



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 19, 2011

Ms. Janie Willman
City Secretary
City of Leon Valley
6400 El Verde Road
Leon Valley, Texas 78238

OR2011-13535

Dear Ms. Willman:

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# 430568.

The City of Leon Valley (the "city") received a request for all proposals submitted in response to a specified request for proposals ("RFP"), including the awarded bid, and information related to the tabulation of vendor scores and the RFP process. You claim the submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code. You also state release of this information may implicate the proprietary interests of certain third parties. Accordingly, you state, and provide documentation showing, 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.¹ 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 arguments from Frost. We have considered the submitted arguments and reviewed the submitted information.

¹The third parties notified pursuant to section 552.305 are: Alamo Insurance Group; The Benefits Source, Inc.; Frost Insurance Agency, Inc. ("Frost"); Gallagher Benefit Services, Inc.; Strategic Benefit Solutions, PLLC; Villareal Insurance Agency, L.L.C.; Willis Group Holdings Limited; and Wortham Insurance & Risk Management.

We note 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 only received comments from Frost. We, thus, have no basis for concluding any portion of the submitted information constitutes the proprietary information of any of the remaining third parties. *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 submitted information on the basis of the proprietary interests of any of the remaining third parties.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978) (section 552.104 no longer applicable when bidding had been completed and contract is in effect). You indicate release of portions of the submitted information would give advantage to a competitor or bidder. Beyond this general assertion, you have not provided specific arguments explaining how releasing the information at issue will compromise the bidding process. Consequently, we conclude the city may not withhold the information at issue under section 552.104 of the Government Code.

Frost raises section 552.110 of the Government Code for its submitted information. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 provides that 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 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 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 Huffines*, 314 S.W.2d at 776. 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim 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 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. *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 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 (to prevent disclosure of commercial or financial information, party must show by specific factual

²The 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).

evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Frost states its information consists of trade secrets under section 552.110(a) of the Government Code. Upon review, we find Frost has failed to demonstrate any portion of its submitted information meets the definition of a trade secret, nor has the company demonstrated the necessary factors to establish a trade secret claim for its information. Accordingly, the city may not withhold any of the information at issue under section 552.110(a) of the Government Code.

Frost contends some of its information is excepted under section 552.110(b) of the Government Code. Upon review, we conclude Frost has established release of its pricing information would cause the company substantial competitive injury. Therefore, the city must withhold the information we have marked under section 552.110(b). However, we find Frost has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications, and experience). We, therefore, conclude the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note portions of the remaining information are subject to section 552.136 of the Government Code, which provides 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.”³ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for purposes of section 552.136. We conclude the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note a portion of the remaining information appears to 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.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the city must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The city must release the remaining information, but any information that is 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 430568

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Richard J. Reynolds IV
Associate Corporate Counsel
Frost
P.O. Box 1600
San Antonio, Texas 78296-1600
(w/o enclosures)

Mr. Gary Looney
Alamo Insurance Group
3201 Cherry Ridge Drive, Suite D405
San Antonio, Texas 78230
(w/o enclosures)

Ms. Lisa Nava
The Benefits Source, Inc.
Suite 510
4715 Fredericksburg Road
San Antonio, Texas 78229
(w/o enclosures)

Mr. Ron Luster
Willis
Suite 500
920 Memorial City Way
Houston, Texas 77024
(w/o enclosures)

Ms. Jenni Haff
Wortham Insurance
131 Interpark Boulevard
San Antonio, Texas 78216
(w/o enclosures)

Mr. Matt Stedman
Gallagher Benefit Services, Inc.
601 NW Loop 410, Suite 325
San Antonio, Texas 78216
(w/o enclosures)

Mr. Kent Scherzinger
Strategic Benefit Solutions, P.L.L.C.
8555 Laurens Lane, Suite 301
San Antonio, Texas 78218
(w/o enclosures)

Mr. James R. Villarreal
Villarreal Insurance Agency, L.L.C.
7272 Wurzbach Road, Suite 106
San Antonio, Texas 78240
(w/o enclosures)