



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2011

Ms. Therese Sternenberg
Public Information Act Coordinator
Texas State University System
Thomas J. Rusk Building
200 East 10th Street, Suite 600
Austin, Texas 78701

OR2011-13736

Dear Ms. Sternenberg:

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# 430731.

The Texas State University System (the "system") received two requests from different requestors for information submitted by bidders for request for proposal number 758-11-00012.¹ You state that, although the system takes no position with respect to the requested information, it may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the system notified the third parties of the request for information and of their right to submit arguments stating why their information should not be released.² *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 applicability

¹You state, and submit supporting documentation demonstrating, the system sought and received clarification of one of the requests for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a 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).

²The third parties notified pursuant to section 552.305 are: Computer Methods International Corporation ("CMiC"); e-Builder, Inc. ("e-Builder"); Owner In-Site, LLC ("In-Site"); PMWeb, Inc. ("PMWeb"); Skire, Inc. ("Skire"); and Systemates, Inc. ("Systemates").

of exception in certain circumstances). We have reviewed the submitted information and the comments submitted by CMiC, e-Builder, In-site, Skire, and Systemates.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). In its comments submitted to our office, In-site states it does not object to release of its information. Additionally, as of the date of this letter, this office has not received comments from PMWeb explaining why its information should not be released to the requestors. Thus, we have no basis to conclude that the release of any of PMWeb's information would implicate PMWeb's interests. *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, we conclude that the system may not withhold any of PMWeb's information on the basis of any interest PMWeb may have in the information. We will consider the arguments submitted by CMiC, e-Builder, Skire, and Systemates for their respective information.

Skire raises section 552.104 of the Government Code. This section excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, section 552.104 is a discretionary exception that 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 Nos. 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), 522 (1989) (discretionary exceptions in general). As the system does not seek to withhold any information pursuant to this exception, no portion of Skire's information may be withheld on this basis.

CMiC, e-Builder, Skire, and Systemates each claim that some of their information is excepted from disclosure under section 552.110 of the Government Code. 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). A "trade secret" has been defined as the following:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.³ *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 2. However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

Section 552.110(b), which 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.*; ORD 661 at 5-6 (business enterprise must

³There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

show by specific factual evidence that release of information would cause it substantial competitive harm).

CMiC, e-Builder, and Skire each claim portions of their information constitute trade secrets. Upon review, we find that CMiC and Skire have each established a *prima facie* case that portions of their information constitute trade secrets. Accordingly, the system must withhold CMiC's and Skire's information we have marked under section 552.110(a). However, CMiC and Skire have failed to demonstrate any of their remaining information meets the definition of a trade secret. We note that CMiC has published the identities of some of its customers on its website. Further, we find that e-Builder has failed to demonstrate that any of its information meets the definition of a trade secret. Additionally, none of these parties demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the system may not withhold any of e-Builder's information, or CMiC's or Skire's remaining information on this basis.

CMiC, e-Builder, Skire, and Systemates each contend some of their information is commercial or financial information, release of which would cause competitive harm. Upon review, we conclude CMiC, e-Builder, Skire, and Systemates have established that release of some of their information would cause them substantial competitive injury. Accordingly, the system must withhold the information we have marked under section 552.110(b). However, we find that CMiC, e-Builder, Skire, and Systemates have not made the specific factual or evidentiary showings required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Additionally, we note the pricing information of winning bidders of a government contract, such as e-Builders, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see also* ORD 319 at 3. *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). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. Furthermore, we note that e-Builder and Systemates have each published the identities of some of their customers on their websites, making this information publically available. We, therefore, conclude the system may not withhold any of CMiC's, e-Builder's, Skire's, or Systemates's remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information appears to 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 also* Open Records Decision No. 109 (1975). If a

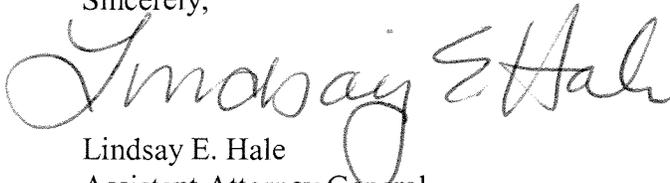
member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the system must withhold the information we have marked under section 552.110 of the Government Code. The system must release the remaining information; however, any information protected by copyright may only 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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 430731

Enc. Submitted documents

c: Requestors
(w/o enclosures)

Mr. Bobby Brown
Sales and Operations Manager
PMWeb, Inc.
400 Trade Center 128, Suite 3990
Woburn, Massachusetts 01801
(w/o enclosures)

Mr. Sateez Kadivar
Vice President of Business Operations
Skire, Inc.
111 Independence Drive
Menlo Park, California 94025
(w/o enclosures)

Mr. Eric M. Rachal
President
Owner In-Site, LLC
12710 Research Boulevard, Suite 225
Austin, Texas 78759
(w/o enclosures)

Mr. Scott McCarthy
e-Builder, Inc.
1800 Northwest 69th Avenue, Suite 201
Plantation, Florida 33313
(w/o enclosures)

Mr. Frank Giblon
General Counsel
Computer Methods International Corporation
4850 Keele Street
Toronto, Ontario M3J 3K1
Canada
(w/o enclosures)