the basis of any proprietary interest those companies may have in that information.

Guido asserts some of the information in its submitted proposal 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: (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.” See 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 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 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 ORD 552 at 5. 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 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 (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).

Guido raises section 552.110(a) for the portions of its proposal that contain details regarding its project management methods and services, the identities of its former customers, and information about its policies, efforts, and programs the company uses to promote diversity. Upon review, we marked the portions of Guido's proposal that reflect specific processes and methodologies used by the company to manage its projects and promote diversity. We find Guido has adequately demonstrated this information is a trade secret, and the city must withhold the marked information under section 552.110(a) of the Government Code. We also marked most of Guido's customer information in the proposal, which the city must also withhold under section 552.110(a). However, Guido has made the remainder of the customer information it seeks to withhold publicly available on its website. Because Guido has published this customer information, we conclude the company has failed to demonstrate it considers this information to be a trade secret. *See* ORD 402. The remaining information Guido seeks to withhold under section 552.110(a) consists of general statements as to Guido's qualifications and information regarding the company's personnel and experience. Guido has not explained how this remaining information meets the definition of a trade secret. *See* ORDs 552, 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Accordingly, none of the remaining information may be withheld under section 552.110(a).

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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Guido contends its remaining customer information, the information regarding the company's qualifications, personnel, and experience, as well as the submitted auditor and accountant reports, are protected by section 552.110(b). However, Guido merely provides conclusory statements that release of this information would cause the company substantial competitive injury. Thus, we find Guido has not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORD 661 at 5-6. Accordingly, none of the remaining information may be withheld under section 552.110(b).

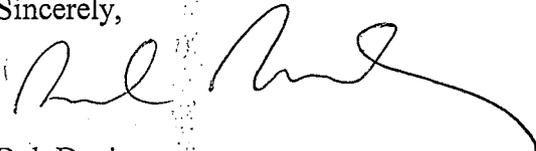
Finally, we note the remaining information contains documents protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* 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).

In summary, the city must withhold the information we marked under section 552.110(a) of the Government Code. The remaining information must be released, but any copyrighted information must 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

Ref: ID# 382374

Enc. Submitted documents

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