ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2011

Ms. Jennifer C. Cohen
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P.O. Box 4087
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OR2011-13034

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# 428038 (ORR # 11-1337).

The Texas Department of Public Safety (the "department") received a request for all responses to a specified request for proposal. Although the department takes no position regarding whether the submitted information is excepted from disclosure, you state release of the requested information may implicate the proprietary interests of third parties. Accordingly, you provide documentation showing you have notified eForce Software/IntelliChoice ("eForce"), EJustice Solutions ("EJustice"), Hitech Systems, Inc. ("Hitech"), Indico Corporation ("Indico"), PTS Soluctions, Inc. ("PTS"), Sleuth Software ("Sleuth"), and Southern Software, Inc ("SSI") of the request and their right to submit arguments to this office. *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, and SSI. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge, and we agree, the department failed to meet the statutory deadlines imposed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to

overcome presumption of openness pursuant to statutory predecessor to section 552.302); *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 issue in this instance, we will address the submitted arguments.

Next, the department and Hitech state the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-07357 (2011). In that ruling, we held the department may withhold the information at issue under section 552.104 of the Government Code. However, as the department acknowledges, section 552.104 no longer applies because a contract has now been awarded. Therefore, the circumstances have changed and the department may not rely on Open Records Letter No. 2011-07357 as a previous determination. *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). Accordingly, we will address the submitted arguments against the disclosure of the information at issue.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from eForce, EJustice, Indico, or Sleuth. Thus, we have no basis to conclude these entities have protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)-(b); 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 of the information at issue on the basis of any proprietary interest eForce, EJustice, Indico, or Sleuth may have in the submitted information. As no exceptions to disclosure have been raised for this information, the department must release eForce's, EJustice's, Indico's, and Sleuth's information to the requestor. However, we will address Hitech's, PTS's, and SSI's arguments against disclosure of their information.

We next note a portion of PTS's and Hitech's submitted arguments pertain to information not submitted by the department. 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 department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

We now address the arguments submitted by Hitech, PTS, and SSI. Hitech raises section 552.101 of the Government Code in conjunction with sections 418.176 and 418.182

of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. 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 the 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, including access codes and passwords, 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.

*Id.* § 418.182(a). The fact that information may generally be related to emergency preparedness or to a security system does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body or third party asserting this section must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

Hitech argues its proposal contains details regarding (1) software systems concerning the dispatch of emergency responders and (2) Hitech's computer security systems. Hitech asserts that if its software is implemented by the department, then release of this information could compromise the security of the department's computers. However, in this instance, Hitech was not the winning bidder and its software is not being used by the department. Therefore, we find Hitech has not demonstrated how any of its information is either "collected,

assembled, or maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity" or "relate[d] 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." *See id.* §§ 418.176(a), .182(a). Therefore, the department may not withhold any of Hitech's information under section 552.101 of the Government Code in conjunction with section 418.176 or section 418.182 of the Government Code.

SSI, PTS, and Hitech each asserts its information is protected by section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure (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 id.* § 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Record Decision No. 552 (1990). Section 757 defines 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 Huffines*, 314 S.W.2d at 776. 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* 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.[1] Open Records Decision No. 402 (1983).

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[1]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

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." 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 information at issue.[2] *See* ORD 661 at 5-6 (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).

SSI, PTS, and Hitech have each raised section 552.110(a) for portions of their information. Upon review, we find PTS has made a *prima facie* case that portions of its customer information constitute trade secret information for purposes of section 552.110(a). Accordingly, the department must withhold the information we have marked in PTS's proposal under section 552.110(a). However, we note PTS has made some of its client information publicly available on its website. Because PTS has published this information, it has failed to demonstrate how this information constitutes trade secret information for purposes of section 552.110(a). In addition, we find SSI and Hitech have not demonstrated the information they seek to withhold constitutes trade secrets for purposes of section 552.110(a). *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Thus, the department may not withhold any of the remaining information under section 552.110(a) of the Government Code.

SSI, PTS, and Hitech also raise section 552.110(b) for portions of their information. Upon review, we find SSI, PTS, and Hitech have not established by a factual or evidentiary showing that release of the remaining information they seek to withhold would cause substantial competitive injury for purposes of section 552.110(b). *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial

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

[2]In its section 552.110 arguments, PTS relies on the test announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), concerning the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal entity. *See Nat'l Parks*, 498 F.2d 765. Although this office applied the *National Parks* test at one time to the statutory predecessor to section 552.110, the Third Court of Appeals overturned that standard in holding *National Parks* was not a judicial decision for purposes of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (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 the release of the information at issue would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing Seventy-sixth Legislature's enactment of Gov't Code § 552.110(b)).

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, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

In summary, the department must withhold the information we have marked in PTS's proposal under section 552.110(a) of the Government Code. The department must release the remaining information 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,

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Open Records Division

MHB/agn

Ref: ID # 428038

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c: Requestor
(w/o enclosures)

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