



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2012

Ms. Mary Ann Slavin
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-13603

Dear Ms. Slavin:

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# 463542 (DSHS #20427).

The Texas Department of State Health Services (the "department") received a request for all documents related to bids submitted in response to Solicitation # 53700-2-0000094678 for Media Production Support Blanket Contract, including proposals from any firm that scored in the top five, including the winning proposal, specifically, cost proposals, executive summaries, descriptions of the services to be performed, work products and attachments, agency documentation, subcontractor information, and exceptions and attachments; any written or e-mailed notes, reviews, rankings, comments, forms, feedback sheets, score cards, judging forms, or other materials that would explain the review, scoring, and awarding process; and any materials that would demonstrate what set the winning proposal apart from the other submissions. You state all releasable information has been provided to the requestor.¹ Although you claim no exceptions to disclosure of the submitted information, you state its release may implicate the proprietary interests of MicroAssist. Accordingly, you notified MicroAssist of the request and of its right to submit arguments to this office as to why the requested information should not be released. See Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested

¹You state all information that was not marked "confidential" was released to the requestor, including the first three pages of the submitted bid.

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 the circumstances). We have considered arguments received by MicroAssist and reviewed the submitted information.

Initially, you acknowledge the department did not comply with its ten-business-day deadline under section 552.301(b) of the Government Code in requesting this decision. Gov't Code § 552.301(a)-(b). We note the department also failed to comply with its fifteen-business-day deadline under section 552.301(e) of the Government Code. *See id.* § 552.301(e). 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 a compelling reason exists to withhold the information from disclosure. *Id.* § 552.302; *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. Open Records Decision No. 150 at 2 (1977). Because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider whether the information at issue is excepted under the Act.

MicroAssist contends its information should not be disclosed because it was marked confidential and should be treated as such. However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Next we consider MicroAssist's arguments under sections 552.102, 552.104, 552.110, and 552.131 of the Government Code.² Section 552.102(a) excepts from disclosure

²Although MicroAssist also raises section 552.153 of the Government Code, the company has submitted no arguments in support of the applicability of this section. Accordingly, this decision does not address section 552.153. *See* Gov't Code § 552.301(e)(1)(A), .302.

“information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). However, section 552.102 applies only to information in a personnel file of a government employee. *See id.* Therefore, we find section 552.102 is not applicable to MicroAssist’s information, and thus, no portion of its information may be withheld on this basis.

Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104. However, section 552.104 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). As the department does not seek to withhold any information pursuant to section 552.104, no portion of MicroAssist’s information may be withheld on this basis.

Section 552.110 of the Government Code 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also Open Records Decision No. 552 at 2 (1990).* Section 757 provides that 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 (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 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 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.*; see also 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).

MicroAssist argues portions of its information constitute trade secrets. Upon review, we find MicroAssist has not demonstrated how any of the submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. See RESTATEMENT OF TORTS § 757 cmt. b, 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). 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 319 at 3, 306 at 3. Accordingly, the department may not withhold any of the submitted information under section 552.110(a) of the Government Code.

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).

MicroAssist also claims portions of the submitted information constitute commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Upon review, we find MicroAssist has established its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Additionally, MicroAssist has established the customer information we have marked constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the department must withhold the information we have marked under section 552.110(b) of the Government Code. We note, however, MicroAssist has made its remaining customer information publicly available on its website. As this information is publicly available, we find the release of this information would not cause MicroAssist substantial competitive harm. Further, upon review, we find MicroAssist has not established any of its remaining information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.131 of the Government Code provides, in part, as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

Gov't Code § 552.131(a). We note the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because we have already disposed of MicroAssist's claim under section 552.110, the department may not withhold any of MicroAssist's information under section 552.131(a) of the Government Code. Furthermore, we note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the department does not assert section 552.131(b) as an exception to disclosure, we conclude no portion of the remaining information is excepted under section 552.131(b) of the Government Code.

In summary, the department must withhold 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, 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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/eb

Ref: ID# 463542

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Heather Poggi-Mannis
MicroAssist
8500 Shoal Creek Boulevard, Suite 225
Austin, Texas 78757
(w/o enclosures)