



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 15, 2012

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2012-12889

Dear Mr. Ramirez:

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# 462045.

The Lower Colorado River Authority (the "LCRA") received a request for the bid tabulation and proposals submitted in response to Request for Proposal No. 7801. You state you have no information responsive to a portion of the request.¹ You also state you have released some information to the requestor. Although you take no position regarding the public availability of the submitted information, you state its release may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation demonstrating, the LCRA 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

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²The third parties notified pursuant to section 552.305 are: Doc2e-File; Dynamic Reprographics; Smart Files; Stars Information Solutions; Texas Star Document Services; The Windward Group.

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 received comments from one of the third parties, Doc2e-File. We have reviewed the submitted information and the comments submitted by Doc2e-File.

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. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, only Doc2e-File has submitted comments to this office explaining why its submitted information should not be released. Therefore, we have no basis to conclude that 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 LCRA may not withhold any portion of the submitted information on the basis of any proprietary interest those companies may have in the information.

Doc2e-File raises section 552.110 of the Government Code for portions of its proposal. 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. *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 trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957). Section 757 provides a trade secret is:

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 single or ephemeral events 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 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* 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 Doc2e-File has established a *prima facie* case that its customer information, which we have marked, constitutes trade secrets.⁴ Therefore, the LCRA must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, we find Doc2e-File has failed to demonstrate how any portion of its remaining information at issue meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade

³The 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 other 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

⁴As our ruling is dispositive, we need not address Doc2e-File's remaining argument against disclosure of the information at issue.

secret and necessary factors have been demonstrated to establish a trade secret claim). Therefore, the LCRA may not withhold any of Doc2e-File's remaining information pursuant to section 552.110(a) of the Government Code.

Doc2e-File contends some of its information is commercial or financial information, release of which would cause it substantial competitive harm. Doc2e-File states it is a privately held company, and its financial information is not publically available and is not posted on the company's website. Further, Doc2e-File argues that providing competitors knowledge of its financial capability and profits would allow competitors to undercut Doc2e-File's prices and lure away customers. We also find Doc2e-File has established that release of its pricing information would cause the company substantial competitive injury. Upon review, we find Doc2e-File has established some of its submitted information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause it substantial competitive harm. Accordingly, the LCRA must withhold the information we have marked under section 552.110(b) of the Government Code. However, upon review, we find Doc2e-File has made only conclusory allegations and has provided no specific factual or evidentiary showing to support its allegations that release of the remaining information at issue would cause Doc2e-File substantial competitive injury. *See Gov't Code* § 552.110(b); *see also, e.g., Open Records Decision Nos. 661 at 5-6* (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), 319 at 3 (1982) (information relating to organization and personnel, market studies, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the LCRA may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Portions of the remaining information are subject to section 552.136 of the Government Code. Section 552.136 states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Gov't Code* § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to: (1) obtain money, goods, services, or another thing of value; or (2) initiate transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the LCRA must withhold the insurance policy numbers we have marked under section 552.136. Doc2e-File also seeks to withhold its federal tax identification number and Dun & Bradstreet Data Universal Numbering System number ("DUNS" number) under section 552.136. Upon review, we find Doc2e-File has failed to demonstrate how its federal tax identification number or DUNS number constitute access device numbers used to obtain

money, goods, services, or another thing of value or initiate a transfer of funds other than a transfer originated solely by paper instrument. Therefore, the LCRA may not withhold the information at issue under section 552.136 of the Government Code.

Doc2e-File argues some of its 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. We note blank forms may not be copyrighted. 37 C.F.R. § 202.1(c).

In summary, the LCRA must withhold the information we have marked under section 552.110 of the Government Code and the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released; however, any information subject to 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/ag

Ref: ID# 462045

Enc. Submitted documents

**c: Requestor
(w/o enclosures)**

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