



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2010

Ms. Dylbia L. Jefferies
Civil Legal Division
Cameron County Commissioners Court
110 East Monroe Street
Brownsville, Texas 78520

OR2010-18988

Dear Ms. Jefferies:

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# 403867.

The Cameron County Purchasing Agent (the "county") received a request for seven categories of information pertaining to the request for proposals for inmate telephone service at Cameron County jail facilities. You state you have released some information to the requestor. You indicate the county takes no position as to disclosure of the information. You indicate the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you indicate you have notified Global Tel*Link Corporation ("GTL") and Public Communications Services, Inc. ("PCS") of the request and of each company's right to submit arguments to this office as to why its information should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 42 (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 Act in certain circumstances). We have received comments from GTL and PCS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the county has not submitted information responsive to categories two through seven of the instant request. We assume, to the extent any information responsive to categories two through seven existed when the county received the request for

information, you have released this information to the requestor. If not, then you must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

Next, we must address the county's procedural obligations under the Act. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You inform us the county received the present request for information on September 24, 2010. Thus, the county's ten-business-day deadline under section 552.301(b) was October 8, 2010. However, you did not request a ruling from this office until October 14, 2010. Thus, the county has failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *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); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third party interests can provide compelling reasons to withhold information, we will consider whether the submitted information is excepted from disclosure under the Act.

GTL raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the county does not argue section 552.104 is applicable, we will not consider GTL's claim under this section. *See* ORD 592 (section 552.104 may be waived by governmental body). Therefore, the county may not withhold any of GTL's information under section 552.104 of the Government Code.

GTL and PCS raise section 552.110 of the Government Code for the submitted information. Section 552.110 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. 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* Open Records Decision 552 at 2 (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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

The 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.

Id.; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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).

Having reviewed GTL's arguments, we find GTL has not demonstrated how the information it seeks to withhold in its proposal meets the definition of a trade secret. *See* ORD 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). For example, GTL has not shown its workstation requirements are part of a process for continuous use in the operation of its business. Rather, GTL states the workstation requirements are dependent upon specific facility limitations, are designed for a customer's specific needs, and are not generally relevant beyond a particular bid. Information as to a single event does not meet the definition of a trade secret. Consequently, the county may not withhold any of GTL's information under section 552.110(a) of the Government Code.

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.*; Open Records Decision No. 661 (1999).

Upon reviewing GTL's brief, we find GTL failed to demonstrate the information it seeks to withhold is commercial or financial information the release of which would likely result in substantial competitive injury. Accordingly, the county may not withhold any of GTL's information under section 552.110(b). PCS states its financial statements reveal PCS's revenue and profit margins and that a competitor could use this information to calculate PCS's anticipated profit from a proposed contract. PCS further states its competitors could then undercut its profit margins in order to improperly win a future contract. Based on these representations, we find PCS demonstrated its financial statements are commercial or financial information the release of which would cause it substantial competitive harm. Accordingly, the county must withhold PCS's financial statements under section 552.110(b).

In summary, the county must withhold PCS's financial statements under subsection 552.110(b) of the Government Code. The remaining requested 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/vb

Ref: ID# 403867

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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