



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2010

Ms. Candice M. De La Garza
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2010-16782

Dear Ms. De La Garza:

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# 399139.

The City of Houston (the "city") received a request for the responses to RFI Q23449 for a point of sale system. You state some of the responsive information will be released. Although the city takes no position with respect to the public availability of the submitted information, you indicate the release of this information may implicate the proprietary interests of Active Network, Geco, Inc., Stone Bond Technologies, L.P., TDX Tech, and Texas NICUSA, L.L.C. Accordingly, you notified these third parties of the city's receipt of the request for information and of their right to submit arguments to this office as to why their 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 Active Network and reviewed the submitted information.

Initially, 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 received comments only from Active Network explaining why its information should not be released. Therefore, we have no basis to conclude the remaining notified companies have protected proprietary interests in their 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, the

city may not withhold these companies' information on the basis of any proprietary interest they may have in their information.

Next, Active Network claims portions of its information are excepted under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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.¹ 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

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 other 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).

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. *See* Open Records Decision No. 402 (1983). We note that pricing information pertaining to a particular proposal 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; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) 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 (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).

Upon review, we find that Active Network has established that most of its customer information constitutes trade secrets. Therefore, the city must withhold this information, which we have marked, under section 552.110(a) of the Government Code. We note, however, that Active Network has published the identities of one of its customers on its website. Thus, Active Network has failed to demonstrate that the information it has published on its website is a trade secret. Further, Active Network has failed to demonstrate that any of the remaining information it seeks to withhold meets the definition of a trade secret, nor has Active Network demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision No. 319 at 3 (1982) (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). Thus, none of Active Network’s remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Upon review of Active Network’s arguments and the information at issue, we find that Active Network has established that the pricing information we have marked constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the city must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Active Network has made only conclusory allegations that the release of the remaining information it seeks to withhold would result in substantial damage to its competitive position. Thus, Active Network has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (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). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

Finally, we note that some of the submitted information is 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 (1977). 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 information we have marked under section 552.110 of the Government Code. The remaining information must be released, but any information protected by copyright 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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/em

Ref: ID# 399139

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Giulia Rivera
Legal Counsel
Active Network
10182 Telesis Court, Suite 300
San Diego, California 92121
(w/o enclosures)

Mr. Phong Hua
Application Specialist
Life Sciences & Healthcare Sector
Stone Bond Technologies, LP
1021 Main Street, Suite 1550
Houston, Texas 77002
(w/o enclosures)

Ms. Renne Loring
Director of Outreach
Texas NICUSA, LLC
301 Congress, Avenue, Suite 400
Austin, TX 78701
(w/o enclosures)

Ms. Jennifer Graves
Geco, Inc.
1754 North 48th Street
Meza, Arizona 85205
(w/o enclosures)

Mr. Brett Larson
VP Business Development
TDX Tech
5735 West Old Shakopee Road
Bloomington, Minnesota 55437
(w/o enclosures)