



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 4, 2009

Mr. David DeFoy
Texarkana Independent School District
4241 Summerhill Road
Texarkana, Texas 75503

OR2009-02784

Dear Mr. DeFoy:

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# 336237.

The Texarkana Independent School District (the "district") received a request for information related to a request for proposals for a student information system, including the awarded contract, submitted proposals, and evaluation documents.¹ You state that some responsive information has been released to the requestor. While you raise sections 552.101 and 552.110 of the Government Code as possible exceptions to disclosure for the remaining requested information, you make no arguments as to whether the information at issue is excepted under that section. Furthermore, because release of the requested proposals may implicate the proprietary interests of third parties, the district was required by section 552.305 of the Government Code to notify the companies whose proposals are at issue of the request and of their opportunity to submit comments to this office explaining

¹We note that the requestor, SunGard Public Sector Inc., excluded its own proposal from the requested information.

why the requested information should be withheld from disclosure. 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). Tyler Technologies, Inc. ("Tyler"), in correspondence forwarded to this office by the district, asserts that some of its information is excepted under section 552.110 of the Government Code. We have reviewed the submitted arguments and information.

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). As of the date of this letter, we have not received comments from any interested third party other than Tyler explaining why the requested proposals should not be released. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the requested 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, 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). Consequently, the district may not withhold the requested proposals based on the proprietary interests any of the remaining third parties may have in them.

Section 552.110 of the Government Code 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 party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 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.² RESTATEMENT OF TORTS § 757 cmt. b. This office has held that 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 that 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)*. We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); ORD 319 at 3, 306 at 3.

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." 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).

Tyler asserts that the information in Section 11 "Specifications" is excepted under section 552.110(a). The "Specifications" information is a checklist of whether Tyler's software meets the software requirements that the district seeks. We find that Tyler has failed to establish a *prima facie* case that this checklist information is a trade secret. Therefore, the district may not withhold this information under section 552.110(a).

²The 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; (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)*.

Tyler also asserts that some of its pricing information, contained in Section 13 "Investment Summary" and in the follow up questions, is a trade secret because the pricing contained in the proposal is based on a price guide and "deviation therefrom is rare and requires a number of steps of approval."³ However, after review of Tyler's arguments and the documents at issue, we find Tyler has not established that its pricing information constitutes a process or device for continuous use in the operation of its business. See Restatement of Torts § 757 cmt. b. After review of Tyler's arguments, we conclude that Tyler has failed to establish a *prima facie* case that its pricing information is a trade secret. See Open Records Decision Nos. 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 306 at 3 (1982). Therefore, the district may not withhold this information under section 552.110(a).

Tyler further claims that the information at issue is excepted from public disclosure under section 552.110(b) of the Government Code. After reviewing its arguments and the information at issue, we find that Tyler has established that some of the submitted information, which we have marked, constitutes commercial and financial information, the release of which would cause the company substantial competitive harm. Accordingly, the district must withhold the information we have marked under section 552.110(b). However, we determine that no portion of the remaining submitted information is excepted from disclosure under section 552.110(b) and the district may not withhold it on that basis.

We note that Tyler's proposal contains insurance policy numbers. Section 552.136(b) of the Government Code provides 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." We have marked the insurance policy numbers in Tyler's proposal that the district must withhold under section 552.136.

Finally, we note that some of the materials at issue appear to 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 protected by copyright. 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 materials protected by copyright, 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 district must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining submitted

³Tyler does not object to release of the pricing totals listed in section 13.1 of its proposal.

information must be released to the requestor, but any copyrighted information may only be released in accordance with copyright law.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 336237

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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