



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2014

Ms. Lisa D. Mares
Counsel for the City of McKinney
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2014-17826

Dear Ms. Mares:

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# 538418 (McKinney ID No. 10-11083).

The City of McKinney (the "city"), which you represent, received a request for four specified bids submitted in response to a specified request for proposals involving depository services. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Wells Fargo Bank, N.A. ("Wells Fargo"); JPMorgan Chase Bank, N.A. ("JPMorgan"); LegacyTexas Bank ("Legacy"); and Prosperity Bank ("Prosperity"). Accordingly, you state, and provide documentation showing, you notified these 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. *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 JPMorgan, Legacy, and Prosperity. We have considered the submitted arguments, as well as the exceptions you claim, and reviewed the submitted information.

Initially, we note some of the submitted information, which we have indicated, is not responsive to the instant request because it is not one of the four specified bids requested by the requestor. This ruling does not address the public availability of any information that is

not responsive to the request and the city is not required to release such information in response to this request.

The city, Prosperity, and JPMorgan all argue the submitted information is excepted under section 552.104 of the Government Code. 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 Prosperity's or JPMorgan's claims under section 552.104. *See* Open Records Decision No. 592 at 8 (1991). However, we will address the city's claim under section 552.104 for the submitted information. Section 552.104 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 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). 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). Section 552.104 generally does not except information relating to competitive bidding after a contract has been awarded and executed. *See* Open Records Decision No. 541 (1990). However, this office has determined that in some circumstances section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5.

In this instance, you inform us the bid has been awarded by the city, and the contract has been finalized and executed. However, you also argue disclosure of the submitted information will allow competitors to undercut future bids when the city solicits bids for the same or similar services. Upon review, we find you have not demonstrated how release of the submitted information will harm the city's interest in a particular competitive situation. Accordingly, the city may not withhold any of the submitted information under section 552.104 of the Government Code.

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 JPMorgan, Legacy, and Prosperity explaining why their submitted information should not be released. Therefore, we have no basis to conclude Wells Fargo has a protected proprietary interest in the submitted information. *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. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest Wells Fargo may have in the information.

Although the city argues the submitted information is excepted under section 552.110 of the Government Code, 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 argument under section 552.110. However, we will address the third parties' arguments that some of their information is excepted from disclosure under section 552.110 of the Government Code. 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 that are 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 the following:

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 RESTATEMENT OF TORTS § 757 cmt. b. 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

¹The 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).

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 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, substantial competitive injury would likely result from release of the information at issue. *See id.*; *see also* ORD 661 at 5 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

JPMorgan, Legacy, and Prosperity object to the release of their information under section 552.110 of the Government Code. Prosperity relies on the test announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), concerning the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal entity. *See Nat’l Parks*, 498 F.2d 765. Although this office applied the *National Parks* test at one time to the statutory predecessor to section 552.110, the Third Court of Appeals overturned that standard in holding *National Parks* was not a judicial decision for purposes of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information at issue would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing Seventy-sixth Legislature’s enactment of Gov’t Code § 552.110(b)).

Upon review, we find JPMorgan, Legacy, and Prosperity have each demonstrated their pricing information, which we have indicated, consists of commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the city must withhold the information we have indicated under section 552.110(b) of the Government Code. We further find JPMorgan and Legacy have both demonstrated their client information consists of commercial or financial information, the release of which would cause substantial competitive harm. Thus, the city must withhold JPMorgan’s and Legacy’s client information under section 552.110(b); however, to the extent the client information is publicly available on the companies’ websites, the city may not withhold such information under section 552.110(b). We find none of the third parties have provided a specific factual or evidentiary showing that the release of their remaining information would cause substantial competitive injury. *See* ORD 661 at 5-6 (1999) (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). Therefore, none of the remaining information may be withheld under section 552.110(b).

We find Prosperity and Legacy both have failed to establish a *prima facie* case their information meets the definition of a trade secret, and have failed to demonstrate the necessary factors to establish a trade secret claim for their information. *See* ORD 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). Consequently, the city may not withhold any of the submitted information under section 552.110(a) of the Government Code.

We further note some of the submitted information may 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.

In summary, the city must withhold (1) the pricing information we have indicated under section 552.110(b) of the Government Code; and (2) JPMorgan's and Legacy's client information under section 552.110(b), to the extent it is not publicly available on the companies' websites. The remaining information must be released, but any information 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.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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/ac

Ref: ID# 538418

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Jennifer Owen
For LegacyTexas Bank
Higier Allen & Lautin
5057 Keller Springs Road, Suite 600
Addison, Texas 75001
(w/o enclosures)

Ms. Shanna R. Kuzdzal
Prosperity Bank
80 Sugar Creek Center Boulevard
Sugar Land, Texas 77478
(w/o enclosures)

Ms. Kristen Gibson
J.P. Morgan Chase Bank
1111 Fannin Street
Houston, Texas 77002
(w/o enclosures)

Mr. Stephen Callahan
Wells Fargo Bank
1445 Ross Avenue, Suite 2314
Dallas, Texas 75202
(w/o enclosures)