



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2010

Mr. Michael J. Cosentino
San Marcos City Attorney
City of San Marcos
City Hall
630 East Hopkins
San Marcos, Texas 78666

OR2010-02545

Dear Mr. Cosentino:

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# 370703.

The City of San Marcos (the "city") received a request for proposals submitted for the city's Smart Utility Advanced Metering Infrastructure project. The city takes no position on whether the submitted information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of HD Supply Waterworks, LTD ("HD"); Aqua Metric ("Aqua"); Tantalus Systems Corp. ("Tantalus"); Elster Electricity, LLC ("Elster"); EKA Systems, Inc. ("EKA"); and US Metering and Technology ("UMT"); (collectively, the "third parties"). Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted 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 Tantalus and Elster. We have considered the submitted comments and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). In addition, pursuant to section 552.301(e), within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that

would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). You inform us that the city received the request at issue on October 28, 2009. Accordingly, the ten business day deadline was November 12, 2009, and the fifteen business day deadline was November 19, 2009. However, you did not request a ruling from this office until December 11, 2009 or provide this office with the information required by section 552.301(e) until February 5, 2009. Accordingly, we find that the city failed to comply with the requirements of section 552.301 of the Government Code.

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 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 id.* § 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 by law. Open Records Decision No. 150 (1977). Because third party interests are at stake, we will address whether the submitted information must be withheld to protect the interests of the third parties.

Next, we note that 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from Tantalus and Elster. We, thus, have no basis for concluding that any portion of the submitted information constitutes the other companies' proprietary 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 city may not withhold any of the submitted information based on the proprietary interests of the non-briefing third parties.

Tantalus and Elster claim that portions of their respective proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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 [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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. 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. 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. 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, 306 at 3.

¹The following are the six factors that the Restatement gives 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.

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. *Id.*; *see also* ORD 661 at 5-6.

Both Tantalus and Elster contend that portions of their proposals consist of trade secrets excepted from disclosure under section 552.110(a). Upon review, we find that Tantalus has shown that portions of its systems configuration and performance information are protected trade secrets under section 552.110(a). Accordingly, the city must withhold the information we have marked under section 552.110(a). However, although Tantalus also seeks to withhold its customer information, we note that Tantalus has published the identities of all of the customers at issue on its website. Because Tantalus published this information, we cannot conclude that the identities of these published customers qualify as trade secrets. Further, we conclude that Tantalus and Elster have failed to demonstrate that any portion of the remaining information constitutes a trade secret. Accordingly, the city must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We determine that no portion of the remaining information is excepted from disclosure under section 552.110(a) of the Government Code.

We also find that Tantalus and Elster have demonstrated that release of portions of their respective pricing information would result in substantial competitive harm. Accordingly, we have marked the information that must be withheld under section 552.110(b). However, upon review of the remaining arguments, we find that Tantalus and Elster have failed to demonstrate that substantial competitive harm would result from the release of any of the remaining information. *See* ORD 661 at 5-6. Accordingly, we determine none of the remaining submitted information may be withheld under section 552.110(b) of the Government Code.

Tantalus also claims that some of its remaining information is excepted from disclosure under section 552.139 of the Government Code, which provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a

contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

Gov't Code § 552.139(a), (b). Upon review, we determine that Tantalus has failed to demonstrate that any of its remaining information relates to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). *See id.* § 2059.055 (defining confidential network information for purposes of section 2059.055). Furthermore, Tantalus has not demonstrated that its information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of Tantalus' remaining information may be withheld under section 552.139 of the Government Code.

We note that portions of the submitted information appear 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).* Thus, in releasing the submitted information, the city must comply with applicable copyright law.

In summary, the city must withhold the information we have marked under section 552.110(a) of the Government Code. The city must withhold the pricing information we have marked under section 552.110(b) of the Government Code. The remaining information must be released to the requestor, but any copyrighted information may only 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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 370703

Enc. Submitted documents

cc: Requestor
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