



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 14, 2011

Mr. James G. Nolan  
Assistant General Counsel, Open Records  
Texas Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711

OR2011-05221

Dear Mr. Nolan:

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# 414532 (CPA ID# 6946062954).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for the responses and bid tabulations related to RFP CCG-DIS-2010-003 for digital imaging services. You state the comptroller will release some requested information to the requestor. Although you take no position as to the public availability of the remaining requested information, you state release of this information may implicate the proprietary interests of American Cadastre LLC d/b/a/ AMCAD ("AMCAD"); Compu-Data International, LLC ("Compu-Data"); BancTec BPO ("BancTec"); Global 360, Inc. ("Global"); Precision Micrographics & Imaging, Inc. ("Precision"); Gill Digital Services ("Gill Digital"); HOV Services, LLC ("HOV"); and InStream, LLC ("InStream"). Thus, pursuant to section 552.305 of the Government Code, you notified those third parties of the request and of the companies' rights to submit arguments to this office as to why their information should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (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 the Act in certain circumstances). We have received comments from Compu-Data and Global and reviewed the submitted information.

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 AMCAD, BancTec, Precision, Gill Digital, HOV, or InStream explaining why those companies' submitted proposals should not be released. Therefore, we have no basis to conclude those six companies have any protected proprietary interests in their 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 (1990). Accordingly, the comptroller may not withhold any portion of the proposals pertaining to AMCAD, BancTec, Precision, Gill Digital, HOV, or InStream based upon the proprietary interests of those companies.

Both Compu-Data and Global contend their submitted proposals must be withheld because the proposals are marked as proprietary and confidential. However, information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Compu-Data raises section 552.101 and cites to Open Records Decision No. 652 (1997). Open Records Decision No. 652 addressed under what circumstances the Texas Natural Resource Conservation Commission, which has been renamed the Texas Commission on Environmental Quality (the “commission”), must withhold from the public “trade secret” information pursuant to section 382.041 of the Health and Safety Code. *See* ORD 652 at 1 (addressing whether Health and Safety Code section 382.041 supplants common-law trade secret protection for certain information filed with the commission). Thus, we understand Compu-Data to assert its information is confidential under section 382.041. Section 382.041 provides in relevant part that “a member, employee, or agent of [the commission] may not disclose information submitted to [the commission] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.” Health & Safety Code § 382.041(a). By its own terms, section 382.041 pertains only to information submitted to the commission. *See id.*; *see also* ORD 652 at 5. The proposals at issue in this request, however, were submitted to the comptroller. Consequently, none of Compu-Data’s information is made confidential by section 382.041 of the Health and Safety Code, and the comptroller may not withhold it under section 552.101 on that ground.

Both Compu-Data and Global raise section 552.110 of the Government Code. Section 552.110 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." 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 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 ORD 552 at 5. 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.<sup>1</sup> Open Records Decision No. 402 (1983).

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<sup>1</sup>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 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; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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* ORD 661 at 5-6 (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).

Compu-Data and Global raise section 552.110(a) of the Government Code. Compu-Data first claims its customers' identities should be withheld as trade secrets. We have marked the customers in Compu-Data's proposal that the comptroller must withhold under section 552.110(a) of the Government Code. However, Compu-Data has made the remaining listed customers publicly available on its website, and does not explain how information that has been published on a website could also be a trade secret. *See* ORD 402. Compu-Data also claims specific portions of its proposal reveal techniques the company uses that are not common knowledge. We have marked the portions of the company's proposal that reveal specific methods and processes of Compu-Data. Because Compu-Data has shown how this marked information meets the definition of a trade secret and is protectable as such, the comptroller must withhold the information we marked under section 552.110(a). Compu-Data also claims its pricing information, general qualifications, and service terms tailored for this proposal are trade secrets. However, such information is generally not protected under section 552.110, and the company has not explained how this information meets the definition of a trade secret. *See Huffines*, 314 S.W.2d at 776; ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 306 at 3. Further, pricing information of a winning bidder, as Compu-Data is in this case, is generally not excepted under section 552.110 because this office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Thus, no remaining information in Compu-Data's proposal may be withheld on the basis of section 552.110(a). Upon review of its submitted comments, Global has not provided any arguments explaining how any portion of its proposal meets the definition of a trade secret. Thus, we conclude Global has failed to establish any of its information is confidential pursuant to section 552.110(a), and the comptroller may not withhold any part of that company's proposal on that basis.

Compu-Data and Global also raise section 552.110(b). However, both companies have made only conclusory assertions that release of their proposals would cause the companies substantial competitive injury, and neither has provided any specific factual or evidentiary showing to support such assertion. *See* Open Records Decision Nos. 661 (1999), 509 at 5 (1988), 319 at 3 (1982); *see also* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Therefore, the comptroller may not

withhold any portion of the submitted information under section 552.110(b) of the Government Code.

The submitted proposals pertaining to Compu-Data and HOV contain insurance policy numbers that are subject to section 552.136 of the Government Code.<sup>2</sup> Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. This office has determined insurance policy numbers are “access device” numbers for purposes of section 552.136. Accordingly, the comptroller must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>3</sup>

Compu-Data claims the social security numbers of its personnel are excepted from disclosure. We note the proposal for Gill Digital also contains an individual’s social security number. Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147(a). Accordingly, the comptroller may withhold the social security numbers from the submitted information under section 552.147 of the Government Code.<sup>4</sup>

Finally, we note some of the remaining information may be 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 comptroller must withhold the information we marked in Compu-Data’s proposal under section 552.110(a) of the Government Code. The comptroller must also withhold the insurance policy numbers we marked in the proposals for Compu-Data and HOV under section 552.136 of the Government Code. The comptroller may withhold the

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

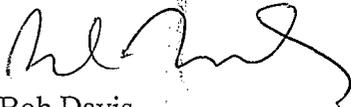
<sup>4</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b). As we are able to make this determination, we need not address Compu-Data’s argument against disclosure of this information under section 552.101 of the Government Code.

social security numbers in the proposals pertaining to Compu-Data and Gill Digital under section 552.147 of the Government Code. The comptroller must release the remaining information, but any information protected by copyright may only 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](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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/tf

Ref: ID# 414532

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Dallas M. Wolf  
American Cadastre LLC  
d/b/a AMCAD  
1710 Whittemore Street  
Rock Island, Illinois 61201  
(w/o enclosures)

Mr. Fred Summers  
Senior Sales Executive  
HOV Services  
11850 Hempstead Highway, Suite 270  
Houston, Texas 77092  
(w/o enclosures)

Ms. Cindy Rumbo  
Director of Business Development  
DocuData  
2701 East Grauwlyer Road  
Irving, Texas 75061  
(w/o enclosures)

Mr. Juan J. Celaya  
President & CEO  
Compu-Data  
11427 Slashpine Drive  
The Woodlands, Texas 77380  
(w/o enclosures)

Mr. William Owens  
Chief Operating Officer  
InStream, LLC  
365 Great Circle Road  
Nashville, Tennessee 37228  
(w/o enclosures)

Ms. Peggy Gerstenberg  
President  
Precision Micrographics & Imaging, Inc.  
8204 North Lamar, Suite C-20  
Austin, Texas 78753  
(w/o enclosures)

Mr. Chuck Barnett  
Vice President  
Global 360, Inc.  
10537 Gulfdale Street  
San Antonio, Texas 78216  
(w/o enclosures)

Ms. Barbara Gill  
CEO & President  
Gill Digital Services, LLC  
8150 North Central Expressway, Suite M-  
2250  
Dallas, Texas 75206  
(w/o enclosures)