



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2011

Mr. James G. Nolan
Assistant General Counsel
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2011-06918A

Dear Mr. Nolan:

This office issued Open Records Letter No. 2011-06918 on May 17, 2011. In that ruling we determined that because Office Depot, Inc. ("Office Depot") had not submitted any arguments against the disclosure of its information, we had no basis to conclude Office Depot had any proprietary interest in its information, and, thus, none of Office Depot's information may be withheld on that basis. However, Office Depot has informed this office it did submit arguments. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 17, 2011. Your request was assigned ID# 425272 (CPA ID# 7037634014).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for all protests and responses to protests filed in conjunction with the contract awarded for RFP# 615-A1. You state the comptroller has released some information to the requestor. You do not take a position as to whether the submitted information is excepted under the Act; however, you state you notified Office Depot of the comptroller's receipt of the request for information and of the right of Office Depot to submit arguments to this office as to why the requested information should not be released to the requestor. *See id.* § 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 correspondence from

Office Depot. We have considered Office Depot's arguments and reviewed the submitted information.

Office Depot claims some of the submitted information is protected by section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties such as Office Depot. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). As Office Depot acknowledges, the comptroller does not raise section 552.104 as an exception to disclosure. Therefore, the comptroller may not withhold any of the submitted information under section 552.104 of the Government Code.

Office Depot also claims section 552.110 of the Government Code for some of the submitted information. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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." Gov't Code § 552.110(a)-(b).

The Supreme Court of Texas 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 single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees 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) (emphasis added); *see 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 the person establishes a *prima facie* case

for the exception, and no one submits an argument that rebuts the claim as a matter of law.¹ See Open Records Decision No. 552 at 5 (1990). We cannot conclude that section 552.110(a) is applicable, however, 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. See Open Records Decision No. 402 (1983).

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 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).

Office Depot claims both aspects of section 552.110 for portions of the submitted information. Having considered Office Depot’s arguments and reviewed the submitted information, we conclude the comptroller must withhold Office Depot’s pricing information, which we have marked, under section 552.110(b).² However, we find Office Depot has neither demonstrated that any of the remaining information constitutes a trade secret under section 552.110(a) nor made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining information would cause Office Depot substantial competitive harm. We therefore conclude the comptroller may not withhold any of the remaining information under section 552.110. See Gov’t Code § 552.110(a)-(b); Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances

¹The 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 Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

²As we are able to make this determination, we need not address your argument under section 552.110(a) of the Government Code for this information.

would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, professional references, market studies, and qualifications).

In summary, the comptroller must withhold Office Depot's pricing information, which we have marked, under section 552.110(b) of the Government Code. As no further exceptions to disclosure are raised, 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, 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/bs

Ref: ID# 425272

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Washington, DC 20006
(w/o enclosures)