



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 29, 2009

Mr. James K. Lowry, Jr.
Langley & Banack
745 East Mulberry Suite 900
San Antonio, Texas 78212-3166

OR2009-08953

Dear Mr. Lowry:

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# 349039.

The Northside Independent School District (the "district"), which you represent, received a request for the responses of SunGard Bi-Tech, LLC ("SunGard") and Tyler Technologies, Inc. ("Tyler") to a specified request for proposals.¹ You inform us that some of the requested information has been released. You take no position on the public availability of the submitted information. You believe, however, that the submitted information may implicate the interests of SunGard and Tyler. You notified SunGard and Tyler of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released.² Both SunGard and Tyler have submitted arguments under section 552.110 of the Government Code.³ We have considered their arguments and reviewed the submitted information.

¹We note that the district received a series of clarifications of the original request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under Gov't Code § 552.301(b)).

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

³SunGard informs us that the company is now known as SunGard Public Sector.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “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.” Gov’t Code § 552.110(a)-(b).

The Supreme Court of Texas 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 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 [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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a 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 the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁴ *See* Open Records Decision No. 552 at 5 (1990).

⁴The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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).

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 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).

SunGard contends that its references, some of its pricing information, and other parts of its proposal constitute trade secrets under section 552.110(a). SunGard also appears to contend that the information in question is excepted from disclosure under section 552.110(b). Having considered SunGard's arguments and reviewed the information at issue, we conclude that the district must withhold SunGard's references, which we have marked, under section 552.110(a). We also conclude that the district must withhold the pricing information that we have marked in SunGard's proposal under section 552.110(b). We find that SunGard has not demonstrated that any other information in its proposal qualifies as a trade secret under section 552.110(a). We also find that SunGard has not made the specific factual or evidentiary showing required by section 552.110(b) that the release of any other information in SunGard's proposal would cause the company substantial competitive harm. We therefore conclude that the district may not withhold any other information relating to SunGard under section 552.110. *See* Gov't Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Tyler contends that Section 13 of its proposal, "Functional Requirements," and some of the pricing information in Section 8 of its cost proposal constitute trade secrets under section 552.110(a). Tyler also appears to contend that the information in question is excepted from disclosure under section 552.110(b). Having considered Tyler's arguments and reviewed the information at issue, we find that Tyler has not established that its "Functional Requirements" and pricing information constitute processes or devices for continuous use in the operation of Tyler's business. *See* RESTATEMENT OF TORTS § 757 cmt. b. We therefore conclude that Tyler's "Functional Requirements" and pricing information may not be withheld from disclosure as trade secrets under section 552.110(a). Under section 552.110(b), we find that Tyler has not made the required factual or evidentiary showing that release of its "Functional Requirements" would cause the company substantial competitive harm. With regard to Tyler's pricing information, the district informs us that Tyler was the winning bidder. The pricing information of a winning bidder is generally not excepted from disclosure under section 552.110(b). *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 at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. See Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). We therefore conclude that the district may not withhold any of Tyler's information under section 552.110(b).

We note that section 552.136 of the Government Code is applicable to some of the submitted information.⁵ Section 552.136(b) provides 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"). We have marked account and insurance policy numbers that the district must withhold under section 552.136.

We also note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. See Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the district must withhold the information that we have marked under sections 552.110 and 552.136 of the Government Code. The rest of the submitted information must be released. Any information that is protected by copyright 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

⁵Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SC/cc

Ref: ID# 349039

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Ms. Jonnese Kaminski
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Tyler Technologies, Inc.
370 US Route One
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Sincerely,

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

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