



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 8, 2014

Ms. Linda L. Sjogren  
City Attorney  
City of Big Spring  
310 Nolan Street  
Big Spring, Texas 79720-2657

OR2014-05792

Dear Ms. Sjogren:

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# 519045.

The City of Big Spring (the "city") received a request for the winning proposal submitted in response to a specified RFP for oil and gas production. You claim the submitted information is excepted from disclosure under sections 552.104, 552.110, and 552.113 of the Government Code. You also state release of this information may implicate the proprietary interests of Veritas 321 Energy Partners, L.P. ("Veritas"). Accordingly, you state and provide documentation showing, you have notified Veritas of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments from Veritas. We have considered the submitted arguments and reviewed the submitted information.

The city and Veritas both raise section 552.104 of the Government Code. However, section 552.104 only protects the interests of a governmental body and does not protect the

interests of third parties; therefore, we will not consider Veritas' claims under section 552.104. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated that the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates that public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (1982) (suggesting such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

You raise section 552.104 of the Government Code for the information you have marked. You inform us that, although the contract arising from this specific competitive procurement has been awarded, the city's purchasing department is actively preparing a second request for proposals soliciting bids for identical production on a different tract of city-owned mineral acreage. You state release of the information you have marked "would create a potential harm to the [c]ity's interest in procuring the best possible proposals on the imminent second RFP for [o]il and [g]as [p]roduction on other city lands." Based on your representations and our review of the information at issue, we agree the city may withhold the information you have marked under section 552.104 of the Government Code.<sup>1</sup>

Both the city and Veritas claim portions of the remaining information are subject to section 552.113 of the Government Code, which provides in relevant part:

(a) Information is excepted from the requirements of [required public disclosure] if it is:

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<sup>1</sup>As our ruling is dispositive for this information, we do not address Veritas' arguments against its disclosure.

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(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

Gov't Code § 552.113(a)(2). In Open Records Decision No. 627 (1994), this office concluded section 552.113(a)(2) protects from public disclosure only (I) geological and geophysical information regarding the exploration or development of natural resources that is (ii) commercially valuable. ORD 627 at 3-4 (overruling rationale of Open Records Decision No. 504 (1988)). The decision explained the phrase "information regarding the exploration or development of natural resources" means "information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation." *Id.* at 4 n.4. However, section 552.113(a)(2) does not except general geological information about a particular location that is unrelated to the "presence or absence of natural resources." In order to be commercially valuable for purposes of Open Records Decision No. 627 and section 552.113, information must not be publicly available. Open Records Decision No. 669 (2000).

Upon review, we agree the information we have marked is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the city must withhold the information we have marked pursuant to section 552.113 of the Government Code.<sup>2</sup> However, we find none of the remaining information at issue is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the city may not withhold any of the remaining information at issue under section 552.113.

Although the city argues the submitted information is excepted under section 552.110 of the Government Code, this section is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city's argument under section 552.110. However, we will discuss Veritas' arguments under section 552.110. 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, 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

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<sup>2</sup>As our ruling is dispositive for this information, we do not address the remaining arguments against its disclosure.

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.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b. 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 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). We note pricing 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; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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

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<sup>3</sup>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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

§ 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 (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).

Upon review, we find Veritas has failed to establish a *prima facie* case that any portion of the remaining information meets the definition of a trade secret. We further find Veritas has failed to demonstrate the necessary factors to establish a trade secret claim for the remaining information. *See* ORDs 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); 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted under section 552.110). 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 the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Consequently, the city may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Furthermore, we find Veritas has made only conclusory allegations that the release of any of the remaining information would result in substantial harm to its competitive position. Thus, we find Veritas has failed to demonstrate the release of any of the remaining information would cause it substantial competitive harm. *See* ORDs 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 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Accordingly, the city may not withhold any of the remaining information under section 552.110(b).

Veritas also claims the remaining information is subject to section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

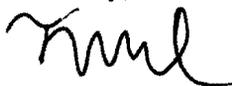
Gov't Code § 552.131(a)-(b). We note the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because we have already disposed of Veritas' claims for the information at issue under section 552.110, the city may not withhold any of the submitted information under section 552.131(a) of the Government Code. We note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the city does not assert section 552.131(b) as an exception to disclosure, we conclude no portion of the submitted information is excepted under section 552.131(b) of the Government Code.

In summary, the city may withhold the information you have marked under section 552.104 of the Government Code. The city must withhold the information we have marked under section 552.113 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



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Assistant Attorney General  
Open Records Division

TN/bhf

Ref: ID# 519045

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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