ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2011

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla Street, Room 7BN
Dallas, Texas 75201

OR2011-10695

Dear Mr. Ernst:

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# 424881.

The City of Dallas (the "city") received a request for the best and final responses, executive summaries, and questionnaire exhibits pertaining to requests for proposals BSZ1018, Certified Network, and BSZ1019, Third Party Administrator and Non-Network Cost Containment. Although you indicate the city takes no position with respect to the public availability of the submitted proposal information, you state its release may implicate third parties' proprietary interests. Accordingly, you state, and provide documentation showing, the city notified Argus Services Corporation ("Argus"); Broadspire Services, Inc. ("Broadspire"); Carl Warren & Company ("Carl Warren"); CorVel Healthcare Corporation ("CorVel"); ESIS, Inc. ("ESIS"); JI Specialty Services, Inc. ("JI"); and TRISTAR Risk Management ("TRISTAR") of the request and of each company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from CorVel. We have considered the submitted arguments and reviewed the submitted information.

Initially, CorVel seeks to withhold information the city has not submitted 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 city.[1] *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

CorVel claims some of its submitted bid proposal information is excepted from disclosure under section 552.110 of the Government Code. This section 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." 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* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the

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[1]As our ruling for this information is dispositive, we need not address CorVel's assertions under section 552.136 of the Government Code and copyright law.

definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.[2] Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); Open Records Decision No. 661 at 5-6 (1999).

CorVel claims its submitted customer and pricing information it has highlighted constitutes trade secrets under section 552.110(a). Upon review, we find CorVel has established its customer information constitutes trade secrets. Therefore, the city must withhold this information, which we have marked, under section 552.110(a) of the Government Code.[3] We find, however, CorVel has not demonstrated how its pricing information meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (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). We note pricing information pertaining to a particular proposal or 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3. Consequently, the city may not withhold CorVel's pricing information under section 552.110(a) of the Government Code.

CorVel also claims the pricing information it has highlighted constitutes commercial information that, if released, would cause the company substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find CorVel has

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[2]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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at2 (1982), 255 at 2 (1980).

[3]As our ruling for this information is dispositive, we need not address CorVel's remaining argument against disclosure for this information.

established release of some of the pricing information it seeks to withhold would cause the company substantial competitive injury. Therefore, the city must withhold this information, which we have marked, under section 552.110(b) of the Government Code. We find, however, CorVel has not demonstrated how release of the remaining information it has highlighted would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *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). Consequently, the city may not withhold any of CorVel's remaining information at issue under section 552.110(b) of the Government Code.

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, we have not received comments from any of the remaining notified third parties explaining why their submitted information should not be released. Therefore, we have no basis to conclude any of those parties has protected proprietary interests in its information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (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 (party must establish *prima facie* case that information is trade secret), 542 at 3. Consequently, the city may not withhold any of Argus's, Broadspire's, Carl Warren's, ESIS's, JI's, or TRISTAR's information on the basis of any proprietary interests those companies may have in the information.

We note some of ESIS's and TRISTAR's submitted 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. Accordingly, the city must release ESIS's and TRISTAR's submitted information in accordance with copyright law.

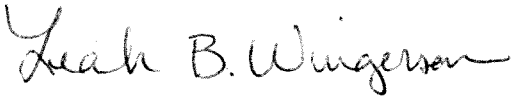
In summary, the city must withhold CorVel's information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The city must release the

remaining information, but any of ESIS's and TRISTAR's information protected by copyright must 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, 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 424881

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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