



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 15, 2017

Mr. Cristian Rosas-Grillet
Assistant City Attorney
City of Laredo
P.O. Box 579
Laredo, Texas 78042-0579

OR2017-18606

Dear Mr. Rosas-Grillet:

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# 670985 (PIR Nos. W007597-052417 and W007697-061317).

The City of Laredo (the "city") received two requests from different requestors for information pertaining to a specified franchise agreement and ordinance. You state you have released some information. You state the city does not have information responsive to portions of the request.¹ You state release of this information may implicate the proprietary interests of Lar-Con Services, LLC ("Lar-Con"); PedroPete Services, LLC ("PedroPete"); Southern Sanitation Services ("Southern Sanitation"); and Trashco Ltd. ("Trashco"). Accordingly, the city states, and provides documentation showing, it notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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 Lar-Con, PedroPete, and Trashco. We have considered the submitted arguments and reviewed the submitted information.

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Initially, we note Lar-Con, PedroPete, and Trashco object to disclosure of information the city has not submitted to this office for review. This ruling does not address information that was not submitted by the city and is limited to the information submitted as responsive by the city.² *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Southern Sanitation explaining why the submitted information should not be released. Therefore, we have no basis to conclude Southern Sanitation 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest Southern Sanitation may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at 841. Trashco states it has competitors. Trashco states release of the information at issue would cause substantial and irreparable competitive harm and give its competitors an unfair advantage. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839.

²As we are able to make this determination, we need not address the arguments against disclosure of this information.

After review of the information at issue and consideration of the arguments, we find Trashco has established the release of its information would give advantage to a competitor or bidder. Thus, we conclude the city may withhold Trashco's information under section 552.104(a) of the Government Code.³

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). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 provides that a trade secret is:

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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

⁴The 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).

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 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. *See* 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* ORD 661 at 5.

Lar-Con and PedroPete assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Lar-Con and PedroPete have established a *prima facie* case their information constitutes trade secret information. Therefore, Lar-Con’s and PedroPete’s customer information, which we marked, must generally be withheld under section 552.110(a) of the Government Code. However, to the extent Lar-Con and PedroPete have published any of the customer information they seek to withhold on their companies’ websites, such information is not confidential under section 552.110(a). Additionally, we conclude Lar-Con and PedroPete have failed to establish a *prima facie* case that any portion of their remaining information at issue meets the definition of a trade secret. We further find Lar-Con and PedroPete have not demonstrated the necessary factors to establish a trade secret claim for their remaining information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of the remaining information belonging to Lar-Con and PedroPete may be withheld under section 552.110(a).

Lar-Con and PedroPete contend some of their remaining information, including their customer information, is commercial or financial information, release of which would cause substantial competitive harm to the companies. To the extent any of the customer information Lar-Con and PedroPete seek to withhold has been published on the companies’ websites, we find Lar-Con and PedroPete have failed to establish release of such information would cause them substantial competitive harm. Upon review, we find Lar-Con and PedroPete have not made the specific factual or evidentiary showing that release of their information at issue would cause the companies substantial competitive harm. Consequently, the city may not withhold any portion of Lar-Con and PedroPete’s remaining information under section 552.110(b) of the Government Code.

In summary, the city may withhold Trashco’s information under section 552.104(a) of the Government Code. To the extent Lar-Con’s and PedroPete’s customer information is not

publicly available on the companies' websites, the city must withhold the customer information we marked under section 552.110(a) 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, 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,



D. Michelle Case
Attorney
Open Records Division

DMC/sdk

Ref: ID# 670985

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

4 Third Parties
(w/o enclosures)