



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 4, 2003

Ms. Hadassah Schloss
Open Records Administrator
Texas Building & Procurement Commission
P.O. Box 13047
Austin, Texas 78711

OR2003-5412

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185268.

The Texas Building and Procurement Commission (the "commission") received a written request for all proposals submitted to the commission in connection with RFP #303-2-0662, as well as the winning proposal for RFP #303-3-10595. You contend that the proposals submitted to the commission in connection with RFP #303-2-0662 are excepted from required public disclosure pursuant to section 552.104 of the Government Code. You also contend that portions of the requested proposals may be excepted from required public disclosure pursuant to section 552.110 of the Government Code "contingent on the vendors sending the necessary arguments to your office" and that certain e-mail addresses contained in the submitted proposals must be withheld pursuant to section 552.137 of the Government Code.

Because your section 552.104 claim is the more inclusive, we will address it first. Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The primary purpose of section 552.104 is to protect the government's interests in competitive bidding situations. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. *See* Open Records Decision No. 306 (1982). Section 552.104 generally does not, however, except bids or proposals from

disclosure once the bidding is over and the contract is in effect, Open Records Decision Nos. 306 (1982); 184 (1978), or where no contract is awarded. Open Records Decision No. 201 (1978). Because you inform us that RFP #303-2-0662 was cancelled and no contract was ever awarded, we conclude that section 552.104 is not applicable to the proposals submitted in connection with that RFP. Consequently, the commission may not withhold any of the requested proposals pursuant to section 552.104.

However, you have also sought a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public. In accordance with section 552.305(d), the commission notified representatives of the eight interested parties of the records request and of their right to submit arguments to this office as to why the requested information should not be released to the public. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990). 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). This office has timely received arguments from representatives of Emerging Solutions, Inc. d/b/a Constructware ("Constructware") that certain information contained in that company's proposal is excepted from required public disclosure. Because we have not received comments from any of the other companies that submitted proposals to the commission, this office has no basis for concluding that those companies have a privacy or proprietary interest in this information. Consequently, the commission must release those proposals to the requestor in their entirety, except as discussed later in this ruling.

Constructware contends that portions of its proposal are excepted from required public disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects both "trade secret" information and "commercial or financial" information. *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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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 *See id.* This office has held that we must accept a person's claim for exception as valid under that branch if that person establishes a *prima facie* case for

¹ The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

exception and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

After considering Constructware's submission, we conclude that Constructware has established the applicability of section 552.110 to certain portions of its proposal, and we have marked that proposal accordingly. However, the commission must release the remaining information contained in the Constructware proposal, as well as the remaining submitted proposals in their entirety, except as discussed below.

The submitted proposals contain e-mail addresses that the commission is required to withhold from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address *of a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

We generally agree that the information you have marked constitutes private e-mail addresses. Accordingly, section 552.137 of the Government Code requires the commission to withhold those e-mail addresses unless the commission receives an affirmative consent to release from the person to whom an e-mail address belongs. Additionally, we have marked some additional e-mail addresses that must be withheld pursuant to section 552.137. However, some of the e-mail addresses you have marked do not constitute private e-mail addresses and therefore must be released; we have marked those e-mail addresses accordingly. We note that section 552.137 does not apply to a public employee's governmental e-mail address or a business' general e-mail or web page address.

Additionally, we note that one of the submitted proposals contains federal tax return forms. Title 26 section 6103(a) of the United States Code renders tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a

taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Consequently, the commission must withhold this information under section 552.101 of the Government Code in conjunction with federal law.²

Finally, we note that some of the submitted materials are protected by copyright. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials unless the materials are otherwise excepted from required public disclosure. Attorney General Opinion JM-672 at 2-3 (1987). Also, the requestor may make copies of copyrighted materials unassisted by the state. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2.

In summary, the commission must withhold the information in the Constructware proposal that we have marked as coming within the protection of section 552.110. The commission must also withhold tax return information pursuant to section 552.101 and the private e-mail addresses pursuant to section 552.137. The remaining information must be released to the requestor, but the commission may not make copies of any copyrighted materials.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CMN/RWP/sdk

Ref: ID# 185268

Enc: Submitted documents

c: Ms. Becky Hill
A+ Integrated Solutions
10435 Burnet Road, Suite 102
Austin, Texas 78758
(w/o enclosures)

Mr. Ted Haywood
Commint, Inc.
11511 Katy Freeway, Suite 450
Houston, Texas 77079
(w/o enclosures)

Mr. Gary J. Christian
Constructware
3780 Mansell Road, Suite 200
Alpharetta, Georgia 30022
(w/o enclosures)

Ms. Sandy Mask
KJM
2515 McKinney Ave., Suite 930
Dallas, Texas 75201
(w/o enclosures)

Ms. Leslie DeLatte
Orion Communications, Inc.
P.O. Box 140507
Dallas, Texas 75214
(w/o enclosures)

Mr. Saul Valetin
3D International, Inc.
1900 West Loop
Houston, Texas 77027
(w/o enclosures)

Ms. Jody R. McKenzie
ManagePath
13355 Noel Road, Suite 2400
Dallas, Texas 75240
(w/o enclosures)

Mr. Roy Montgomery, Jr.
Montgomery Technology, Inc.
P.O. Box 1576
Eules, Texas 76039
(w/o enclosures)

Ms. Sunny Duddilla
SunPlus Data Group, Inc.
3783 Presidential Parkway, Suite 130
Atlanta, Georgia 30340
(w/o enclosures)