



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2010

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2010-12384

Dear Ms. Sims:

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# 390437.

The City of Lubbock (the "city") received a request for each Statement of Qualifications ("SOQ") submitted to the city in response to Request for Qualifications number 10-045-MA, as well as any scoring matrix sheets used to rank the responding firms. Although you take no position as to the public availability of the submitted information, you state its release may implicate the proprietary interests of the third parties whose information is at issue. Thus, pursuant to section 552.305 of the Government Code, you were required to notify Traffic Engineers, Inc. ("Traffic"), Kimley-Horn and Associates, Inc. ("Kimley"), Delcan Corporation ("Delcan"), Scientel Wireless, LLC ("Scientel"), Walter P. Moore and Associates, Inc. ("Walter Moore"), WilburSmith Associates ("WilburSmith"), Teal Engineering Services, Inc. ("Teal"), and Lee Engineering, LLC ("Lee") of the request and of the companies' right to submit arguments to this office as to why their information should not be released. 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 applicability of exception to disclosure under in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

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 Traffic, Kimley, Delcan, Scientel, WilburSmith, Teal, or Lee explaining why any portion of those companies' submitted information should not be released. Therefore, we have no basis to conclude Traffic, Kimley, Delcan, Scientel, WilburSmith, Teal, or Lee have any 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 (1990). Consequently, the city may not withhold any portion of the information pertaining to Traffic, Kimley, Delcan, Scientel, WilburSmith, Teal, Lee on the basis of any proprietary interest those companies may have in that information.

Walter Moore submitted a brief to this office and states certain sections of its SOQ include "confidential information and trade secrets[.]" Thus, we understand Walter Moore to raise sections 552.101 and 552.110(a) of the Government Code for portions of its SOQ. 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 exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Walter Moore has not directed our attention to any law under which any of the submitted information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the city may not withhold any of that company's submitted information under section 552.101 of the Government Code.

Section 552.110(a) of the Government Code protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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* Open Records Decision No. 552 at 5 (1990). 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). Walter Moore generally states portions of its SOQ include trade secrets, but neither explains how the information meets the definition of a trade secret nor demonstrates any necessary factors of a trade secret claim. Thus, we find Walter Moore failed to establish the applicability of section 552.110(a) to any of its submitted information, and no information may be withheld on that basis.

However, the submitted information contains insurance policy numbers that are subject to section 552.136 of the Government Code.² Section 552.136(b) states that "[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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device").

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).

²The 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).

This office has determined insurance policy numbers are "access device" numbers for purposes of section 552.136. Thus, the city must withhold the insurance policy numbers we marked in the submitted information under section 552.136 of the Government Code.³

The remaining information contains documents 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 city must withhold the insurance policy numbers we marked under section 552.136 of the Government Code. The remaining submitted information must be released, but any copyrighted information must 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

³We 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 an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 390437

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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