ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2014

Ms. Elaine Nicholson
Assistant City Attorney
Law Department
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2014-02502

Dear Ms. Nicholson:

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# 513663.

The City of Austin (the "city") received a request for the list of bidders and their pricing related to RFP 1100 TVN0029. Although you take no position on the public availability of the submitted information, you state the release of the submitted information may implicate the proprietary interests of a third party. Accordingly, you inform us, and provide documentation showing, you notified the Institute for Building Technology & Safety ("IBTS") of the request and of the company's right to submit comments to this office as to why the submitted information should not be released to the requestor. *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 circumstances). We have received comments from IBTS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have only submitted information pertaining to one bidder. To the extent information responsive to the remainder of the request existed on the date the city received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested

information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, you acknowledge, and we agree, the city did not comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision. *See id.* § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 of the Government Code results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *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); *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. Open Records Decision No. 150 at 2 (1977). Because third party interests can provide a compelling reason to withhold information, we will consider whether any of the responsive information may be excepted under the Act.

Next, we note IBTS argues against the release of information that was not submitted by the city. This ruling does not address information that was not submitted by the city and is limited to the information the city has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

IBTS raises section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. However, IBTS 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). Accordingly, none of the submitted information may be withheld on that basis.

IBTS raises section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the city, not the proprietary interests of private parties such as IBTS. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the city does not raise section 552.104 as an exception to disclosure. Therefore, the city may not withhold any of the submitted information under section 552.104 of the Government Code.

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, 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 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.[1] 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* Open Records Decision No. 552 at 5 (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).

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[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 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; *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) of the Government Code 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 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).

IBTS asserts its submitted information contains trade secrets. Upon review, we find IBTS has failed to demonstrate any of its submitted information meets the definition of a trade secret, nor has IBTS demonstrated the necessary factors to establish a trade secret claim for this information. We further note pricing information pertaining to a particular proposal or 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." *See* RESTATEMENT OF TORTS § 757 cmt. b; *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Accordingly, the city may not withhold any of IBTS's information under section 552.110(a) of the Government Code.

IBTS contends some of its information is commercial or financial information, release of which would cause substantial competitive harm to the company. Upon review, we find IBTS has established some of its submitted information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the city must withhold the information we have marked under section 552.110(b) of the Government Code. However, upon review, we find IBTS has not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

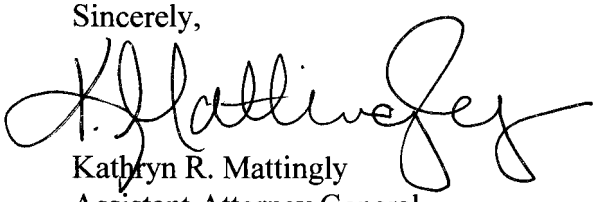
In summary, the city must withhold the information we have marked under section 552.110(b) of the Government Code. The city must release the remaining information to the requestor.

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.texasattorneygeneral.gov/open/

orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 513663

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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