

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 21-007s

**RESPONDENT:** Office of Court Administration

**DATE:** December 8, 2021

**SPECIAL COMMITTEE:** Judge Stephen B. Ables, Chairman; Judge Ray Wheless; Judge Olen Underwood; Judge Missy Medary; Judge Susan Brown

Petitioner requested copies of certain documents and responses received by Respondent in response to a request for offers (RFO) issued by Respondent. Respondent provided Petitioner copies of the RFO responses submitted by the vendors, including an offer containing redactions from a specific vendor (“Vendor”). At the time Vendor submitted its offer under the RFO, Vendor identified the redacted information as trade secret and proprietary information that should be withheld in the event Respondent received a records request for the Vendor’s offer. Respondent informed Petitioner that certain information in Vendor’s RFO response would be withheld from disclosure under Rule 12.5(i)(3) of the Rules of Judicial Administration as “trade secret or commercial or financial information made privileged or confidential by statute or judicial decision.” Petitioner filed an appeal requesting access to the redacted RFO information and Vendor was notified of the appeal. Vendor submitted a letter asserting that the redacted RFO information was proprietary trade secret and commercial information that should not be released by Respondent. Vendor also noted that in accordance with Texas Government Code Section 552.110<sup>1</sup>, “courts must preserve the secrecy of trade secrets and all other ‘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.’”

Respondent provided the special committee a copy of the offer without pricing information and the committee, in Rule 12 Decision No. 21-007, concluded that the offer information Vendor wished to withhold was exempt from disclosure under Rule 12.5(i)(3) because it related to Vendor’s trade secrets. The special committee also requested for its review the line-item pricing and hourly rates information Vendor believes are exempt from disclosure. In response, Respondent provided a copy of the proposal submitted by Vendor in response to the RFO with the pricing information.

Rule 12.5(i)(3) exempts from disclosure any judicial record that is confidential or exempt from disclosure under a state or federal constitutional provision, statute, or common law, including

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<sup>1</sup> Vendor cited Section 552.110 of the Business and Commerce Code, but the quoted language is from Section 552.110 of the Government Code. Chapter 552 of the Government Code, commonly referred to as the Public Information Act, governs the public’s right of access to records of public entities in the executive and legislative branches of government.

information that relates to a trade secret or commercial or financial information made privileged or confidential by statute or judicial decision. A “trade secret” is “any formula, pattern, device or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know it or use it.” *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (citing Restatement of Torts § 757 cmt. b (1939)). Trade secret analysis involves the weighing of six nonexclusive factors<sup>2</sup>, not all of which need to be satisfied to find a trade secret exists; other circumstances can be relevant to trade secret analysis. 113 S.W.3d at 740. Moreover, “[i]t is self-evident that the subject matter of a trade secret must be secret.” *Luccous v. J.C. Kinley Co.*, 376 S.W.2d 336, 338 (Tex. 1964); Restatement of Torts § 757 cmt. b. Some Texas courts have deemed pricing and rate information a trade secret in certain circumstances<sup>3</sup> while others have not<sup>4</sup>, and a trade secret is generally something continuously used in the operation of the business. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Restatement of Torts § 757 cmt. b. (“[A trade secret] 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, as, for example, the amount or other terms of a secret bid for a contract[.]”). Finally, we note that parallel Open Records Letter Rulings issued by the Attorney General suggest that, as a matter of policy, the public has a strong interest in pricing information in government contracts.<sup>5</sup>

The proposal submitted for our review includes recurring quarterly/annual charges, pricing assumptions, and an hourly rate for change orders. Our trade secret analysis of this information leads us to conclude that neither the quarterly/annual charges nor the hourly rate for change orders rise to the level of “trade secret.” The recurring charges cannot reasonably be said to be “secret,” as the current value of Respondent’s contracts can be quickly located by the public on the Legislative Budget Board’s contract database website. Recurring charge amounts, annually or quarterly, can be easily deduced from this information. And the hourly rate figure for change orders found in the proposal, considered in context of the overall contract, appears to relate to a “single or ephemeral event[] in the conduct of the business” rather than a “formula, pattern, device, or compilation of information” that presents an opportunity to obtain an advantage over competitors. We also note that there is a strong public interest in pricing information found in Respondent’s contracts. Accordingly, this information is not exempt from disclosure under Rule 12.5(i)(3). As for Vendor’s pricing assumptions, we agree that some information present in this section of the proposal rises to the level of a “trade secret” as it sheds light on how the Vendor developed the

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<sup>2</sup> These factors include: (1) the extent to which the information is known outside the business, (2) the extent to which it is known by employees and others involved in the business, (3) the extent of measures taken to guard the secrecy of the information, (4) the value of the information to the business and its competitors, (5) the amount of effort or money expended in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Union Pac. R.R., Co.*, 294 S.W.3d 589 (Tex. 2009) (citing *In re Bass*, 113 S.W.3d at 739).

<sup>3</sup> See, e.g., *Waste Management of Texas v. Abbott*, 406 S.W.3d 626, 635-38 (Tex. App. Eastland 2013) rev. denied (June 19, 2015) (holding pricing and volume information in waste tickets qualified as a trade secret); *Bertotti v. C.E. Shepherd Co.*, 752 S.W.2d 648, 653-54 (Tex. App. – Houston [14th Dist.] 1988, no writ.) (upholding temporary injunction to enforce non-compete covenant because company had legitimate interest in protecting product information, including price information).

<sup>4</sup> *General Insulation Co. v. King*, No. 14-08-00633-CV, 2010 Tex. App. LEXIS 490, 2010 WL 307952, \*4 (Tex. App. – Houston [14th Dist.] Jan. 26, 2010, no pet.) (concluding summary-judgment proof established that customer-specific pricing did not rise to level of a trade secret).

<sup>5</sup> See, e.g., Open Records Letter Ruling Nos. 2012-10618, 2011-17965, and 2009-04170.

fees listed in its response to the RFO. This pricing information makes it similar to that found in cases where courts found pricing and volume information qualified as a trade secret.<sup>6</sup> For this reason, we conclude that the pricing assumption information is exempt from disclosure.

We next consider Vendor's assertion that courts must, in accordance with the Public Information Act (PIA) provision found in Government Code Section 552.110, "preserve the secrecy of trade secrets and all other '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.'" However, Respondent is a judicial agency that is subject to Rule 12 of the Rules of Judicial Administration, not to the PIA, and Rule 12 does not include a similar exemption.<sup>7</sup>

For the reasons stated above, we conclude that Vendor's recurring quarterly/annual charge and hourly rate for change order pricing information is not exempt under Rule 12.5(i)(3), and that information should be released. Conversely, we find that the pricing assumption information does rise to the level of a trade secret and is exempt from disclosure.

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<sup>6</sup> See *Waste Management v. Abbott*, 406 S.W.3d at 635-38.

<sup>7</sup> We note that even if Rule 12 did include a similar provision, Vendor has failed to demonstrate based on specific factual evidence that disclosure would cause substantial competitive harm to Vendor.