



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2008

Ms. Andrea Sheehan
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2008-17130

Dear Ms. Sheehan:

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# 330117.

The Region 10 Education Service Center (the "center") received two requests for the awarded contract, all proposals, and all evaluative information pertaining to a specified request for proposals ("RFP"). You state that you have released the Prologic Technology Systems, Inc. and SunGard Bi-Tech proposals in accordance with a prior ruling issued by this office. *See* Open Records Letter No. 2008-04936A (2008) (stating that with exception of information marked under sections 552.110 and 552.136, proposals must be released in accordance with copyright law). You claim that insurance policy numbers in the submitted proposals are excepted from disclosure under section 552.136 of the Government Code. You also state that release of the submitted proposals may implicate the proprietary interests of third parties. Accordingly, you notified Lawson Software ("Lawson"), Weidenhammer Systems Corporation ("Weidenhammer"), Skyward, Inc. ("Skyward"), Tyler Technologies, Inc. ("Tyler"), and Harris School Solutions ("Harris") of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 applicability of exception to

disclosure in certain circumstances). We have received comments from Lawson and Tyler. We have considered the submitted arguments and reviewed the submitted information.

We note that 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, we have not received any arguments from Skyward, Harris, or Weidenhammer. We thus have no basis for concluding that any portion of the proposals submitted by Skyward, Harris, or Weidenhammer constitute proprietary information, and the center may not withhold any portion of this information on that basis. *See* 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).

Because Lawson and Tyler responded to their section 552.305 notices, we will address the arguments submitted by those companies. Lawson asserts that portions of its proposal are excepted under 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 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 No. 592 (1991). As the center does not raise section 552.104, this exception is not applicable to Lawson's proposal. *Id.* (stating section 552.104 may be waived by governmental body).

Lawson and Tyler assert that portions of their proposals are subject to section 552.110 of the Government Code. Section 552.110(a) protects trade secrets 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that 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 that section 552.110(a) is applicable 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. 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.* § 552.110(b); *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Lawson argues that portions of its response to the RFP, alternate proposals, and licensing fee breakdown are trade secrets under section 552.110(a). Lawson states, however, that the response was developed to suit the center’s specific needs. Lawson also states the alternate proposals describe the system modifications specifically requested by the center for this implementation project. Finally, Lawson acknowledges that the submitted licensing fee breakdown reveals specific discounts that were offered or negotiated for this contract. Based on Lawson’s representations that the response, alternate proposals, and licensing fee breakdown were specifically developed for the center, we find that Lawson has failed to demonstrate that this information meets the definition of a trade secret. *See* Restatement of Torts § 757 cmt. b (1939) (information is generally not trade secret if it pertains to single or ephemeral events in the conduct of business). Accordingly, the center may not withhold this information under section 552.110(a).

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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Lawson also argues that release of its response and licensing fee breakdown would cause substantial competitive harm to its interests. Based on Lawson's representations and our review of the information, we find that release of the licensing fee breakdown would cause Lawson competitive harm and the center must withhold the marked spreadsheets under section 552.110(b). However, Lawson has failed to demonstrate that the release of the response would cause it substantial competitive harm. Gov't Code § 552.110(b); *see also* 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). Accordingly, the response may not be withheld under section 552.110(b).

Tyler argues that the itemized prices in its price sheet and individual district schedules of cost should be withheld under section 552.110(b). After reviewing the arguments and the information at issue, we conclude that Tyler has demonstrated that the release of the itemized prices in the price sheets and schedule of costs, which we have marked, would cause it substantial competitive harm. Thus, the center must withhold the marked prices pursuant to section 552.110(b) of the Government Code. Tyler argues that the technical specifications section of the Technical and Module Specification Forms is a trade secret under section 552.110(a). Tyler explains, however, that the center's RFP lists technical requirements for the project and the proposing business responds in a checklist format showing which requirements it meets. Based on Tyler's explanation that the technical specifications checklist is specific to the project at issue, we find that it has failed to demonstrate that the checklist meets the definition of a trade secret. *See* Restatement of Torts § 757 cmt. b (1939). Accordingly, the center may not withhold the technical specifications checklist under section 552.110(a).

The center claims that insurance policy numbers contained in the proposals submitted by Weidenhammer, Lawson, and Tyler are subject to section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining "access device"). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. The center must withhold the insurance policy numbers you have marked in these proposals under section 552.136.

Finally, we note that some of the materials at issue 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. 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 center must withhold the marked prices in Tyler's price sheets and schedule of costs and Lawson's licensing fee breakdown spreadsheets under section 552.110(b). The center must withhold the marked insurance policy numbers under section 552.136. The remaining information must be released, but any copyrighted information may only 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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eb

Ref: ID# 330117

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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