



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2012

Mr. Patrick Tyler
General Counsel
The Commission on State Emergency Communications
333 Guadalupe Street, Suite 2-212
Austin, Texas 78701-3942

OR2012-02777

Dear Mr. Tyler:

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# 446246.

The Commission on State Emergency Communications (the "commission") received a request for the proposal amounts submitted by AT&T Texas ("AT&T"), Motorola Solution, NTS Communications, Telecommunication Systems, Inc., and Verizon Business in response to RFP # 477.1.00064. Although the commission takes no position with respect to the public availability of the submitted information, you indicate its release may implicate the proprietary interests of third parties. Pursuant to section 552.305 of the Government Code, you were required to notify interested third parties of the request and of their opportunity to submit comments to this office explaining why the submitted information should be withheld from disclosure. *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 comments from AT&T. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us that portions of the submitted information are not responsive to the request. This decision does not address the public availability of the non-responsive information, which we have marked, and it need not be released in response to the present request.

Next, we note 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. Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only AT&T has submitted comments to this office explaining why the company's information should not be released. Therefore, we have no basis to conclude the remaining third parties 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 commission may not withhold any portion of the responsive information it submitted for our review based upon the proprietary interests of the remaining third parties.

AT&T raises section 552.110 of the Government Code for portions of its responsive information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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." *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 a "trade secret" from section 757 of the Restatement of Torts, which holds 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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).

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. *See* ORD 661 at 5-6.

AT&T asserts the information it has marked constitutes trade secrets subject to section 552.110(a). Specifically, AT&T claims this information concerns specific components of the company's "Flat Rate Business Lines, DSL, [and] SR to LNG and LNG to ALI Circuits[.]" Upon review of the information at issue, we agree the information that we have marked constitutes trade secrets. Accordingly, the commission must withhold this information under section 552.110(a) of the Government Code. However, we find the remaining information AT&T seeks to withhold consists of pricing information. Such information is generally not protected under section 552.110(a), and AT&T has not explained how this information meets the definition of a trade secret. *See Huffines*, 314 S.W.2d at 776; ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 306 at 3. Thus, none of the remaining information at issue may be withheld under section 552.110(a) of the Government Code.

AT&T also raises section 552.110(b) for the remaining information at issue. Although AT&T seeks to withhold this information from disclosure, we note AT&T was awarded the contract related to the RFP at issue. Pricing information of a winning bidder is generally not excepted under section 552.110(b) because this office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Upon

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 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 [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).

review of its arguments, we find AT&T has not provided the specific factual or evidentiary showing that release of any of its remaining information would cause the company substantial competitive injury. *See* Open Records Decision Nos. 661 at 5-6, 509 at 5 (1988) (because costs, 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). Therefore, because AT&T has failed to demonstrate the applicability of section 552.110(b), the commission may not withhold any portion of the remaining information at issue on that basis.

In summary, the commission must withhold the responsive information we have marked under section 552.110(a) of the Government Code. The commission must release the remaining responsive information.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

Ref: ID# 446246

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)