



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 6, 2009

Mr. Kenneth Scott Oliver
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2009-02964

Dear Mr. Oliver:

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# 336811.

The San Antonio Water System (the "system") received a request for information regarding a contract for collection services, including (1) the vendor proposals submitted in response to the request for proposals, (2) documents showing how the vendors were ranked or scored during the proposal evaluation process, (3) a list of the companies that submitted proposals or requested a copy of the request for proposals, and (4) reports pertaining to the performance and success of the contract on a historical basis. You state the system has provided the requested scoring documents and list of companies to the requestor. You also state the system has no information responsive to the request for reports pertaining to the performance and success of the contract.¹ Although you take no position with respect to the public availability of the submitted vendor proposals, you indicate their release may implicate the proprietary interests of Gila Corporation d/b/a Municipal Services Bureau ("MSB"), NCO Group ("NCO"), and Penn Credit Corporation ("Penn"). Accordingly, you state, and have provided documentation showing, you notified MSB, NCO, and Penn of the request and of each company's right to submit arguments to this office as to why the submitted proposals

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining 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). We have considered comments submitted by NCO, and reviewed the submitted 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 MSB or Penn explaining why their submitted proposals should not be released. Therefore, we have no basis to conclude MSB and Penn have protected proprietary interests in their submitted 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. Accordingly, the system may not withhold MSB's and Penn's proposals on the basis of any proprietary interest they may have in the information.

We understand NCO to claim portions of its submitted proposal are excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "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." *See* Gov't Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Although NCO claims its client references and work flow process constitute trade secrets, it has not submitted any arguments explaining how this information meets the definition of a trade secret or how the trade secret factors apply to this information. *See* ORD 552 at 5 (party must establish *prima facie* case that information is trade secret). Consequently, the system may not withhold NCO's client references and work flow process under section 552.110(a) of the Government Code.

NCO also claims its client references and work flow process constitute commercial information that, if released, would cause substantial competitive harm to the company.

²The 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 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.

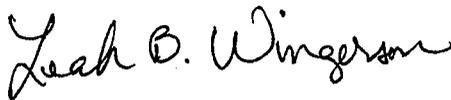
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

After reviewing NCO's arguments and its submitted information, we find NCO has established release of its client references would cause it substantial competitive injury. Therefore, the system must withhold this information, which we have marked, under section 552.110(b). We find, however, NCO has provided no specific factual or evidentiary showing release of its work flow process would cause the company substantial competitive injury. Therefore, the system may not withhold NCO's work flow process information under section 552.110(b). As no other exceptions to disclosure have been raised, the remaining proposal information must be released.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/cc

Ref: ID# 336811

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Mr. Bruce Cummings
President
Gila Corporation d/b/a Municipal Services Bureau
6505 Airport Blvd., Suite 100
Austin, Texas 78752
(w/o enclosures)

Mr. Bruce Kramer
Director, Corporate Communications
NCO Group
507 Prudential Road
Horsham, Pennsylvania 19044
(w/o enclosures)

Mr. Richard Templin
Penn Credit Corporation
916 South Fourteenth Street
Harrisburg, Pennsylvania 17104
(w/o enclosures)