



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2011

Mr. David Timberger
Division Director - General Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2011-07773

Dear Mr. Timberger:

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# 419367 (Commission PIR No. 11.03.15.13).

The Texas Commission on Environmental Quality (the "commission") received a request for the response submitted by RFD & Associates, Inc. ("RFD") to the Scope of Work for the Permit and Registration Information System, Deliverable Based Information Technical Services, Solicitation No. 582-10-94200. You state the commission has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You state that release of the submitted information may implicate the proprietary interests of RFD. Accordingly, you state, and provide documentation showing, you notified RFD of the 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); *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 RFD. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note RFD seeks to withhold information that the commission has not submitted for our review. This ruling does not address information beyond what the commission has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the commission submitted as responsive to the request for information. *See id.*

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. The commission raises section 552.101 in conjunction with the federal Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552. FOIA applies to an "agency," which is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]" *See* 5 U.S.C. § 552a(a)(1) (referring to 5 U.S.C. § 552(e) for definition of "agency"). In this instance, the information at issue was created for and is maintained by the commission, which is a state, and not a federal, agency. This office and the courts have stated FOIA applies only to federal agencies and not to state or local agencies. *See Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments not subject to FOIA); Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). Accordingly, the commission may not withhold the submitted information under section 552.101 in conjunction with FOIA.

Also, the commission generally argues, under section 552.101, that release of the submitted information "would likely result over all in a lessening of competition, and an undermining of the solicitation process, all to the detriment of the state." Further, the commission asserts that if required to release the information at issue "RFD may elect not to participate in any future solicitation . . . and that would be a loss for the agency." However, despite these general arguments, the commission has failed to direct our attention to any statute, nor are we aware of any, that would make any of the submitted information confidential under section 552.101. Therefore, the commission may not withhold any portion of the submitted information under section 552.101.

RFD raises section 552.104 of the Government Code as an exception to disclosure for its proposal. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the commission does not seek to withhold any information pursuant to section 552.104, no portion of RFD's information may be withheld on this basis.

Next, we address the submitted arguments under section 552.110 of the Government Code. Although the commission argues the submitted information is excepted from disclosure 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 will only address RFD's arguments under section 552.110.

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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and

(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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 2 (1990). 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).

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); Open Records Decision No. 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).

RFD raises section 552.110(a) for portions of its submitted statement of work. After reviewing the submitted information and arguments, we find that RFD has made a *prima facie* case that some of its client information, which we have marked, constitutes trade secret information. We note, however, that RFD publishes the identities of some of its clients on its website. In light of RFD’s own publication of such information, we cannot conclude that the identities of these clients qualify as trade secrets. Furthermore, we determine that RFD has failed to demonstrate that any portion of the remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the commission must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code.

Upon review of RFD’s arguments under section 552.110(b), we find that RFD has made only conclusory allegations that the release of any of its remaining information would result in substantial damage to the company’s competitive position. Thus, RFD has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *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).

Accordingly, none of RFD's remaining information may be withheld under section 552.110(b) of the Government Code.

In summary, the commission must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 419367

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(Documents submitted by third party enclosed)