



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 28, 2011

Ms. Anne M. Constantine  
Legal Counsel  
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P.O. Box 619428  
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OR2011-05817

Dear Ms. Constantine:

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# 415768.

The Dallas/Fort Worth International Airport Board (the "board") received a request for the responses, scoring methodology, and results related to a specified request for proposals. You claim that some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. In addition, you state some of the submitted information may implicate the proprietary interests of third parties. Accordingly, you have notified DLT Solutions ("DLT"); RFD & Associates, Inc.; SAP Public Services, Inc.; Mythics, Inc.; Noetix Corporation ("Noetix"), and MicroStrategy Services Corporation ("MicroStrategy") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 comments from DLT, Noetix, and MicroStrategy. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge the request for information was ruled upon in Open Records Letter No. 2011-00700 (2011). In that ruling, we determined the board may withhold may withhold the scoring sheets under section 552.111 of the Government Code, the board must withhold the information we have marked under section 552.110(b) and section 552.136 of the Government Code, and the board must release the remaining information in accordance

with copyright law. You now submit additional responsive information pertaining to MicroStrategy. You acknowledge the board failed to meet the deadline prescribed by section 552.301(e) of the Government Code in requesting an open records decision from this office with respect to the newly submitted information. *See* Gov't Code § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the 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; *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). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because third-party interests are at stake, we will address MicroStrategy's arguments against the disclosure of the newly submitted information. However, you must continue to follow Open Records Letter No. 2011-00700 with respect to the remaining requested information. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

MicroStrategy asserts its information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, MicroStrategy has not directed our attention to any law, nor are we aware of any law, under which any of this information is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the board may not withhold any of the information at issue under section 552.101 of the Government Code.

MicroStrategy also raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, this section is a discretionary exception that only protects the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government). The board has not raised section 552.104. Therefore, we will not consider MicroStrategy's claim under section 552.104, and the board may not withhold any of MicroStrategy's information on that basis.

Next, MicroStrategy raises section 552.110 of the Government Code for portions of its submitted information. 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) of the Government Code excepts from disclosure “[a] trade secret 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. 1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides 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.<sup>1</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person’s claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a

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<sup>1</sup>The following are the six factors 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.

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).

matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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). 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

MicroStrategy asserts its customer information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find that MicroStrategy has established a *prima facie* case that some of its customer information, which we have marked, constitutes trade secrets. Therefore, the board must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that MicroStrategy has made the remaining customer information it seeks to withhold publicly available on its website. Because MicroStrategy has published this information, it has failed to demonstrate this information is a trade secret. Accordingly, none of the remaining information at issue may be withheld on that basis.

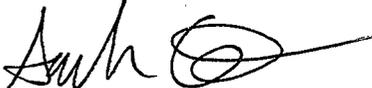
MicroStrategy states release of portions of its remaining information will cause it substantial competitive harm by allowing its competitors to know the specific processes, formulas, and methodologies used in MicroStrategy’s business. Upon review of MicroStrategy’s arguments under section 552.110(b), we find MicroStrategy has established the release of a portion of its information constitutes commercial or financial information the release of which would cause the company substantial competitive injury. Therefore, the board must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find MicroStrategy has made only conclusory allegations that the release of any of the remaining information at issue would result in substantial harm to its competitive position. *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 (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 is too speculative), 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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

In summary, except for the newly submitted information pertaining to MicroStrategy, the board must continue to follow our ruling in Open Records Letter No. 2011-00700. With respect to the submitted information, the board must withhold the information we have marked under section 552.110 of the Government Code. The remaining submitted 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](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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Assistant Attorney General  
Open Records Division

SEC/tf

Ref: ID# 415768

Enc. Submitted documents

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