



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 24, 2011

Ms. Jennifer C. Cohen
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Texas Department of Public Safety
P.O. Box 4087
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OR2011-07357

Dear Ms. Cohen:

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# 417222 (ORA# 11-0434, 11-0696).

The Texas Department of Public Safety (the "department") received two requests from different requestors for four categories of information from RFO Nos. 405-11-00690, 405-IT10-0799, 405-IT10-0812, 405-IT10-0800, 405-IT10-0720, and 405-IT10-0542.¹ We understand you have released some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Hitech Systems, Inc. ("Hitech"); PTS Solutions, Inc. ("PTS"); EJustice Solutions ("EJustice"); Spillman Technologies, Inc. ("Spillman"); eForce Software/IntelliChoice ("eForce"); Southern Software, Inc. ("Southern"); Sleuth Software ("Sleuth"); COOP Systems ("COOP"); Trapwire, Inc. f/k/a/Abraxas Applications ("Trapwire"); Objectec, Ltd. ("Objectec"); Omniware American, Inc. ("Omniware"); Corpus Solution LLC ("Corpus"); Column Technologies ("Column"); Legal Files Software ("Legal

¹We note the department 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); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Files”) and NEOGOV. 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 comments from Hitech, PTS, Ejustice, Spillman, Southern, COOP, Trapwire, and Legal Files. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, the department did not fully comply with section 552.301 of the Government Code for the first request. While the department timely raised section 552.104 of the Government Code within the ten-business-day time period as required by subsection 552.301(b), the department did not raise section 552.101 of the Government Code until after the ten-business-day deadline had passed for the first request. Further, although the department received clarification of the first request on February 18, 2011, the department did not submit information pertaining to RFO 405-IT10-800 until March 31, 2011, thus failing to meet its fifteen-day-deadline under subsection 552.301(e) of the Government Code. A governmental body’s failure to comply with the procedural 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). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.101 of the Government Code and the interests of third parties can provide compelling reasons to overcome this presumption; therefore, we will consider these arguments for the information at issue. We will also consider the applicability of your timely-raised exception for the submitted information.

We note it appears most of RFO No. 405-11-00690 is the subject of a previous ruling by this office, in response to which we issued Open Records Letter No. 2011-00975 (2011). In that ruling, we found RFO 405-11-00690 must generally be released, but any copyrighted information must be released in accordance with copyright law. We have no indication the law, facts, and circumstances on which this prior ruling was based have changed. Thus, to the extent RFO 405-11-00690 is identical to the information previously requested and ruled upon by this office, the department must continue to rely on this ruling as a previous determination and release the identical information in accordance with Open Records Letter No. 2011-00975. *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). To the extent

RFO 405-11-00690 is not encompassed by the previous ruling, we will address the submitted arguments.

We note 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 eForce, Sleuth, Objectec, Omniware, Corpus, Column, or NEOGOV explaining why their 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 department may not withhold any portion of the remaining proposals based upon the proprietary interests of the remaining third parties.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The department and Trapwire raise section 552.101 in conjunction with provisions of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Sections 418.176 and 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.176 provides in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a). Section 418.182 provides, in relevant part:

(a) Except as provided by Subsections (b) and (c), information . . . in the possession of a governmental entity that relates to the specifications,

operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental body that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required public disclosure under [the Act].

Id. § 418.182(a)-(b). The fact that information may be related to a governmental body's security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, an entity asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The department and Trapwire assert RFO 405-IT10-0799 details a proposed security system designed for early detection of terroristic and criminal activities for the state capitol complex. You indicate release of a portion of RFO 405-IT10-0799, which you have marked, would reveal the type of security to be provided to the capitol complex and, thus, should be withheld under section 418.182 of the Government Code. Trapwire asserts the portions of its information revealing the locations where Trapwire's security system is deployed and information relating to its methodology and operation should be withheld under section 418.182 of the Government Code. Upon review, we find the department and Trapwire have established portions of RFO 405-IT10-0799 relate to the specifications of a security system used to protect public or private property from an act of terrorism or related criminal activity. Accordingly, the department must withhold the portions of RFO 405-IT10-0799 we have marked under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code.² However, we find the department and Trapwire failed to establish how any of the remaining information at issue relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Consequently, the department may not withhold any of the remaining information at issue under section 552.101 in conjunction with section 418.182 of the Government Code.

