



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 17, 2011

Mr. Robert Schell
Assistant Director General Counsel
North Texas Tollway Authority
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OR2011-11886

Dear Mr. Schell:

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# 427261.

The North Texas Tollway Authority (the "authority") received a request for the proposals submitted in response to request for proposals ("RFP") 03206-NTT-00-GS-CS. You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of 3i Services ("3i"); Anodyne Imaging ("Anodyne"); Electronic Transaction Consultants Corporation ("ETC"); MPS Limited ("MPS"); Secure One Data Solutions ("Secure"); Stellar US, L.L.C. ("Stellar"); Telvent; and Zenisys Corporation ("Zenisys"). Accordingly, you notified these third parties of the request and of their right to submit arguments to this office as to why their 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) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received arguments from Anodyne, ETC, Telvent, and Zenisys. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that 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 3i, MPS, Secure, or Stellar explaining why their submitted information should not be released. Therefore, we have no basis to conclude that 3i, MPS, Secure, or Stellar 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 authority may not withhold any portion of the submitted information based upon the proprietary interests of 3i, MPS, Secure, or Stellar.

Next, we address ETC's argument the present request for information is unreasonably vague, broad, and burdensome. Upon review, we find the request is not unreasonably vague or broad because it asks for specific items. Additionally, a governmental body may not decline to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (cost or difficulty in complying with Act does not determine availability of information). The fact that it may be burdensome to provide the information at issue does not relieve a governmental body of its responsibility to comply with the Act. *Id.*; Open Records Decision No. 497 (1988). In this instance, the authority submitted information that it has deemed to be responsive to the request. Accordingly, we will determine whether the claimed exceptions are applicable to the submitted information.

Next, we note that ETC and Telvent seek to withhold from public disclosure information the authority did not submit. This ruling does not address information that was not submitted by the authority and is limited to the information submitted by the authority. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

The authority, ETC, and Telvent each raise section 552.104 of the Government Code, which excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." *Id.* § 552.104(a). We note section 552.104 protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See Open Records Decision No. 592* (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). Thus, we will address only the authority's arguments against disclosure under section 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See id.* Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See Open Records Decision No. 463* (1987). Generally, section 552.104 does not except bids from disclosure

after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990).

You inform us that the authority received proposals in response to the RFP at issue, but that a firm was not selected and the RFP was canceled without a contract having been awarded or executed. You have provided general assertions that release of the information at issue would harm the interests of the authority. However, we find you have not explained how the authority was engaged in a particular competitive bidding situation at the time the authority received the present request for information, nor have you demonstrated that public release of the information at issue would cause specific harm to the authority's interests in any such competitive bidding situation. Accordingly, the authority may not withhold the submitted information under section 552.104 of the Government Code.

Anodyne, ETC, Telvent, and Zenisys raise section 552.110 of the Government Code for portions of the submitted information. Section 552.110 protects (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 trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted 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. 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 ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of the submitted arguments, we find that ETC has made a *prima facie* case that portions of its submitted information pertaining to its processes, systems, training, and quality control constitute trade secrets. Accordingly, the authority must withhold the information we have marked under section 552.110(a) of the Government Code. We find Anodyne, ETC, Telvent, and Zenisys have failed to demonstrate that any portion of the remaining information meets the definition of a trade secret, nor have these third parties demonstrated the necessary factors to establish a trade secret claim for this information. We note that pricing 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); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly,

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

the authority may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Upon review of the submitted arguments under section 552.110(b), we find that Anodyne, ETC, Telvent, and Zenisys have established their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause them substantial competitive injury. Therefore, the authority must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Anodyne, ETC, Telvent, and Zenisys have made only conclusory allegations that the release of their remaining information would result in substantial damage to each company's 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 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, the authority may not withhold any of the remaining information under section 552.110(b).

We note that a portion of the remaining information is subject to section 552.136 of the Government Code.² Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. This office has determined that insurance policy numbers are subject to section 552.136. Accordingly, we find that the authority must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.³

We note some of the materials at issue 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

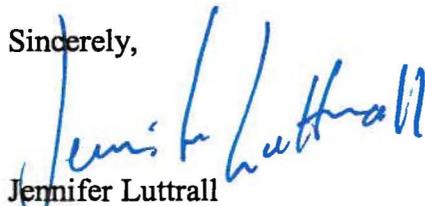
governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the authority must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The authority must release the remaining information, but any information protected by copyright may be released only 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 427261

Enc. Submitted documents

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