



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 25, 2011

Mr. James Mu  
Assistant General Counsel  
TDCJ - Office of the General Counsel  
PO Box 4004  
Huntsville, Texas 77342-4004

OR2011-05660

Dear Mr. Mu:

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# 415324.

The Texas Department of Criminal Justice (the "department") received a request for any contract modifications between the department and a named entity and the most recent monthly invoice and quarterly performance report from the named entity. You state some information has been, or will be, released to the requestor. Although you raise section 552.110 of the Government Code as a possible exception to disclosure for a portion of the submitted information, you make no argument as to whether the information is excepted from disclosure under that section. You state release of this information may implicate the proprietary interests of a third party. Accordingly, you submit documentation showing you notified Pro Tech Monitoring, Inc. ("Pro Tech") of the request and the 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) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 on behalf of Pro Tech. You claim a portion of the submitted information is excepted from disclosure under section 552.134 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Pro Tech submitted information with its arguments against disclosure that the department did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Pro Tech does not object to release of the contract modifications and raises section 552.110 of the Government Code for the quarterly report and invoice at issue. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure (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 a "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 Record Decision No. 552 (1990). Section 757 defines 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 Huffines*, 314 S.W.2d at 776. 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).

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 Record Decision No. 661 at 5-6 (1999) (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).

Pro Tech asserts the quarterly report and pricing information in the invoice constitute trade secrets protected by section 552.110(a). Upon review, we find Pro Tech has failed to demonstrate the information at issue meets the definition of a trade secret. We note 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 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; ORDs 319 at 3, 306 at 3. Accordingly, the department may not withhold the submitted information under section 552.110(a).

Pro Tech also asserts the submitted information is protected by section 552.110(b). Pro Tech states release of the quarterly report and pricing information would give competitors an advantage by permitting them to use this information against Pro Tech in future bids. However, we find Pro Tech has failed to establish by a factual or evidentiary showing that release of the information at issue would cause the company substantial competitive injury. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue). Further, we note the pricing information of entities contracting with a government body is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, the department may not withhold the submitted information under section 552.110(b).

---

<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).

Pro Tech next claims the information at issue is excepted under section 552.108 of the Government Code. This section provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. Pro Tech is not a law enforcement agency or prosecutor. Furthermore, section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests, as distinguished from exceptions that are intended to protect the interests of third parties, and may be waived by the governmental body. *See* Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Because the department does not seek to withhold any information under section 552.108, none of the submitted information may be withheld on that basis.

Finally, the department raises section 552.134 for the submitted invoice. Section 552.134 of the Government Code provides, in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [department] is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). You state the submitted information relates to inmates confined in facilities operated by the department. We find the information we have marked is subject to section 552.134. You also assert, and we agree, section 552.029 of the Government Code does not apply to the information at issue. Therefore, the department must withhold the information we have marked under section 552.134.

In summary, the department must withhold the information we have marked under section 552.134. The remaining information must be released to the requestor.

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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/eeg

Ref: ID # 415324

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Hope Beall  
Pro-Tech  
1838 Gunn Highway  
Odessa, Florida 33556  
(w/o enclosures)