



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2010

Ms. Evelyn W. Njuguna
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2010-02548

Dear Ms. Njuguna:

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# 370877 (PIR# 16487).

The City of Houston (the "city") received a request for evaluation and scoring sheets and a copy of all proposals that were submitted for a specified request for proposals. You claim that the submitted evaluation matrixes and scoring sheets are excepted from disclosure under section 552.104 of the Government Code. While you take no position with respect to the public availability of the requested proposals, you state that the request may implicate the proprietary interests of Motorola, Inc. ("Motorola"), Carahsoft Technology Corporation ("Carahsoft"), Tribridge Holdings, LLC ("Tribridge"), Lagan Technologies, Inc. ("Lagan"), Idea Integration Corporation ("Idea"), Toadfly Technologies ("Toadfly"), eVerge Group, Inc. ("eVerge"), Ciber Inc. ("Ciber"), and Smartsoft International Inc. ("Smartsoft"). Accordingly, you notified these entities of this request for information and of their right to submit arguments to this office as to why the information 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). Tribridge, Lagan, Idea, Toadfly, Ciber, and Smartsoft responded to the notice and argue that some or all of their information is excepted from disclosure. We have considered the submitted arguments and reviewed the submitted information.

Section 552.104 of the Government Code protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes

to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990).

You state the specified request for proposal ("RFP") was cancelled without any contract awarded. You state the city anticipates re-issuing another RFP in January 2010 with substantially similar specifications and requirements as those in the cancelled RFP. You assert release of the submitted evaluation matrixes and scoring sheets at this time would harm the city's ability to negotiate and receive a fair contract on the re-issued RFP because vendors will be able to tailor their responses and submit pricing that is similar to the information contained in the submitted evaluation matrixes and scoring sheets. Based on your representations, we conclude the city may withhold the evaluation matrixes and scoring sheets under section 552.104 of the Government Code.

We now turn to the submitted proposals, which you assert may be subject to third party claims. 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) 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, this office has not received comments from Motorola, Carahsoft, or eVerge explaining why each third party's submitted information should not be released. Therefore, we have no basis to conclude that these third parties have a protected proprietary interest 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. Accordingly, the city may not withhold any portion of the submitted proposals based upon the proprietary interests of Motorola, Carahsoft, or eVerge.

Toadfly raises section 552.101 of the Government Code for its partnership tax returns. Section 552.101 excepts from disclosure "information considered confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as a taxpayer's "identity, the nature, source, or amount of his income[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993

F.2d 1111 (4th Cir. 1993). Thus, the city must withhold the partnership tax returns in Toadfly's proposal, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.¹

Toadfly asserts its owner's name and residence address are excepted from disclosure under section 552.101 of the Government Code. Additionally, Idea raises section 552.101 for its entire proposal. However, neither Toadfly nor Idea have directed our attention to any law, nor are we aware of any law, under which any of this information is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold the name and residence address of Toadfly's owner or any of Idea's proposal under section 552.101 of the Government Code.

Toadfly also raises section 552.102 of the Government Code for the residence address of its owner. Section 552.102(a) of the Government Code excepts from public 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). Section 552.102 only applies to information in a personnel file of an employee of a governmental body. The information Toadfly seeks to withhold is not contained in the personnel file of a governmental employee. Therefore, section 552.102 is inapplicable to any information in Toadfly's proposal. Accordingly, the city may not withhold any information on this basis.

Toadfly and Ciber also assert their information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the city does not seek to withhold Toadfly or Ciber's proposals under this exception, no portion of these proposals may be withheld on this basis.

Tribridge, Lagan, and Ciber argue section 552.110(a) and/or section 552.110(b) of the Government Code for portions of their proposals. Idea and Smartsoft also raise section 552.110, but have submitted no arguments in support of their assertions of this exception. 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

¹As our ruling for the partnership tax returns is dispositive, we need not address Toadfly's argument under section 552.110 of the Government Code for this information.

§ 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 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 776 (Tex. 1958). 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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

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

than “a process or device for continuous use in the operation of the business.”
RESTATEMENT OF TORTS § 757 cmt. b (1939).

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* Open Records Decision No. 661 at 5 (1999).

Upon review, we conclude Ciber has established a *prima facie* case that portions of its proposal, including its customer lists and pricing information, which we have marked, constitute trade secret information pursuant to section 552.110(a). Additionally, we find that both Tribridge and Lagan have made the specific factual or evidentiary showing that portions of their proposals, which we have marked, constitute commercial or financial information the release of which would cause Tribridge and Lagan substantial competitive injury under section 552.110(b). Accordingly, the city must withhold the information we have marked under section 552.110 of the Government Code.

However, upon review, we find that none of the parties have established a *prima facie* case that any portion of the remaining information constitutes a trade secret protected by section 552.110(a). We also conclude that none of the parties have made the specific factual or evidentiary showing required by section 552.110(b) that the release of any of the remaining information would cause substantial competitive harm. *See* Open Records Decision No. 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), 509 at 5 (because costs, bid specifications, and circumstances would change for future contracts, assertions that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Additionally, we note that Tribridge has published the identities of some of its customers on its website, making this information publicly available. Therefore, the city may not withhold any of the remaining information under section 552.110.

Idea also raises section 552.113 of the Government Code, which protects certain geological, geophysical, and other information regarding the exploration or development of natural resources. *See* Gov’t Code § 552.113; *see generally* Open Records Decision No. 627 (1994). Because Idea has not demonstrated that this exception is applicable to any of the remaining information at issue, the city may not withhold any information under section 552.113 of the Government Code.

Idea also raises section 552.131 of the Government Code, which provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" 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." *Id.* Thus, the protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); ORD 552, 661. Therefore, because we have already disposed of Idea's claims under section 552.110, the city may not withhold any of the remaining information under section 552.131(a) of the Government Code.

Section 552.131(b) protects information relating to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See Gov't Code* § 552.131(b). This aspect of section 552.131 protects the interests of governmental bodies, not those of third parties. Therefore, because the city does not claim this exception, none of the remaining information may be withheld under section 552.131(b) of the Government Code.

We note some of the remaining bid information is excepted from disclosure under section 552.136 of the Government Code, which provides that "[n]otwithstanding any other provision of this chapter, 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.”³ Gov’t Code § 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 we have marked pursuant to section 552.136 of the Government Code.⁴

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 city may withhold the evaluation matrixes and scoring sheets under section 552.104 of the Government Code. The city must withhold Toadfly’s partnership tax returns, which we have marked, under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the information we have marked in Ciber’s proposal under section 552.110(a). The city must withhold the information we have marked in Tribridge and Lagan’s proposals under section 552.110(b) of the Government Code. The city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released, but any information that is protected by copyright 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

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We 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.

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,



Kate Hartfield
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Open Records Division

KH/dls

Ref: ID# 370877

Enc. Submitted documents

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(w/o enclosures)

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