



ATTORNEY GENERAL OF TEXAS  
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April 11, 2012

Ms. Anne M. Constantine  
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P.O. Box 619428  
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OR2012-05222

Dear Ms. Constantine:

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# 450332.

The Dallas/Fort Worth International Airport Board (the "board") received a request for all contracts and supporting exhibits between the Dallas/Fort Worth International Airport and SKIDATA, Inc. ("SKIDATA") for a specified time period. You state the board is releasing some of the requested information. You state that, although the board takes no position with respect to the remaining requested information, it may implicate the interests of SKIDATA. Accordingly, you state, and provide documentation demonstrating, the board notified SKIDATA of the request for information and of its right to submit arguments stating why its information should not be released. *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 of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by SKIDATA.

Initially, SKIDATA asserts the information it indicates within the submitted information is not responsive to the current request for information because it was not incorporated into the requested contract or exhibits. As such, we find the information we have marked is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and the board need not release such information in response to this request.

Next, SKIDATA contends portions of the responsive information were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-01060 (2011). In the previous ruling, the request sought the accepted bid proposal submitted by SKIDATA to the board. SKIDATA explains some of the information ruled upon in the previous ruling is now incorporated into the requested contracts. SKIDATA contends the portions of the bid proposals which we concluded the board must withhold under section 552.110 of the Government Code must be withheld in accordance with the prior ruling. However, the present request is for all contracts and any supporting exhibits. Although the requested contract may contain previously ruled upon information, the information exists as part of the requested contract and, therefore, is not precisely the same information as ruled on in Open Records Letter No. 2011-01060. *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 the same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, the board may not rely on the previous ruling as a previous determination for the information within the bid proposal, as it exists within the requested contract.

Next, you acknowledge, and we agree that the board did not comply with its ten-business-day deadline under section 552.301 of the Government Code in requesting this decision. Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *see also 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 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because a third party's interests are at stake, we will consider the submitted third-party arguments against disclosure.

SKIDATA 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 board does not seek to withhold any information pursuant to this exception, no portion of the responsive information may be withheld on this basis.

SKIDATA asserts some of its 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. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny 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 Huffines*, 314 S.W.2d at 776. 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. ORD 552 at 5-6. 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) 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.* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

SKIDATA claims some of its information, including its individual pricing information and specific equipment and system design information, constitutes commercial information that, if released, would cause the company substantial competitive harm. Upon review of SKIDATA’s arguments under section 552.110(b), we conclude SKIDATA has established the release of its equipment and system design information and the pricing information pertaining to maintenance services the board has not opted to purchase, which we have marked, would cause it substantial competitive injury. Accordingly, the board must withhold the information we have marked under section 552.110(b).<sup>2</sup> However, we find SKIDATA has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining responsive information would cause the company substantial

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

<sup>2</sup>As our ruling is dispositive, we need not address SKIDATA’s remaining arguments for this information.

competitive harm. *See* Open Records Decision Nos. 661 (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), 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). We note the submitted information is contained within executed contracts and contract modifications between SKIDATA and the board. We note the pricing information of winning bidders, such as SKIDATA, is generally not excepted from disclosure under section 552.110(b). 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* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Consequently, the board may not withhold any of the remaining responsive information under section 552.110(b) of the Government Code.

SKIDATA also raises section 552.110(a) for some of its information, including pricing information. Upon review, we conclude SKIDATA has failed to demonstrate how any of its remaining responsive information meets the definition of a trade secret, nor has SKIDATA demonstrated the necessary factors to establish a trade secret claim. *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). Further, we note pricing information pertaining to a particular 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." RESTATEMENT OF TORTS § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; ORD Nos. 319 at 3, 306 at 3. Therefore, the board may not withhold any of the remaining responsive information under section 552.110(a) of the Government Code.

SKIDATA also raises section 552.139 of the Government Code for some of the remaining responsive information. Section 552.139 provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139. Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). SKIDATA states the information for which it raises section 552.139 pertains to the Dallas/Fort Worth International Airport's parking control computer system and computer network design, as well as SKIDATA's computer systems, generally, and that release of the information would make these systems more vulnerable to attacks. However, SKIDATA has not demonstrated how any of the remaining responsive information relates to computer network security, or to the design, operation, or defense of the computer network as contemplated in section 552.139(a). Further, we find SKIDATA has failed to explain how any of the remaining responsive information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the board may not withhold any of the remaining responsive information under section 552.139 of the Government Code.

SKIDATA states, and we agree, some of the responsive information is 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 board must withhold the information we have marked under section 552.110(b) of the Government Code. The board must release the remaining responsive 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](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/ag

Ref: ID# 450332

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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