



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 19, 2010

Ms. Bertha A. Ontiveros  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901

OR2010-10718

Dear Ms. Ontiveros:

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# 386978.

The City of El Paso (the "city") received two requests for the winning bidder's response to solicitation number 2010-062R. You indicate the submitted proposal may be excepted under sections 552.101, 552.104, and 552.110 of the Government Code, but take no position as to whether this information is excepted under those sections. You also explain that the submitted information may contain a third party's proprietary information subject to exception under the Act. Accordingly, you have notified L. Hicks, Inc. ("Hicks") of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have reviewed the submitted information. We have also considered comments received from Hicks.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and (2) "[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(a)-(b).

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 the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>1</sup> Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* 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

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<sup>1</sup>The 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).

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.*; *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).

Upon review of Hicks’ arguments and the information at issue, we find that Hicks has made a *prima facie* case that a portion of its information, which we have marked, is protected as trade secret information. Thus, the city must withhold this information under section 552.110(a). However, we conclude that Hicks has failed to establish a *prima facie* case that any of the remaining information at issue is a trade secret protected by section 552.110(a). *See* Open Records Decision Nos. 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), 402. Therefore, none of the remaining information may be withheld under section 552.110(a).

Additionally, we find that Hicks has made only conclusory allegations that the release of any of their remaining information would result in substantial damage to the company’s competitive position. *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). Furthermore, Hicks is the winning bidder for the contract at issue. 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, none of the remaining information may be withheld under section 552.110(b).

Next, we note that Hicks informs us that some of its references contain peace officers’ home telephone numbers. Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b).<sup>2</sup> We have marked phone numbers in the submitted information. If these individuals are licensed peace officers as defined by Article 2.12, Code of Criminal Procedure, and elect to restrict access to their information in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 to the extent these numbers are the peace officers' home telephone numbers. The city may not withhold this information under section 552.1175 if these individuals are not licensed peace officers, if the individuals do not make an election under section 552.1175(b), or if the telephone numbers are not the officers' home telephone numbers.

Finally, Hicks informs us that some of the remaining information is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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 of the Government Code. If the information we marked under section 552.1175 relates to home telephone numbers of individuals who are licensed peace officers as defined by Article 2.12, Code of Criminal Procedure, and elect to restrict access to their information in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175. The remaining information must be released, but any information subject to copyright must be released in accordance with copyright law.

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<sup>2</sup>Although Hicks claims the information is subject to section 552.117 of the Government Code, section 552.1175 of the Government Code is the proper exception for this information.

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](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,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/tp

Ref: ID# 386978

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

Mr. Lew Hicks  
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(w/o enclosures)