



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 15, 2011

Ms. Ashley D. Fourt  
Assistant District Attorney  
Tarrant County  
401 West Belknap  
Fort Worth, Texas 76196-0201

OR2011-16793

Dear Ms. Fourt:

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# 436327.

The Tarrant County Purchasing Department (the "department") received a request for all responses to request for proposal number 2011-107. Although you take no position, you state that the release of the requested information may implicate the proprietary interests of a certain third party. Accordingly, you provided notice of the request to EMC Corporation ("EMC"), notifying it of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code §552.305 (permitting interested third parties to submit to attorney general reasons why requested information should not be released); *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 applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

EMC claims portions of its information are 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.<sup>1</sup> *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. Open Records Decision No. 552 at 5 (1990). 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).

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<sup>1</sup>There 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232.

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.*; Open Records Decision No. 661 at 5-6 (1990) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find that EMC has established a *prima facie* case that portions of its information constitute trade secrets. The department must withhold the customer information we have marked pursuant to section 552.110(a) of the Government Code. We note that EMC has made the remaining customer information it seeks to withhold publicly available on its website. Because EMC has published this information, it has failed to demonstrate this information is a trade secret. We also note that 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). Thus, EMC has failed to demonstrate any of its remaining information meets the definition of a trade secret. Additionally, EMC failed to demonstrate the necessary factors to establish a trade secret claim for this information. Accordingly, the department may not withhold the remaining information on this basis.

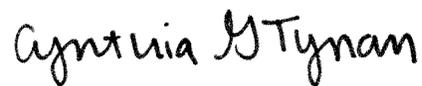
EMC also contends some of its information is commercial or financial information, release of which would cause competitive harm. EMC states, and the department confirms, that although it was awarded the contract at issue, the requestor, a competitor, challenged the award, and the department rescinded its contract with EMC. Therefore, the contract was never executed and EMC anticipates that the department will re-issue the request. Upon review, we conclude EMC has established that release of some of its information would cause it substantial competitive injury. Accordingly, the department must withhold the information we have marked under section 552.110(b). However, we find that EMC has not made the specific factual or evidentiary showings required by section 552.110(b) that release of any of its remaining information 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). We therefore conclude the department may not withhold any of EMC’s remaining information under section 552.110(b) of the Government Code.

In summary, the department must withhold the customer information we have marked under section 552.110(a) of the Government Code, as well as the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

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](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,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/em

Ref: ID# 436327

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Christopher P. Terry  
EMC Corporation  
8444 Westpark Drive  
McLean, Virginia 22102  
(w/o enclosures)