



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2010

Ms. Michelle T. Rangel
Assistant County Attorney
Fort Bend County
301 Jackson Street, Suite 728
Richmond, Texas 77469-3108

OR2010-09144

Dear Ms. Rangel:

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# 383818.

The Fort Bend Purchasing Department (the "county") received a request for vendor proposals, scoring sheets, cumulative point scoring and matrices, cost/price pages, and the awarded contract related to Request for Proposal No. 06-067. You claim the submitted information is subject to a previous determination by this office. You also state release of some of the requested information may implicate the proprietary interests of several third parties. Accordingly, you provide documentation showing the county notified ISECUREtrac Corporation ("ISECURE"), Pro Tech Monitoring, Inc. ("Pro Tech"), SecureAlert ("Alert"), Sentinel Offender Services ("Sentinel"), and BI, Inc. ("BI") of the request for information and of the right of each to submit arguments to this office as to why its requested 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). We have considered the submitted arguments and reviewed the submitted information.

You represent the submitted information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2007-05357 (2007). In this prior ruling, we ruled the manuals submitted in Sentinel's proposal must be withheld under

section 552.110(a) of the Government Code, the insurance policy numbers we marked must be withheld under section 552.136 of the Government Code, and the remaining information must be released. The information we ordered released in Open Records Letter No. 2007-05357 included Pro Tech's proposal. Pro Tech now argues portions of its proposal are excepted under sections 552.108 and 552.110 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the county may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. However, section 552.108 only protects the interests of a governmental body and is not designed to protect the interests of private parties. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions are intended to protect only the interests of governmental body as distinct from exceptions intended to protect information deemed confidential by law or interests of third parties). Because the county has not submitted any arguments under section 552.108, that section is not applicable in this instance. We further note section 552.108 is a discretionary exception under the Act and does not make information confidential under law or expressly prohibit its release for purposes of section 552.007. *See* Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver). However, because section 552.110 makes information confidential under law, we will consider Pro Tech's arguments under that section.

Section 552.110 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." *See* 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.¹ 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).

As mentioned above, Pro Tech's information was subject to a previous request for information, in response to which this office issued Open Records Letter No. 2007-05357.

¹The 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).

In that prior ruling, the county notified Pro Tech pursuant to section 552.305, and Pro Tech failed to submit any arguments that its information was excepted from disclosure under the Act. Since the issuance of the previous ruling on May 7, 2007, Pro Tech has not disputed this office's conclusion regarding the release of its submitted proposal, and we presume that, in accordance with that ruling, the county has released the proposal. In this regard, we find Pro Tech has not taken necessary measures to protect the requested proposal in order for this office to conclude that any portion of that document now either qualifies as a trade secret or contains commercial or financial information, the release of which would cause Pro Tech substantial harm. *See Gov't Code § 552.110, RESTATEMENT OF TORTS § 757 cmt. b (1939); see also ORDs 661, 319 at 2, 306 at 2, 255 at 2.* Accordingly, we conclude that the county may not withhold any information in Pro Tech's proposal under section 552.110 of the Government Code.

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, we have not received comments from ISECURE, Sentinel, Alert, or BI explaining why any previously released portion of their proposals should not be released. Therefore, we have no basis to conclude the law, facts, or circumstances have changed with respect to these third parties' submitted proposals. Consequently, the county must continue to rely on Open Records Letter No. 2007-05357 with respect to the information that pertains to ISECURE, Sentinel, Alert, and BI. *See Open Records Decision No. 673 (2001)* (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling; ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We have marked these parties' proposals in accordance with our ruling in Open Records Letter No. 2007-05357.

In summary, as you raise no exceptions to disclosure, we conclude the county must continue to rely on Open Records Letter No. 2007-05357 as a previous determination and withhold or release the proposals pertaining to ISECURE, Sentinel, Alert, and BI in accordance with Open Records Letter No. 2007-05357. The county must release Pro Tech's proposal in its entirety.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

Ref: ID# 383818

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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