



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 29, 2010

Ms. Connie Crawford
Assistant County Attorney
El Paso County
4815 Alameda Avenue, 8th Floor, Suite B
El Paso, Texas 79905

OR2010-19475

Dear Ms. Crawford:

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# 404179 (El Paso County File No. HO-10-288).

The El Paso County Hospital District (the "district") received a request for all information used to evaluate and decide on a winning vendor for a specified RFP, including matrices used to compare products, pricing evaluations, and supporting RFP response material from the responding vendors.¹ While you take no position with respect to the public availability of the submitted information, you state that the request may implicate the proprietary interests of DocuData Solutions; American Cadastre, LLC d/b/a AMCAD ("AMCAD"); Smith & Hammaker; and HOV Services, Inc. Accordingly, you notified these entities of this request for information and of their right to submit arguments to this office as to why the information should not be released. *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 arguments from AMCAD. We have considered the submitted arguments and reviewed the submitted information.

¹You indicate the district sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

Initially, we note that 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, this office has not received comments from the remaining third parties explaining why each of the companies' submitted information should not be released. Therefore, we have no basis to conclude that these third parties have 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, the district may not withhold any portion of the submitted proposals based upon the proprietary interests of the remaining third parties.

AMCAD asserts its RFP response is not responsive to the present request because it was not the winning vendor nor did it establish the parameters for the evaluation of the bids received by the district. We note that a governmental body may communicate with a requestor for the purpose of clarifying or narrowing the request for information. *See* Gov't Code § 552.222(b). However, a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 (1990). In this case, the district sought and received clarification from the requestor and has submitted responsive information for our review. We consider the district to have made a good faith effort to identify the information that is responsive to the request. Accordingly, we will consider the arguments submitted by AMCAD against disclosure of the submitted information.

AMCAD asserts portions of its proposal are confidential under section 552.110 of the Government Code. 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. *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, 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 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 776 (Tex. 1958). 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). We note that pricing information pertaining to a particular 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." RESTATEMENT OF TORTS § 757 cmt. b (1939).

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.

Upon review, we conclude AMCAD has established a *prima facie* case that its scanning methodology process, which we have marked, constitutes trade secret information pursuant to section 552.110(a). Additionally, we find that AMCAD has made the specific factual or evidentiary showing that portions of its remaining proposal, including its pricing information and most of its customer list, which we have marked, constitute commercial or financial information the release of which would cause AMCAD substantial competitive injury under

²The 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).

section 552.110(b). Accordingly, the district must withhold the information we have marked under section 552.110 of the Government Code.

However, upon review, we conclude that AMCAD has failed to make the specific factual or evidentiary showing required by section 552.110(b) that the release of any of its remaining information would cause substantial competitive harm. *See* Open Records Decision 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), 509 at 5 (because costs, bid specifications, and circumstances would change for future contracts, assertions that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Additionally, we note that AMCAD has published the identity of one of its customers on its website, making this information publicly available. Therefore, the district may not withhold any of the remaining information in AMCAD's proposal under section 552.110 of the Government Code.

In summary, the district must withhold the information we have marked in AMCAD's proposal under section 552.110 of the Government Code. 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 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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/eeg

Ref: ID# 404179

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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