



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2009

Ms. Jacqueline Cullom Murphy
Assistant Criminal District Attorney
Civil Section
Cadena-Reeves Justice Center
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2009-08364

Dear Ms. Murphy:

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# 346210.

The Bexar County Purchasing Department (the "department") received a request for a copy of the winning proposal submitted for RFP #2008-008. Although you take no position regarding the public availability of the requested information, you state it may implicate the rights of the third party whose proposal has been requested. You state, and provide documentation showing, that you have notified System Innovators of its right to submit arguments to this office as to why the submitted proposal should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from System Innovators. We have considered the submitted arguments and reviewed the submitted information. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

System Innovators argues that portions of the submitted proposal are confidential under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this 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* ORD 232. This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law.

See ORD 552. 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. See Open Records Decision No. 402 (1983). We 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 (1939); see *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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. See *id.* § 552.110(b); see also ORD 661 at 5-6.

System Innovators argues that release of the screen shots and text it has marked in its proposal would transmit detailed information about its software architecture and functions that is known only to individuals within the company or who have purchased or seen demonstrations of the software. Further, System Innovators argues that it has expended significant amounts of time and money in the development of the software and would potentially lose substantial revenue if it were to be imitated by one of its competitors. Upon review, we find that System Innovators has established a *prima facie* case that portions of its proposal, which we have marked, constitute trade secrets. Accordingly, the department must withhold the information, which we have marked, pursuant to section 552.110(a). However, we note that System Innovators publishes the remaining information it seeks to withhold on its internet website. Thus, System Innovators has failed to demonstrate that the information published on its website is a trade secret. Therefore, the remaining information may not be withheld on the basis of section 552.110(a) of the Government Code.

System Innovators also seeks to withhold its pricing information, as well as the remaining information, under section 552.110(b). However, we note that the pricing information of a winning bidder, such as System Innovators in this instance, 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 reason that disclosure of prices charged government is a cost of doing business with government). We also determine that System Innovators has failed to establish that the release of the remaining information would cause the company substantial competitive injury. See ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of

particular information at issue), 319 at 3 (information relating to organization and personnel, market studies, experience, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). As noted above, System Innovators has made much of this information available on its website. Therefore, we conclude that none of the remaining information may be withheld under section 552.110(b) of the Government Code.

We note that the submitted information 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection 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 department must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released; however, in releasing the information that is copyrighted, the department must comply with applicable 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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 346210

Enc. Submitted documents

c: Requestor
(w/o enclosures)