



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2010

Ms. Pat Tuohy
Executive Director
Central Texas Library System, Inc.
1005 West 41st Street, Suite 100
Austin, Texas 78756

OR2010-05392

Dear Ms. Tuohy:

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# 376058.

The Central Texas Library System, Inc. (the "system") received two requests for information related to a specified request for proposals. You state that the system will release some of the requested information to the requestors.¹ Although you take no position on the public availability of the submitted information, you indicate that it may contain proprietary information. You state, and provide documentation showing, that you have notified COMPanion Corporation, Auto-Graphics, The Library Corporation ("TLC"), Insignia Software, SirsiDynix, and Biblionix L.L.C. ("Biblionix") of the requests and of their opportunity to submit comments to this office as to why the submitted information should not be released to the requestors. 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 the applicability of exception to disclose under Act in certain circumstances). Representatives of TLC and Biblionix have submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.

¹The system states that three of the third parties have indicated that some or all of their information may be released.

Initially, we note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received comments from COMPAnion Corporation, Auto-Graphics, Insignia Software, and SirsiDynix. Therefore, because these third parties have not demonstrated that any of their information is proprietary for the purposes of the Act, the system may not withhold any of the submitted information on the basis of any proprietary interest that any of these parties may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Turning to the arguments that we received from Biblionix, we begin with Biblionix's claim under section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 protects information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). However, Biblionix has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the system may not withhold any of the submitted information under section 552.101 of the Government Code.

Biblionix claims that portions of its proposal are excepted under section 552.110 of the Government Code. In addition, we understand TLC to raise section 552.110 for portions of its proposal. This exception protects the proprietary interests of third 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). 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.² *See* ORD 552 at 5. We cannot conclude, however, 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Biblionix and TLC claim sections 552.110(a) and 552.110(b) are applicable to portions of their proposals. With specific regard to Biblionix's claim for withholding its pricing information, we note that pricing information pertaining to a particular contract is generally not a trade secret under section 552.110(a) 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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

Having considered the submitted arguments and reviewed the information at issue, we have marked portions of Biblionix's proposal as trade secret information under section 552.110(a). In addition, we find TLC has made a *prima facie* case that some of its client information is protected as trade secret information. We note, however, TLC publishes the identities of some of its clients on its website. In light of TLC's own publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. Furthermore, Biblionix and TLC have failed to demonstrate that any portion of their remaining information constitutes a trade secret. Accordingly, the system 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).

Biblionix and TLC also claim portions of their proposals are excepted from disclosure under section 552.110(b). Upon review, we find that TLC has established that the release of its pricing information would cause the company substantial competitive harm. Therefore, the system must withhold the information we have marked under section 552.110(b) of the Government Code. We also understand TLC to argue its customer information is subject to section 552.110(b), but as previously stated, TLC has published the identities of some of its customers on its website. Thus, TLC has failed to demonstrate that release of these customers' information and any of its remaining information would cause it substantial competitive injury. In addition, we find Biblionix has failed to provide specific factual evidence demonstrating that release of any of its information would result in substantial competitive harm to the company. *See* Open Records Decision Nos. 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 (1988) (because 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder, such as Biblionix, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *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, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the remaining information may not be withheld under section 552.110(b).

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 system must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released; however, 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 376058

Enc. Submitted documents

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