



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 24, 2011

Mr. Victor Morales  
Procurement Director  
Lower Rio Grande Valley Development Council  
311 North 15th Street  
McAllen, Texas 78501-4705

OR2011-02790

Dear Mr. Morales:

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# 409918.

The Lower Rio Grande Valley Development Council (the "council") received two requests for information pertaining to RFP#B091029. The first requestor seeks all vendor proposals, evaluation scoring sheets, meeting minutes, records, notes, correspondence, emails, drafts, studies, analyses, and other documents pertaining to the vendor selection process conducted under the RFP; the second requestor seeks all submittals, scoring, and evaluation comments for the RFP. Although you take no position as to whether the submitted information is excepted under the Act, we understand you to believe release of the submitted information may implicate the proprietary interests of Beck Disaster Recovery, Inc. ("BDR"), Shaw Environmental & Infrastructure, Inc. ("Shaw"), Gonzalez & Arrambide, Inc., URS Corporation, Camp Dresser & McKee Inc., and ACS. Accordingly, we understand you notified the third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *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 received comments from BDR and Shaw. We have considered the submitted comments and reviewed the submitted information.

Initially, we note a portion of the submitted information is not responsive to the first request because it was created after the date the council received the request for information. We

also note the second request seeks only the submittals, scoring, and evaluation comments relating to the RFP. Accordingly, any information that does not consist of the submittals, scoring, and evaluation comments is not responsive to the second request. This ruling does not address the public availability of any information that is not responsive to the request and the council is not required to release such information in response to this request.

Next, we must address the council's obligations under section 552.301 of the Government Code, which prescribes the procedures 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* Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general 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). The submitted information indicates the council received the first request for information on October 28, 2010 and the second request for information on November 16, 2010. Accordingly, you were required to request a decision from this office by November 12, 2010 for the first request and December 2, 2010, and to submit the information required by section 552.301(e) by November 19, 2010 for the first request and December 9, 2010 for the second request. However, you did not request a ruling from this office until December 15, 2010, and you did not submit information to this office until February 3, 2011. Furthermore, we note that as of the date of this ruling, the council has only submitted portions of the responsive information for our review. Accordingly, we conclude the council failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision Nos. 630 (1994), 586 (1991), 319 (1982). This office has held a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). Because third-party interests are at stake, we will address

the arguments provided to this office by BDR and Shaw for the submitted information.<sup>1</sup> We also note portions of the submitted information may be subject to sections 552.117, 552.136, and 552.137 of the Government Code, which also provide compelling reasons to withhold information. Accordingly, we will also consider the applicability of these sections to the submitted information.

Next, we note that 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, this office has not received comments from the remaining third parties explaining why each third party's submitted information should not be released. Therefore, we have no basis to conclude that these third parties have a protected proprietary interest in the 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. Accordingly, the council may not withhold any portion of the submitted proposals based upon the proprietary interests of the remaining third parties.

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 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 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 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

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<sup>1</sup>We note BDR asserts that information it identifies as its "Narrative of Proposed Program" and "Pricing and Financial Statements" is confidential. However, the council has not submitted this information for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Accordingly, we are unable to address BDR's arguments with respect to this information. If BDR believes this information is confidential and may not lawfully be released, BDR must challenge this ruling in court pursuant to section 552.3215 of the Government Code.

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 776 (Tex. 1958). 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.<sup>2</sup> 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 note that pricing 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).

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.*; *see also* ORD 661 at 5.

Upon review, we find that neither BDR nor Shaw has established a *prima facie* case that any portion of the responsive information constitutes a trade secret protected by section 552.110(a). Accordingly, the council may not withhold any of the information at issue under section 552.110(a) of the Government Code.

Upon review, we find that Shaw has made the specific factual or evidentiary showing that its pricing information and portions of its client information constitute commercial or

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<sup>2</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 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).

financial information the release of which would cause it substantial competitive injury under section 552.110(b). Accordingly, the council must withhold this information, which we have marked, under section 552.110 of the Government Code. However, upon review, we conclude that neither BDR nor Shaw have made the specific factual or evidentiary showing required by section 552.110(b) that the release of any of the remaining responsive information would cause substantial competitive harm. *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 (because costs, bid specifications, and circumstances would change for future contracts, assertions that release of bid proposal might give competitor unfair advantage on future contracts was entirely 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). In addition, Shaw has made some of the client information it seeks to withhold publicly available on its website. Because Shaw itself published this information, we are unable to conclude such information is proprietary. Therefore, the council may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The council may only withhold information under section 552.117(a)(1) if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, the council must withhold the cellular telephone numbers we have marked pursuant to section 552.117(a)(1) if the employees concerned timely elected to keep the marked information confidential under section 552.024 and if the employees concerned paid for the cellular telephone service with their own funds. If the employees whose cellular telephone numbers we marked either did not make a timely request for confidentiality or did not pay for the cellular telephone service, the information at issue may not be withheld under section 552.117.

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We note the remaining information contains insurance policy numbers. Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are “access device” numbers for purposes of section 552.136. Thus, the council must generally withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. We note, however, that the second requestor has a right of access to her company’s own insurance policy numbers. *See id.* § 552.023 (person or person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4. Accordingly, the council may not withhold the second requestor’s company’s insurance policy numbers from her. The remaining insurance policy numbers must be withheld from both requestors.

We note the remaining information contains the e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137(c) excludes e-mail addresses provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent, those contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract. *See id.* § 552.137(c). We also note section 552.137 is not applicable to an e-mail address of a person who has a contractual relationship with a governmental body or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the council must withhold the marked e-mail addresses under section 552.137, unless the owners have affirmatively consented to their release. *See id.* § 552.137(b).

We note that some of the materials at issue may be 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the council must withhold the information we have marked under section 552.110 of the Government Code from Shaw’s proposal. The council must withhold the cellular telephone numbers we marked under section 552.117(a)(1) of the Government

Code if the employees at issue timely elected confidentiality under section 552.024 of the Government Code and paid for the cellular telephone service with their own funds. The council must generally withhold the insurance policy numbers we marked under section 552.136 of the Government Code, except that it must release the second requestor's company's insurance policy numbers to her. The council must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.<sup>4</sup> The remaining responsive information must be released, but any copyrighted information may only be released in accordance with copyright laws.

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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/em

Ref: ID# 409918

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

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<sup>4</sup>We note Open Records Decision No. 684 (2009) was issued as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code and e-mail addresses of members of the public, under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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