



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2010

Mr. Tyler Wallach
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2010-06103

Dear Mr. Wallach:

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# 377222 (City of Fort Worth PIR No. 2115-10).

The City of Fort Worth (the "city") received a request for an electronic copy of seven named companies' responses to Request for Proposals 07-308. You state that the city will withhold the insurance numbers in the submitted information pursuant to a previous determination issued to the city.¹ While you take no position with respect to the public availability of the remaining submitted information, you state that the request may implicate the proprietary interests of the third parties whose information has been requested. Accordingly, you state that you have notified the interested third parties of this request for information and of their right to submit arguments to this office as to why the information should not be released.² 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

¹We 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.

²The interested third parties are CIBER, Inc. ("CIBER"); eVerge Group ("eVerge"); SAP Public Service ("SAP"); Strategic Information Solutions, Inc. ("SIS"); CherryRoad Technologies ("CherryRoad"), Oracle, and SunGard Public Sector ("SunGard").

received arguments from CherryRoad, Oracle, and SunGard. We have considered the submitted arguments and reviewed the submitted information.

CherryRoad seeks to withhold certain internal financial statements submitted to the city. We note, however, that the city has not submitted that information for our review. Because the city did not submit such information, this ruling does not address that information and is limited to information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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 id.* § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from CIBER, eVerge, SAP, or SIS explaining why their respective submitted information should not be released. Therefore, we have no basis to conclude that CIBER, eVerge, SAP, or SIS have a protected proprietary interest in their 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 information based on the proprietary interests of CIBER, eVerge, SAP, or SIS.

Oracle and SunGard claim portions of their proposals are excepted from disclosure under section 552.110 of the Government Code. This section 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." Gov't Code § 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 a single or ephemeral event 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.³ Open Records Decision No. 402 (1983). We note that information pertaining to a specific contract with a governmental body 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." *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD Nos. 319 at 3, 306 at 3.

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

³The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Upon review, we find that SunGard and Oracle have established a *prima facie* case that portions of their customer information constitutes trade secrets. We also find that Oracle has demonstrated that additional portions of its proposal constitute protected trade secrets. Thus, the city must withhold the information we have indicated in SunGard's and Oracle's proposals under section 552.110(a). We note, however, that both SunGard and Oracle have made some of the customer information they seek to withhold publicly available on their websites. Because SunGard and Oracle have published this information, they have failed to demonstrate that this information is a trade secret and none of this information may be withheld under section 552.110(a). Additionally, we find that SunGard and Oracle have failed to establish how any of their remaining information constitutes a trade secret under section 552.110(a). See ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Consequently, the city may not withhold any portion of Oracle's or SunGard's remaining information as a trade secret under section 552.110(a).

SunGard also seeks to withhold information in its proposal under section 552.110(b). However, we find that SunGard has made only conclusory allegations that release of the submitted information would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Accordingly, the city may not withhold any of SunGard's remaining information under section 552.110(b).

Oracle next argues that portions of its remaining information are excepted under section 552.139 of the Government Code, which provides:

(a) Information is excepted from [required public disclosure] 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. Upon review, we find that no portion of the remaining information relates to computer network security, restricted information under section 2059.055 of the Government Code, or to the design, operation, or defense of a computer network for purposes of section 552.139(a). Furthermore, Oracle has not demonstrated that the remaining information consists of a computer network vulnerability assessment or report, as contemplated by section 552.139(b). Therefore, the city may not withhold any of the remaining information under section 552.139.

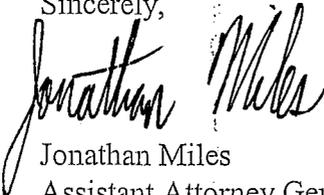
We note that some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection 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).

In summary, the city must withhold the information we have indicated in SunGard's and Oracle's proposals under section 552.110(a) of the Government Code. The remaining information must be released to the requestor, 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 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 377222

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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