The department further states RFO 405-IT10-0799 includes training courses that relate to tactical plans for use in conjunction with the security system that should be withheld under section 418.176 of the Government Code. Trapwire likewise asserts portions of its information consist of a tactical plan that must be withheld under section 418.176 of the

²As our ruling is dispositive, we need not address your remaining arguments for this information.

Government Code. However, we find the remaining information does not relate to staffing requirements of the department, tactical plans of the department, nor does it consist of a list or compilation of pager or telephone numbers of the department maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with section 418.176 of the Government Code.³

The department and Trapwire each claim section 552.104 of the Government Code for portions of the remaining information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Although Trapwire raises section 552.104, this section is a discretionary exception that protects only the interests of a governmental body. Accordingly we only address the department's claim under section 552.104. *See id.* (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); Open Records Decision No. 522 (1989) (discretionary exceptions in general). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

You explain the proposals submitted in response to RFO 405-IT10-0542 are still under review and a contractor has not yet been selected. You state RFO 405-IT10-0720 has been cancelled at this time, but may be reissued at a future date. You contend the release of the information related to these proposals would harm the department's negotiating positions. Based on your representations, and our review, we conclude the department may withhold the proposals submitted in response to RFO 405-IT10-0542 and RFO 405-IT10-0720 under section 552.104 of the Government Code. *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation).⁴

Trapwire next claims section 552.108 for its remaining information. This section provides, in relevant part:

³We note our discussion of sections 418.176 and 418.182 does not encompass the submitted customer information, which we have marked as confidential under section 552.110 of the Government Code.

⁴As our ruling is dispositive, we need not address Hitech's, PTS's, Spillman's, Ejustice's, or Southern's arguments for this information.

(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[.]

Gov't Code § 552.108(a)(1). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. Trapwire 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.

COOP and Legal Files each claim section 552.110 for portions of their submitted information. Trapwire also claims section 552.110 for its remaining information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. 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." Gov't Code § 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* ORD 552 at 2. Section 757 provides that 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.⁵ 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 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). We note pricing and other 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); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

COOP and Trapwire claim portions of their information, and Legal Files claims the entirety of its information, are excepted from disclosure under section 552.110(a) of the Government Code. After reviewing the submitted arguments and the information at issue, we conclude COOP has demonstrated portions of its information, which we have marked, constitute trade secrets for purposes of section 552.110(a). Further, we note Trapwire has shown its customer information constitutes a trade secret. Accordingly, the department must withhold the information we have marked in COOP's and Trapwire's proposals under section 552.110(a) of the Government Code. However, we find COOP and Legal Files have failed to establish a *prima facie* case that any of the remaining information at issue meets the definition of a trade secret. Further, neither COOP or Legal Files have demonstrated the necessary factors to establish trade secret claims for their respective information at issue.

⁵The 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).

See ORD 402. Thus, the department may not withhold any portion of COOP's remaining information or any portion of Legal Files' information under section 552.110(a) of the Government Code.

Legal Files also indicates the release of its information could deter vendors such as Legal Files from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, Legal Files appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). See also *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) of the Government Code by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Legal Files' interests in its information.

COOP, Legal Files, and Trapwire assert portions of the remaining information are excepted from disclosure under section 552.110(b). After reviewing the submitted arguments and the information at issue, we conclude COOP and Trapwire have failed to provide specific factual evidence that any of their remaining information and Legal Files has failed to provide specific factual evidence demonstrating release of any of its information would result in substantial competitive harm to the companies. 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 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). Furthermore, we note the pricing information of a winning bidder, such as COOP and Trapwire, is generally not excepted from

disclosure under section 552.110(b). 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* 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). Accordingly, the department may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

We note some of the materials at issue are 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, to the extent RFO 405-11-00690 is identical to the information previously requested and ruled upon by this office, the department must continue to rely on this ruling as a previous determination and release the identical information in accordance with Open Records Letter No. 2011-00975. The department must withhold the information we have marked in RFO 405-IT10-0799 under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code. The department may withhold RFO 405-IT10-0542 and RFO 405-IT10-0720 under section 552.104 of the Government Code. The department must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.⁶

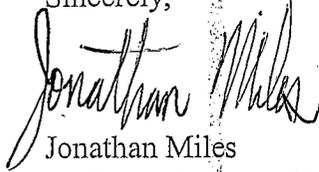
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁶We note the information being released contains social security numbers. 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. *See* Gov't Code § 552.147.

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,



Jonathan Miles
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Open Records Division

JM/em

Ref: ID# 417222

Enc. Submitted documents

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