ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2010

Ms. Cherl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2010-01801

Dear Ms. Byles:

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# 369412 (Fort Worth PIR No. 0121-10).

The City of Fort Worth (the "city") received a request for the requestor's competitors' responses to a specified request for proposal. You claim portions of the submitted information are excepted from disclosure under section 552.136 of the Government Code. You also state release of the requested information may implicate the proprietary interests of several third parties. Accordingly, you notified ChemWare, Inc. ("ChemWare"); LabWare, Inc.; Quality Systems International Corporation; Thermo Fisher Scientific; Ethosoft, Inc. ("Ethosoft"); Wunderlich Malec Systems; and Promium, LLC. *See* Gov't Code § 552.305(d); *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 under certain circumstances). We have received comments from ChemWare and Ethosoft. We have considered the submitted comments and reviewed the submitted information.

Initially, you acknowledge, and we agree, the city failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting a decision from our office. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the

legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because third-party interests and section 552.136 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider the comments submitted by ChemWare and Ethosoft, as well as your argument under section 552.136.

Next, we note 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 only received comments from ChemWare and Ethosoft explaining why their submitted information should not be released. Therefore, the other third parties have not provided us with any basis to conclude that they have protected proprietary interests in the 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. Thus, none of the submitted information may be withheld on the basis of the other third parties' proprietary interests.

Ethosoft raises section 552.102 of the Government Code for the personnel information in its proposal. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). This office has found that section 552.102 only applies to information in a personnel file of an employee of a governmental body. The information Ethosoft seeks to withhold is not contained in the personnel file of a governmental body employee. Therefore, we determine section 552.102 does not apply to Ethosoft's proposal, and none of the information may be withheld on that basis.

ChemWare and Ethosoft assert portions of their proposals 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 id.* § 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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.[1] Open Records Decision No. 402 (1983).

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

---

[1]The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

§ 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.

ChemWare and Ethosoft claim section 552.110(a) for portions of their proposals. Having considered the arguments submitted by ChemWare and Ethosoft, we conclude both companies have established a *prima facie* case that portions of their proposals, including their client lists, which we have marked, constitute trade secret information. Therefore, the city must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, ChemWare publishes the identities of some of its clients on its website. In light of ChemWare's own publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. In addition, ChemWare and Ethosoft have failed to demonstrate any portion of their remaining information at issue constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* ORD 552 at 5-6. Accordingly, the city may not withhold the remaining information at issue under section 552.110(a).

ChemWare also claims its remaining information at issue is subject to section 552.110(b). As noted above, ChemWare publishes the identities of some of its clients on its website. Thus, ChemWare has failed to demonstrate release of this information would cause it substantial competitive harm. Furthermore, upon review of ChemWare's arguments, we find ChemWare has provided conclusory arguments that release of its remaining information at issue would cause it substantial competitive harm. Thus, ChemWare has not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information at issue. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, none of ChemWare's remaining information at issue may be withheld under section 552.110(b).

Section 552.136(b) of the Government Code states 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." *Id.* § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, the city must withhold the insurance policy numbers you have marked pursuant to section 552.136 of the Government Code.[2]

---

[2]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Finally, you also note some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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 city must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. The city must also withhold the insurance policy numbers you have marked under section 552.136 of the Government Code. The remaining information must be released, but any information 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 information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 369412

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Mr. Conor Ward
ChemWare, Inc.
900 Ridgefield Drive, Suite 150
Raleigh, North Carolina 27609
(w/o enclosures)

Mr. Neal K. Wunderlich
Wunderlich Malec Systems
5501 Feltl Road
Minnetonka, Minnesota 55343
(w/o enclosures)

Mr. Bill Moss
Ethosoft, Inc.
880 Marietta Highway, Suite 603
Roswell, Georgia 30075
(w/o enclosures)

Mr. Greg Claeys
Thermo Fisher Scientific Informatics
1601 Cherry Street, Suite 1200
Philadelphia, Pennsylvania 19102
(w/o enclosures)

Mr. Don Tucker
LabWare, Inc.
3 Mill Road, Suite 102
Wilmington, Delaware 19806
(w/o enclosures)

Mr. Craig A. Redd
Quality Systems International Corporation
545 Island Road, Suite 2C
Ramsey, New Jersey
(w/o enclosures)

Mr. Scot Cocanour
Promium, LLC
3350 Monte Villa Parkway, Suite 220
Bothell, Washington 98021
(w/o enclosures)