ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2010

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701

OR2010-14921

Dear Ms. Alexander:

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# 395273.

The Texas Department of Transportation (the "department") received a request for the bid responses including pricing from all respondents other than PrintMailPro for Request for Proposals B442009029901000 and B442009029902000. Although the department takes no position with respect to the public availability of the submitted information, you state its release may implicate the proprietary interests of Business Ink, Co. ("Business Ink") and IBM Corporation ("IBM"). Accordingly, you state, and provide documentation showing, the department notified Business Ink and IBM of its receipt of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestor. *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 comments submitted by Business Ink and IBM and reviewed the submitted information.

Initially, we note a portion of the submitted information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2010-14105 (2010). In Open Records Letter No. 2010-14105, we determined that IBM had not established that any of its information could be withheld under section 552.102 or section 552.104 of the

Government Code. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude the department must rely on Open Records Letter No. 2010-14105 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling. *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). However, we will address the arguments against disclosure of Business Ink's information.

Business Ink claims section 552.104 of the Government Code for its information. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). We note that this exception protects the competitive interests of governmental bodies, not the proprietary interests of a private party such as Business Ink. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the department did not claim an exception to disclosure under section 552.104. Therefore, the department may not withhold any of the submitted information under section 552.104 of the Government Code.

Business Ink claims portions of its proposal are excepted from disclosure under section 552.110 of the Government Code. This section 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[.]" 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* 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).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); 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).

Business Ink claims its customer information, financial standing, business methodology, and personal resumes of company principals are trade secrets under section 552.110(a). Upon review, we find the customer information we have marked constitutes trade secrets and must be withheld under section 552.110(a). We find, however, Business Ink has not demonstrated how any of the remaining information at issue meets the definition of a trade secret. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim); 319 at

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[1]The 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];
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> (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).

2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Consequently, the department may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Business Ink also asserts its financial standing, business methodology, and personal resumes of company principals are excepted from disclosure under section 552.110(b). However, Business Ink has not provided any specific factual evidence demonstrating how the release of the information at issue would cause the company substantial competitive harm. *See* ORD Nos. 661 (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), 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). Therefore, none of the remaining information Business Ink seeks to withhold is excepted under section 552.110(b).

Business Ink claims that the social security numbers in the remaining information are excepted from disclosure under section 552.147 of the Government Code. This section provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147(a). Therefore, the department may withhold the social security numbers in the remaining information under section 552.147 of the Government Code.[2]

In summary, the department must rely on Open Records Letter No. 2010-14105 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling. The department must withhold the customer information we marked under section 552.110(a) of the Government Code. The department may withhold the social security numbers in the submitted information. 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.

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

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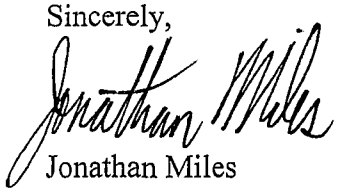
[2]We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/eeg

Ref: ID# 395273

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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