ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2010

Mr. Frank Waite
Assistant District Attorney
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2010-04878

Dear Mr. Waite:

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# 375100.

Dallas County (the "county") received a request for all documents pertaining to the agreement between the county sheriff and Keefe Commissary Network for Commissary Services including the county's RFP No. 2006-028-1786, Keefe's response, and Keefe's best and final offer to the county RFP No. 2006-028-1786. You state you have released some information to the requestor. You do not take a position as to whether the submitted information is excepted under the Act; however, you state its release may implicate the proprietary rights of the third party who submitted the proposal. You state, and provide documentation showing, that you have notified Keefe Commissary Network, LLC ("Keefe") 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 Keefe. We have considered the submitted arguments and reviewed the submitted information.

Keefe contends that section 552.110 of the Government Code is applicable to portions of its proposal. 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 excepted 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.

Keefe argues that portions of its proposal constitute trade secrets under section 552.110(a) of the Government Code. We find that Keefe has established that a portion of its customer information, which we have marked, is a trade secret and must be withheld under section 552.110(a) of the Government Code. However, Keefe has listed some of its customers in other portions of its proposal that it does not seek to withhold. Therefore, we find that Keefe has failed to establish that this information is a trade secret. Furthermore, Keefe indicates that the information they seek to withhold is specifically tailored to each customer. Thus we find that Keefe has not demonstrated that any of its remaining information constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 com. b (1939) (defining a trade secret as a process or device for continuous use in the operation of the business); ORD 552 at 5-6. Thus, the county may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Next, we determine that Keefe has established that the release of its operations information and its financial statements would cause the company substantial competitive harm. Accordingly, the county must withhold the information we have marked under section 552.110(b) of the Government Code. Upon review, however, we find that Keefe has not made the specific factual and evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause their companies substantial competitive harm. *See* Open Records Decision Nos. 661, 319 at 3 (1982) (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), 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 is too speculative). Accordingly, the county may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the county must withhold the information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The remaining information must be released.

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# 375100

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Mr. Keith F. Fuller
1260 Andes Boulevard
St. Louis, Missouri 63132
(w/o enclosures)