



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2010

Mr. Paul M. González
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OR2010-12413

Dear Mr. González:

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# 390481.

The Brownsville Public Utilities Board ("BPUB"), which you represent, received a request for information related to "BPUB's purchases made under the RFP #P056-10 System Installation Project[, and] all responses received from vendors under RFP #P056-10." You state that some responsive information has been released to the requestor. Although BPUB takes no position as to the disclosure of the requested information, you state that it may contain confidential and proprietary information subject to exception under the Act. Accordingly, you state and provide documentation showing BPUB notified the interested third parties 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.¹ 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 ASC and from an attorney on behalf of ASC. We have reviewed the claimed exceptions and the submitted information.

¹The parties notified pursuant to section 552.305 are the following: American Surveillance Co. ("ASC"); Alarm Security Group, LLC, d/b/a Argus Security; Dalco Protection Systems; Johnson Controls, Inc.; Metroplex Control Systems; Security Depot; Security International, Inc.; Southwestern Security Services, Inc.; and Superior Alarms.

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, we have not received comments from any third party other than ASC explaining why the submitted information should not be released. Therefore, we have no basis to conclude that any of the remaining third parties 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 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, BPUB may not withhold any of the submitted information based upon the proprietary interests of the remaining third parties.

ASC seeks to protect its information under sections 552.101, 552.104, 552.108, 552.110, and 552.139 of the Government Code. Although ASC also raises sections 552.111 and 552.133 of the Government Code, the company has provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we presume ASC no longer asserts these exceptions to disclosure. Gov't Code §§ 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested), .302.

ASC asserts that its information is excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. However, ASC has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of the submitted information confidential under section 552.101. Therefore, BPUB may not withhold any portion of the submitted information under section 552.101.

ASC argues that its information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). This exception protects the competitive interests of governmental bodies such as the city, not the proprietary interests of private parties such as ASC. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, BPUB did not raise section 552.104 as an exception to disclosure. Therefore, BPUB may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, ASC claims that its submitted information is excepted under section 552.108 of the Government Code. This section provides, in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a), (b). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. ASC is not a law enforcement agency. Accordingly, ASC has failed to demonstrate that section 552.108 applies. *But see* Open Records Decision No. 474 (1987) (predecessor statute to section 552.108(a)(1) may be invoked by a proper custodian when a criminal incident is still under active investigation or prosecution and law enforcement entity represents that release of records will interfere with investigation or prosecution). Therefore, BPUB may not withhold any of the information at issue under section 552.108 of the Government Code.

Next, ASC claims its information is 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* ORD 552 at 2. 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.² 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 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

ASC claims its information contains trade secrets that should be protected by section 552.110(a) of the Government Code. Having reviewed ASC’s arguments, we find the company has failed to demonstrate how the information at issue meets the definition of a trade secret, and thus BPUB may not withhold this information under section 552.110(a). Although ASC argues the pricing information in its proposal 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.

We also understand ASC to raise section 552.110(b) of the Government Code for its proposal. We note 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

²The 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).

charged government is a cost of doing business with government). Accordingly, as ASC was a winning bidder in this instance, BPUB may not withhold any of ASC's pricing information under section 552.110(b). Further, ASC has made only conclusory allegations that release of the information at issue would result in substantial damage to the company's competitive position. Thus, ASC has not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the submitted information. *See* Open Records Decision Nos. 661 at 5-6 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (because 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, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, BPUB may not withhold any of ASC's information under section 552.110(b) of the Government Code.

ASC also raises section 552.139 of the Government Code, which provides as follows:

(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, or a computer program, network, system, 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 is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. ASC states the information at issue "is deemed security sensitive 'information that relates to computer network security, to restricted information under Section 2059.055, or to the design, operation, or defense of a computer network.'" Upon review, we find ASC has failed to demonstrate the information at issue relates to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). *See id.* § 2059.055

(defining confidential network information for purposes of section 2059.055). Further, we find ASC has failed to demonstrate this information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Consequently, none of ASC's submitted information may be withheld under section 552.139 of the Government Code.

We note some of the remaining information is subject to section 552.130 of the Government Code, which excepts from public disclosure information that relates to a motor vehicle title or registration issued by an agency of this state.³ *Id.* § 552.130(a)(2). Thus, BPUB must withhold the information we have marked under section 552.130 of the Government Code.

We also note portions of the submitted 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). This office has concluded that insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, BPUB must withhold the bank account, check routing, and insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

Finally, we note that some of the submitted 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, BPUB must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The remaining information must be released in accordance with copyright law.

³The Office of the Attorney General will raise mandatory exceptions such as sections 552.130 and 552.136 on behalf of a governmental body. 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 bank account, bank routing, and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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
Open Records Division

CN/tp

Ref: ID# 390481

Enc. Submitted documents

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