



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2008

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2008-16919

Dear Mr. Ramirez:

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# 330360.

The Lower Colorado River Authority (the "LCRA") received two requests from different requestors for (1) the proposals submitted in response to RFP 6909 pertaining to a long term maintenance, repair, and operating contract and (2) comparative bid tabulations and analysis used by LCRA in reaching a decision on the specified RFP.¹ Although you take no position as to the disclosure of the requested information, you state the information may implicate the proprietary interests of third parties. You also state, and provide documentation showing, you have notified Alamo Iron Works ("Alamo"), DXP Enterprises, Inc. ("DXP"), Fastenal Company ("Fastenal"), Grainger Industrial Supply ("Grainger"), Groves Industrial Supply ("Groves"), KBS, Wesco-Distribution, Inc. ("Wesco"), and Wilson Supply ("Wilson") of the requests and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestors. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). Wesco and Wilson have submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.

¹We note one of the requestors originally also requested bid tabulations for RFP 7069, but later withdrew that portion of his request.

Initially, 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Alamo, DXP, Fastenal, Grainger, Groves, and KBS have not submitted to this office any reasons explaining why the requested information should not be released. Therefore, because these companies have not demonstrated any of the submitted information is proprietary for the purposes of the Act, the LCRA may not withhold any of the information pertaining to these companies to protect their interests. *See id.* § 552.110; *see also* 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 (1990).

Wilson claims its information is excepted from disclosure under section 552.101 of the Government Code.² However, Wilson has not directed our attention to any law, nor are we aware of any law, that makes any of its information confidential. *See, e.g.,* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, the LCRA may not withhold any of Wilson's information under section 552.101 of the Government Code.

Wesco and Wilson both assert their information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the LCRA does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Wesco's or Wilson's proposal. *See* ORD 592 (governmental body may waive section 552.104). Thus, the LCRA may not withhold any of Wesco's or Wilson's information on that basis.

Section 552.110 of the Government Code, which Wesco claims and is the appropriate exception for Wilson to raise for the substance of its arguments, protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third

²Section 552.101 provides that "information is excepted from [required public disclosure] if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

party substantial competitive harm. Section 552.110(a) excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). 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.1958); *see also* Open Records Decision No. 552 at 2 (1990). 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. The following are the six factors that the Restatement gives 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 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; and
- (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). This office has held if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown that 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) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we conclude release of Wesco's pricing information and customer information would cause it substantial competitive harm. We also find release of Wilson's customer information would cause it substantial competitive harm. Therefore, the LCRA must withhold this information, a representative sample of which we have marked, under section 552.110(b).³ We note, however, Wilson was awarded the contract by the LCRA in response to this RFP. The pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *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). Thus, Wilson's pricing information may not be withheld under section 552.110(b) of the Government Code. Further, we find Wesco and Wilson have made only conclusory allegations that release of their remaining information would result in substantial competitive harm to their company. *See* ORD 661 at 5-6 (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). Accordingly, the LCRA may not withhold any of Wesco's or Wilson's remaining information under section 552.110(b) of the Government Code. We also find both Wesco and Wilson have failed to demonstrate how any portion of their information meets the

³LCRA must also withhold any corresponding Wesco pricing information from its own bid tabulations.

definition of a trade secret, nor have Wesco and Wilson demonstrated the necessary factors to establish a trade secret claim for their information. Thus, none of Wesco's or Wilson's information may be withheld under section 552.110(a).

We note, however, portions of the remaining submitted information are protected by section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). This office has determined insurance policy numbers are access device numbers for the purposes of section 552.136. Thus, the LCRA must withhold the insurance policy numbers in the submitted information, a representative sample of which we have marked, under section 552.136 of the Government Code.

Finally, we note, and you acknowledge, some of the remaining information is 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. ~~Attorney General Opinion JM-672~~ (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the LCRA must withhold (1) the types of information we have marked in Wesco's and Wilson's proposals under section 552.110(b) of the Government Code and (2) the insurance policy numbers in the submitted information under section 552.136 of the Government Code. The remaining submitted information must be released to the requestors, but any copyrighted information must be released in accordance with copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3). If the governmental body does not file suit over 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 330360

Enc. Submitted documents

c: Requestors
(w/o enclosures)

cc: Mr. Russell Devine
Manager, Business Development &
Shared Services Utility Group
Wesco Distribution, Inc.
225 West Station Square Drive, Suite 700
Pittsburgh, Pennsylvania 15219-1122
(w/o enclosures)

Ms. Janice Kuo Hoppe
Division General Counsel
Wilson Supply
1302 Conti Street
Houston, Texas 77002-1009
(w/o enclosures)

Mr. Mickey Bentley
Grainger Industrial Supply
6006 East Ben White Boulevard
Austin, Texas 78741
(w/o enclosures)

Mr. John Mahon
DXP Enterprises, Inc.
2590 Oakmont Drive, Suite 220
Round Rock, Texas 78665
(w/o enclosures)

Mr. Billy Craft
Alamo Iron Works
943 AT&T Center Parkway
San Antonio, Texas 78219
(w/o enclosures)

Mr. Matt Boyd
Fastenal Company
6006 East Ben White Boulevard
Austin, Texas 78741
(w/o enclosures)

Mr. Matt Miller
Groves Industrial Supply
7301 Pinemont
Houston, Texas 77040
(w/o enclosures)

Mr. Matt McGuire
KBS
504 East St. Elmo Road
Austin, Texas 78745
(w/o enclosures)