



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2012

Mr. Julian W. Taylor, III
Counsel for the City of Freeport
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OR2012-07615

Dear Mr. Taylor:

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# 454142.

The City of Freeport (the "city"), which you represent, received a request for information pertaining to a specified request for proposals. You claim the submitted information is excepted from disclosure under sections 552.110 and 552.136 of the Government Code.¹ Additionally, you state the submitted information may implicate the proprietary interests of third parties. Accordingly, you notified O'Brien's Response Management, Inc. ("O'Brien's") and Yates Construction Inc. ("Yates") of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* 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 the Act in certain

¹The city did not raise section 552.136 of the Government Code as an exception to disclosure within ten business days of the date the city received the request. *See* Gov't Code §§ 552.301(b), .302. However, because section 552.136 is a mandatory exception that can provide a compelling reason to withhold information from disclosure, we will consider your claim under section 552.136, notwithstanding the city's violation of section 552.301(b) in raising this exception. *See id.* § 552.302.

circumstances). We have received comments from O'Brien's and Yates. We have considered the submitted arguments and reviewed the submitted information.

Initially, you contend the instant request for information was not a valid request for purposes of the Act. You state that the instant request was submitted by e-mail to an employee of the fire department. Section 552.301(c) of the Government Code provides that "a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission." Gov't Code § 552.301(c). You state that the fire department employee who received the instant request is neither the city's public information officer nor a person authorized by the public information officer to receive a request submitted by e-mail. Nevertheless, you explain the employee forwarded the e-mail request the city manager, a person that has been designated to receive e-mail and fax requests under the Act. Furthermore, you have requested a decision on the submitted information and otherwise treated the instant request as having been properly submitted. Accordingly, we will determine whether the information at issue is excepted from disclosure.²

O'Brien's raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. However, O'Brien's has not directed our attention to any law, nor are we aware of any law, under which any of the submitted information is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold any of O'Brien's information under section 552.101 of the Government Code.

O'Brien's, Yates, and the city raise section 552.110 of the Government Code. Although the city argues the submitted information is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city'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. *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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

²In the future, the requestor should submit any e-mailed requests to the city's chief administrative officer or his designee as required by section 552.301(c) of the Act.

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.³ 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).

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* Open Records Decision No. 661

³The 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).

at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

O'Brien's and Yates claim portions of their proposals are confidential under section 552.110(a) of the Government Code. Upon review, we find that Yates has established a *prima facie* case that some of its customer information, which we have marked, constitutes trade secrets. Therefore, the city must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note that Yates has published the identities of many of its customers on its website. Thus, Yates has failed to demonstrate that the information it has published on its website is a trade secret. Further, O'Brien's and Yates have failed to demonstrate that any of the remaining information at issue meets the definition of a trade secret, nor has either party demonstrated the necessary factors to establish a trade secret claim for this information. We note that 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); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

O'Brien's and Yates claim portions of their respective proposals are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find that O'Brien's has established that the pricing information we have marked constitutes commercial or financial information, the release of which would cause the companies substantial competitive harm. Therefore, the city must withhold the information we have marked under section 552.110(b) of the Government Code. We note the contract at issue was awarded to Yates. This office considers the price 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* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We therefore find the city may not withhold any of Yates's pricing information under section 552.110(b) of the Government Code. Furthermore, as previously noted, because Yates published its remaining customer information on its website, it has failed to demonstrate how release of this information would cause the company substantial competitive harm. Additionally, we find O'Brien's and Yates have made only conclusory allegations that the release of the remaining information they seek to withhold would result in substantial damage to their competitive positions. Thus, O'Brien's and Yates have not demonstrated that substantial competitive injury would result from the release of any of the remaining information. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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), 319 at 3 (information relating to

organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of the remaining information may be withheld under section 552.110(b).

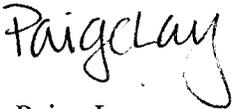
Section 552.136 of the Government Code provides in part that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

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.

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,



Paige Lay
Assistant Attorney General
Open Records Division

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⁴We note section 552.136(c) of the Government Code authorizes a governmental body to redact from the requested information it discloses, without the necessity of requesting a decision from this office, a credit card, debit card, charge card, or access device number. Gov’t Code § 552.136(c) (governmental body may redact information described by subsection 552.136(b) from any information the governmental body discloses without necessity of requesting decision from attorney general); *see id.* § 552.136(d) (entitling requestor to appeal governmental body’s decision to withhold information pursuant to section 552.136(c) to attorney general); *id.* § 552.136(e) (requiring governmental body that withholds information pursuant to section 552.136(c) to provide notice to requestor).

Ref: ID# 454152

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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