



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2012

Ms. Melissa V. Garcia
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2012-16531

Dear Ms. Garcia:

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# 468144 (OGC No. 145310).

The University of Texas System (the "system") received a request for the "Technical Proposal[,] Executed Offer, Proposer's General Questionnaire, Services Agreement Signed, Scenario Shipping Documents & sample reports along with the entire Cost Proposal" for all bidders for the "Non-Exclusive Hazardous Waste Management & Disposal Services Agreement 2012." Although you take no position with respect to the public availability of the submitted information, you state release of the submitted information may implicate the proprietary interests of Heritage Environmental Services, LLC ("Heritage"); LRT Lighting Resources Texas, LLC; Nexeo Solutions, LLC; PSC Environmental Services, LLC ("PSC"); Tradebe Treatment and Recycling, LLC; and Veolia ES Technical Solutions, LLC ("Veolia"). Accordingly, you notified these third parties of the request for information and of their right to submit arguments to this office as to why their submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Heritage, PSC, and Veolia. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have only received correspondence from Heritage, PSC, and Veolia. Thus, we find the remaining interested third parties have not demonstrated that they have a protected proprietary interest in any of their submitted information. *See id.* § 552.110(a)-(b); 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 system may not withhold any of the remaining third parties' information on the basis of any proprietary interests these third parties may have in their information.

Veolia, PSC, and Heritage claim their submitted information or portions thereof 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. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure 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* ORD 552 at 2. 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.¹ *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exception 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); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Veolia and PSC claim portions of their respective submitted information constitute trade secrets. Upon review, we find that Veolia has established a *prima facie* case that its customer information, which we have marked, constitutes a trade secret. Therefore, the system must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, we find Veolia and PSC have failed to demonstrate how any portion of the remaining information at issue meet the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision Nos. 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), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). We further note

¹There 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).

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; ORDs 319 at 3, 306 at 3. Therefore, the system may not withhold any of the remaining information pursuant to section 552.110(a) of the Government Code.

Veolia and PSC also contend portions of their remaining information, and Heritage contends the entirety of its submitted information, consists of commercial or financial information, the release of which would cause substantial competitive harm to Veolia, PSC, and Heritage. Upon review of Veolia and PSC’s arguments under section 552.110(b), we conclude PSC has established the release of portions of its information, which we have marked, would cause it substantial competitive injury. Upon review of Heritage’s arguments under section 552.110(b), we conclude Heritage has established the release of its pricing information, which we have marked, would cause it substantial competitive injury. Accordingly, the system must withhold the information we have marked under section 552.110(b). However, we find Veolia, PSC, and Heritage have made only conclusory allegations that release of the remaining information would cause them substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See Gov’t Code § 552.110(b)*; *see also* Open Records Decision Nos. 509 at 5 (1988) (stating that 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 was entirety too speculative), 319 at 3 (1982) (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). Further, this office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder, such as Veolia, is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 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, 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We therefore conclude that the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note portions of the remaining information are subject to section 552.136 of the Government Code.² 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,

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. Accordingly, the system must withhold the insurance policy numbers and bank account number we have marked under section 552.136 of the Government Code.

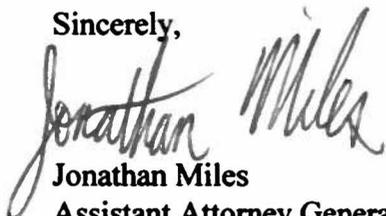
We note that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* 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 system must withhold the information we have marked under section 552.110(a) of the Government Code, 552.110(b) of the Government Code, and section 552.136 of the Government Code. The remaining information must be released, but 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, 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,



Jonathan Miles
Assistant Attorney General
Open Records Division
JM/bhf

Ref: ID# 468144

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Shay Clark
Sales Consultant
LRT Lighting Resources Texas
101 East Bowie Street
Fort Worth, Texas 76110
(w/o enclosures)

Ms. Debi Edwards
Vice President & Corporate Counsel
Heritage Environmental Services
7901 West Morris Street
Indianapolis, Indiana 46231
(w/o enclosures)

Veolia ES Technical Solutions
C/O Mr. Greg M. Dykeman
Strong Pipkin Bissell & Ledyard
Building 595 Orleans
1400 San Jacinto
Beaumont, Texas 77701
(w/o enclosures)

Mr. Paul A. Wise
Vice President
Environmental Services
Nexeo Solutions
5200 Blazer Parkway
Dublin, Ohio 43017
(w/o enclosures)

Mr. Jonathan Katz
Corporate Counsel
PSC Environmental Services
5151 San Felipe, Suite 1600
Houston, Texas 77056
(w/o enclosures)

Mr. David Holmgren
Director
Contract & Outsourcing
Tradebe Treatment & Recycling
4343 Kennedy Avenue
East Chicago, Illinois 46312
(w/o enclosures)