



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2010

Ms. Judith N. Benton
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2010-12336

Dear Ms. Benton:

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# 392223 (City of Waco Reference #: LGL-10-815).

The City of Waco (the "city") received a request for all proposals submitted and awarded in response to a specified request for proposals pertaining to electric demand response services. Although you take no position as to whether the submitted information is excepted under the Act, you state that release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Comverge, Inc. ("Comverge"); EnerNOC, Inc. ("EnerNOC"); and MPower², LLC ("MPower") of the request for information 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) (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 comments from EnerNOC. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2009-17334 (2009). In that ruling, we determined, in part, the city must withhold the portions of MPower's information we marked under section 552.110 of the Government Code but must release the remainder

of MPower's proposal in accordance with copyright law. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based with regard to MPower's proposal, we conclude the city must rely on Open Records Letter No. 2009-17334 as a previous determination and withhold or release MPower's proposal in accordance with Open Records Letter No. 2009-17334. *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). In Open Records Letter No. 2009-17334, the city notified EnerNOC pursuant to section 552.305 when the city received the previous request for information, and EnerNOC failed to submit any arguments that its information was excepted under the Act. Accordingly, in our previous ruling, we ruled that the city must release EnerNOC's information. 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 city may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. However, EnerNOC now claims that its proposal contains private information excepted under section 552.101 of the Government Code, trade secret information protected under section 552.110(a) of the Government Code, and commercial and financial information protected under section 552.110(b) of the Government Code. Because information subject to sections 552.101 and 552.110 of the Government Code is deemed confidential by law, we will address EnerNOC's claims under these exceptions. We will also consider Comverge's information, as it was not previously ruled upon.¹

Next, we note 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, this office has not received comments from Comverge explaining why its submitted information should not be released. Therefore, we have no basis to conclude that Comverge has a protected proprietary interest 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

¹We note Comverge was the requestor in Open Records Letter No. 2009-17334, and CPower, Inc. is the requestor in the present request.

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 upon the proprietary interests of Comverge.

EnerNOC claims portions of its information are excepted under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, we note an individual’s name, home address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision Nos. 554 at 3 (1990) (disclosure of person’s name, address, or telephone number not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers not protected under privacy). Further, common-law privacy protects the interests of individuals, and not those of business and governmental entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Upon review, we find no portion of EnerNOC’s information is highly intimate or embarrassing and not of legitimate public interest. Therefore, we conclude no portion of EnerNOC’s information may be withheld under section 552.101 in conjunction with common-law privacy.

Next, EnerNOC claims portions of its information are excepted 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: (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).

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.² 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).

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 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).

As mentioned above, EnerNOC's information was subject to a previous request for information, in response to which this office issued Open Records Letter No. 2009-17334. In that prior ruling, the city notified EnerNOC pursuant to section 552.305, and EnerNOC failed to submit any arguments that its information was excepted from disclosure under the Act. Since the issuance of the previous ruling on December 8, 2009, EnerNOC has not disputed this office's conclusion regarding the release of its submitted proposal, and we presume that, in accordance with that ruling, the city has released the proposal. In this regard, we find EnerNOC 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 EnerNOC 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 city may not withhold any information in EnerNOC's proposal under section 552.110 of the Government Code.

We note that portions of Comverge's information are subject to section 552.136 of the Government Code.³ Section 552.136 states that "[n]otwithstanding any other provision of this chapter, 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." Gov't Code § 552.136(b). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Accordingly, we find that the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

In summary, we conclude the city must continue to rely on Open Records Letter No. 2009-17334 as a previous determination and withhold or release MPower's proposal in accordance with Open Records Letter No. 2009-17334. The city must withhold the insurance policy numbers we have marked under section 552.136 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.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 392223

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Roy Price III
MPower2, LLC
24 Waterway Avenue, Suite 625
The Woodlands, Texas 77380
(w/o enclosures)

Mr. Mark Schafer
Comverge Inc.
2090 Silver Hawk Court
Rockwall, Texas 75032
(w/o enclosures)

Mr. David Brewster
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, Massachusetts 02110
(w/o enclosures)

Mr. Jeff Jumonville
EnerNOC, Inc.
1900 Georgia Landing Cove
Austin, Texas 78746
(w/o enclosures)