



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2012

Mr. Shaun Davis
Executive Director
South East Texas Regional Planning Commission
2210 Eastex Freeway
Beaumont, Texas 77703-4929

OR2012-09276

Dear Mr. Davis:

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# 456575.

The South East Texas Regional Planning Commission (the "commission") received a request for the winning proposal submitted in response to a specified request for proposals. We understand you to claim the submitted information is excepted by sections 552.101, 552.110, and 552.131 of the Government Code. In addition, you state release of the requested information may implicate the proprietary interests of URS Corporation ("URS"). Accordingly, you provide documentation showing you have notified URS of the request and its right to submit arguments to this office. *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 URS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the commissions' procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving the request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See Gov't Code § 552.301(b).* In this instance, you indicate the commission received the request for information on March 26, 2012. Accordingly, the ten-business-day deadline was

April 9, 2012. The commission's request for a decision, however, reflects it was mailed to us on April 11, 2012. *See id.* § 552.308(a) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the commission failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists 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, 381-82 (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 No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Although you raise section 552.131 of the Government Code, we note this is a discretionary exception that protects, in part, a governmental body's interests, and it may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the commission may not withhold any of the submitted information under section 553.131. However, a third party's assertion of section 552.110 of the Government Code and your assertion of section 552.101 of the Government Code can provide compelling reasons to withhold information. Therefore, we will consider the applicability of those exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. While the commission generally asserts the submitted information is subject to section 552.101, you have not directed our attention to any confidentiality provision that would make any of the submitted information confidential under section 552.101. *See, e.g.,* 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 commission may not withhold any portion of the submitted information under section 552.101 of the Government Code.

The commission raises section 552.110 of the Government Code. We note section 552.110 is designed to protect the interests of third parties, such as URS, not the interests of a governmental body. Thus, we do not address the commission's claims under section 552.110 of the Government Code.

URS also raises section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure (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 a "trade secret" from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 defines 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) (citation omitted); *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.¹ This office will accept a claim that information subject to the Act is excepted as a trade secret under section 552.110(a) if a *prima facie* case for the exception is made, and no one submits an argument 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. 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

¹ 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; *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. *See* Open Records Decision No. 661 at 5-6 (1999) (business must show by specific factual evidence that release of particular information at issue would cause substantial competitive injury).

Upon review, we find URS has failed to demonstrate the information it seeks to withhold meets the definition of a trade secret. *See* Open Records Decision Nos. 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 was entirely too speculative), 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). We note 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 business,” rather than “a process or device for continuous use in the operation of the business.” *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Accordingly, the commission may not withhold any of the submitted information under section 552.110(a).

We also find URS has failed to establish by a factual or evidentiary showing that release of the information at issue would cause the company substantial competitive injury. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue). Further, we note the pricing information of entities contracting with a government body 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 344-45 (2009) (federal cases apply analagous reasoning under Freedom of Information Act to find disclosure of prices charged government is a cost of doing business). Therefore, the commission may not withhold any of the submitted information under section 552.110(b). As no additional exceptions to disclosure are raised, the submitted information must be released to the requestor.

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,



Misty Haber Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 456575

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Mr. Mark A. Howard
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