



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East Eleventh Street
Austin, Texas 78701

OR2011-15707

Dear Ms. Alexander:

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# 434320.

The Texas Department of Transportation (the "department") received three requests for information related to offer number Q222011 001661000. You state you have released some of the requested information to the requestor. Although you take no position on whether the remaining requested information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Agile Assets, Bentley Systems/Exor Corporation ("Bentley"), Environmental Systems Research Institute, Inc. ("ESRI"), and Technology Consortium, LLC ("Technology Consortium"). Accordingly, you have 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); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Bentley and Technology Consortium. We have considered the submitted arguments and reviewed the submitted information.

We note that 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 decision, we have not received correspondence from Agile Assets or ESRI. Thus, Agile Assets and ESRI have not demonstrated that they have a protected proprietary interest 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 the submitted information on the basis of any proprietary interests Agile Assets or ESRI may have in the information. However, we will consider Bentley's and Technology Consortium's arguments against disclosure.

Technology Consortium raises section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. We note common-law privacy protects the interests of individuals, not those of business and governmental entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). Upon review, we find the information Technology Consortium seeks to withhold relates to the financial information of a business. Accordingly, the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Bentley and Technology Consortium both raise 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.¹ *See* 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 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

¹There 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.

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

Upon review, we find that Technology Consortium has established a *prima facie* case that its customer information constitutes trade secrets. Accordingly, the department must withhold the customer information in Technology Consortium’s submitted proposal we have marked under section 552.110(a). However, Technology Consortium has failed to demonstrate any of the remaining information in its proposal meets the definition of a trade secret. We find Bentley has failed to demonstrate that any of the information in its submitted proposal meets the definition of a trade secret. Additionally, Bentley has not demonstrated the necessary factors to establish a trade secret claim for this information. 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 (1982), 306 at 3 (1982). Accordingly, the department may not withhold any of the information in Bentley’s proposal, or any of the remaining information in Technology Consortium’s proposal on this basis.

Bentley and Technology Consortium each contend the information in their submitted proposals is commercial or financial information, release of which would cause competitive harm. Upon review, we conclude Technology Consortium has established that release of some of the remaining information in its submitted proposal would cause the company substantial competitive injury. Accordingly, the department must withhold the information we have marked under section 552.110(b). However, we find Bentley has not made the specific factual or evidentiary showings required by section 552.110(b) that release of any of the information its submitted proposal would cause the company substantial competitive harm. *See* Open Records Decision Nos. 319 at 3 (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 a winning bidder of a government contract, such as Technology Consortium, 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. We therefore conclude the department may not withhold

any of Bentley's information, or any of the remaining information in Technology Consortium's proposal under section 552.110(b) of the Government Code.

We note that portions of the remaining information 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, the department must withhold the information we have marked under section 552.110(a) of the Government Code. The department must also withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released; however, any information that is 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 434320

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

Mr. Ted Johnson
President - Exor Corporation
Bentley Systems, Incorporated
685 Stockton Drive
Exton, Pennsylvania 19341
(Third party w/o enclosures)

Mr. David Palacios
Technology Consortium, LLC
1524 IH 35 South, Suite 320
Austin, Texas 78704
(Third party w/o enclosures)