



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 11, 2010

Mr. Tony Gilman
Texas Health Services Authority
P.O. Box 1564
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OR2010-10926A

Dear Mr. Gilman:

This office issued Open Records Letter No. 2010-10926 (2010) on July 22, 2010. Since that date, our office has been provided with new information. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on July 22, 2010. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 387740.

The Texas Health Services Authority (the "authority") received three requests from different requestors. The first request is for the proposal submitted by Computer Task Group, Inc. ("CTG") in response to RFQ No. 2010-HCC01. The second request is for CTG's contract and the proposals submitted by the non-winning bidders. The third request is for the top three finalists' proposals submitted in response to RFQ No. 2010-HCC01 and the scoring tabulations and notes of evaluators for these finalists. You state you have provided the third requestor with some of the requested information. You state that release of the requested proposals and contract may implicate the proprietary interests of certain third parties.¹

¹The interested third parties are as follows: Capgemini Government Solutions, LLC ("Capgemini"); Advances in Management, Inc.; ("AIM"); Maximus; CTG; Terida-Marsh Joint Venture ("Terida"); Southwest Research Institute ("Southwest"); Public Consulting Group; Gartner; Gorman Health Group, LLC ("Gorman"); Health Management Associates ("Health Management"); Hielix; IBM; Ingenix; Accenture; Courtyard Group; Business & Financial Solutions; MTG Management Consultants; Comsys; Northside Business Consulting, Inc.; PriceWaterhouseCoopers LLP; Colchester Consulting Group; Deloitte Consulting, LLP; Dewpoint; Diamond Management and Technology Consultants, Inc.; Fox Systems; Bass and Associates; Navigant; and The Strategic Organization.

Accordingly, you state that you have notified these third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *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). We have received comments from Public Consulting Group stating that it does not object to the release of its information. We have also received comments from Gorman. We have received arguments from Capgemini, AIM, Maximus, CTG, Terida, Southwest, and Health Management. We have reviewed the submitted information and considered the submitted arguments.²

First, we note interested third parties are allowed ten business days after the date of their receipt of the governmental body's notice under section 552.305(d) to submit their 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 arguments from the remaining third parties, nor Gorman, explaining why their portions of the submitted information should not be released. Therefore, we have no basis to conclude that Gorman or the remaining third parties have protected proprietary interests 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 (1990). Consequently, the authority may not withhold the remaining third parties submitted proposals on the basis of any proprietary interests these companies may have in the information.

CTG raises 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. We note, however, that section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the authority does not seek to withhold any information pursuant to section 552.104, no portion of the submitted information may be withheld on the basis of section 552.104 of the Government Code.

²Although you raise all of the exceptions to disclosure found in the Act, including section 552.106 of the Government Code, you have provided no arguments explaining how any exceptions are applicable to the submitted information. Therefore, we do not address these exceptions. Gov't Code §§ 552.301(b), (e), .302.

AIM, Capgemini, Maximus, CTG, Terida, Southwest, and Health Management claim portions of their proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. 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.³ 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

³The following are the six factors that the Restatement gives 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).

necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code 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 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

We understand AIM and Capgemini to claim portions of their proposals are trade secrets that should be protected by section 552.110(a). Having reviewed AIM’s and Capgemini’s arguments, we find they have made a *prima facie* case that some of their respective client information constitutes trade secrets. We have marked the client information that the authority must withhold from AIM’s and Capgemini’s proposals under section 552.110(a) of the Government Code. However, AIM and Capgemini have made the remainder of the customer information they seek to withhold available on their websites. Because AIM and Capgemini have published this customer information, we conclude they have failed to demonstrate that they consider this information to be a trade secret. *See* ORD 402. Both AIM and Capgemini also assert that the portions of their proposals that concern their methodology should be protected as trade secret information. Upon review, we agree that AIM and Capgemini have also made a *prima facie* case that the information we have marked in AIM’s and Capgemini’s proposals reveals methodologies that are trade secrets of the respective companies. Thus, the authority must withhold this information under section 552.110(a). Although AIM and Capgemini also argue the pricing information in their proposals should be withheld as a trade secret, pricing information pertaining to a particular solicitation or 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.” *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Thus, no pricing information may be withheld under section 552.110(a). Furthermore, we find AIM and Capgemini have not demonstrated how the remaining information they seek to withhold in their proposals meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (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). Consequently, the authority may not withhold any of AIM’s or Capgemini’s remaining information under section 552.110(a) of the Government Code.

We understand AIM and Capgemini to claim that some of their remaining information, and Southwest, Maximus, CTG, Terida, and Health Management to claim that portions of their information would, if released, cause each company substantial competitive harm. Upon review, we find AIM, Capgemini, Southwest, Maximus, Terida, and Health Management

have established that the release of their pricing information would cause each company substantial competitive harm. Thus, the authority must withhold the pricing information, which we have marked, in AIM's, Capgemini's, Southwest's, Maximus's, Terida's, and Health Management's proposals under section 552.110(b) of the Government Code. We note, however, that pricing information of a winning bidder is generally not excepted under section 552.110(b) because 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, as CTG was the winning bidder in this instance, the authority may not withhold any of CTG's pricing information under section 552.110(b). We also determine that Southwest, Maximus, CTG, Terida, and Health Management have established that the release of portions of the remaining information they seek to withhold would cause each company substantial competitive harm. Therefore, the authority must withhold the information we have marked in the proposals at issue under section 552.110(b) of the Government Code. We note that CTG has made some of the information it seeks to withhold publicly available on its website. Because CTG made public some of the client information it now seeks to withhold under section 552.110(b), we conclude that CTG has failed to demonstrate that it considers this information to be confidential. Further, we find that AIM, Capgemini, Southwest, Maximus, CTG, Terida, and Health Management have made only conclusory allegations that release of their remaining information would result in substantial competitive injury. *See generally* Open Records Decision Nos. 661, 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), 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). Accordingly, the authority may not withhold any of AIM's, Capgemini's, Southwest's, Maximus's, CTG's, Terida's, and Health Management's remaining information under section 552.110(b).

We note portions of the remaining information are subject to section 552.136 of the Government Code. Section 552.136(b) states "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b). The authority must withhold the submitted account, routing, and insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

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 certain bank account, routing, and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

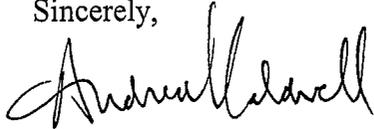
We note that some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, the authority must withhold the portions of AIM's and Capgemini's information we have marked under section 552.110(a) of the Government Code. The authority must withhold the portions of AIM's, Capgemini's, Southwest's, Maximus's, CTG's, Terida's, and Health Management's information we have marked 552.110(b) of the Government Code. The authority must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released to the requestors, but only 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,



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Assistant Attorney General
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ALC/eeg

Ref: ID# 387740

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