



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2009

Ms. Leslie Orton Haby
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2009-03808

Dear Ms. Haby:

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# 337849 (COSA File No. 08-1546).

The City of San Antonio (the "city") received a request for information regarding the RFP for inmate telephone services, including the bid proposals of all companies other than the requestor, the score sheets, the award letter, and the contract between the city and a named company. You state the city will provide most of the requested information to the requestor, with redactions agreed upon by the requestor. Although you take no position with respect to the public availability of the submitted bid proposal, you state its release may implicate the proprietary interests of Securus Technologies ("Securus"). Accordingly, you state, and have provided documentation showing, you notified Securus of the request and of the company's right to submit arguments to this office as to why the submitted bid proposal 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 received comments from Securus. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office, within fifteen business days of receiving the request, a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). You state the city received the request for information on December 31, 2008. However, you did not submit a copy or representative sample of the

information requested until March 6, 2009. Consequently, we find the city failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). In this instance, because third party interests can provide a compelling reason to withhold information, we will consider whether or not the submitted bid proposal is excepted from disclosure under the Act.

Securus claims specified portions of its bid proposal are excepted under section 552.110 of the Government Code. Section 552.110 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* Open Records Decision No. 552 at 5 (1990). 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.¹ 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* 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).

Securus contends certain diagrams and information contained in screen shots included in its bid proposal qualify as trade secret information under section 552.110(a). Upon review of Securus's submitted arguments and bid proposal, we find Securus has established the interactive voice prompt process diagrams on pages 28 and 40 of its bid proposal constitute trade secrets and must be withheld under section 552.110(a). With respect to the information contained in the screen shots on pages 14-15 and 33-36 of Securus's bid proposal, Securus explains the information was "custom-calculated" for the RFP at issue. Based on Securus's explanation the information contained in the specified screen shots is specific to the project at issue, we find Securus has failed to demonstrate the screen shot information meets the definition of a trade secret. Therefore, the city may not withhold any of the information contained in the screen shots on pages 14-15 and 33-36 of Securus's bid proposal under section 552.110(a) of the Government Code.

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 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).

Securus also claims the information contained in the screen shots on pages 14-15 and 33-36 of its bid proposal is excepted under section 552.110(b). We find, however, Securus has made only conclusory allegations that release of its screen shot information would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* ORD 661. Therefore, the city may not withhold the information contained in the screen shots on pages 14-15 and 33-36 of Securus's bid proposal under section 552.110(b).

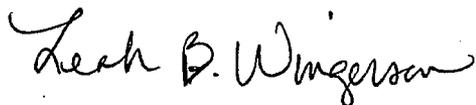
We note part of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of 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). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

In summary, the city must withhold the interactive voice prompt process diagrams on pages 28 and 40 of Securus's bid proposal under section 552.110(a) of the Government Code. The remaining information must 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/cc

Ref: ID# 337849

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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(w/o enclosures)