ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2010

Mr. Michael G. Young
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-18532

Dear Mr. Young:

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# 402990.

The Texas Department of State Health Services (the "department") received a request for information relating to the respondents to RFI No. 537-10-76448, "WIN Evolution Project," including the companies' names, contact information, and responses. You inform us some of the requested information either has been or will be released. You state some of the submitted information is the subject of a previous Open Records Letter Ruling. You also state the submitted information may implicate the respondents' proprietary interests under section 552.110 of the Government Code. Although you take no position on the applicability of that exception, you inform us CMA Consulting Services ("CMA"), iBridge Group, Inc. ("iBridge"), and Sierra Systems, Inc. ("Sierra") were notified of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released.[1] We received correspondence from CMA. We have considered CMA's arguments and reviewed the information you submitted.

[1] *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

You inform us the submitted information relating to iBridge and Sierra was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2010-15025 (2010). In that ruling, we concluded the information relating to iBridge and Sierra must be released, but any information protected by copyright must be released in accordance with copyright law. You do not indicate there has been any change in the law, facts, and circumstances on which the previous ruling is based. Therefore, the department must dispose of the submitted information relating to iBridge and Sierra in accordance with Open Records Letter No. 2010-15025. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

You also acknowledge the department did not comply with its deadlines under section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(a)-(b), (e). Pursuant to section 552.302 of the Government Code, the rest of the submitted information is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because CMA's interests can provide a compelling reason under section 552.302 for non-disclosure of the remaining information, we will consider the company's arguments.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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).

The Supreme Court of Texas 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 single or ephemeral events in the conduct of the business,as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . .. 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) (emphasis added); *see 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 the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.[2] *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude, however, 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).

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* Open Records Decision No. 661 at 5-6 (1990) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CMA contends specified portions of its proposal constitute trade secrets under section 552.110(a). We also understand CMA to contend the information in question is excepted from disclosure under section 552.110(b). Having considered CMA's arguments and reviewed the information at issue, we conclude the department must withhold the pricing information we have indicated under section 552.110(b) of the Government Code. We find CMA has not demonstrated that any of the remaining information at issue constitutes a trade secret for the purposes of section 552.110(a). We also find CMA has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause CMA substantial competitive harm. We

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[2]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];
> (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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

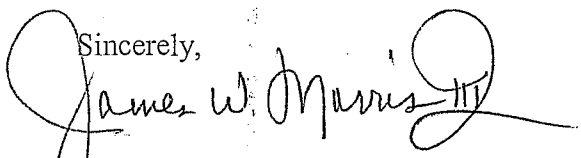
therefore conclude the department may not withhold any of the remaining information relating to CMA under section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

In summary: (1) the department must dispose of the submitted information relating to iBridge and Sierra in accordance with Open Records Letter No. 2010-15025; (2) the department must withhold the pricing information we have indicated under section 552.110(b) of the Government Code; and (3) the rest of CMA's 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 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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JWM/em

Ref: ID# 402990

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