



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 30, 2012

Ms. Lori Fixley Winland
Locke Lord, L.L.P.
100 Congress, Suite 300
Austin, Texas 78701

OR2012-17332

Dear Ms. Winland:

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# 469326.

The North East Texas Regional Mobility Authority (the "authority"), which you represent, received a request for (1) the current contract and amendments; (2) the bidders' technical proposals; and (3) the winning proposal and contract, from a specified request for proposals.¹ Although you take no position with respect to the public availability of the requested information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified Federal Signal Technologies ("FST"), Raytheon Company ("Raytheon"), and Telvent USA, L.L.C. ("Televent") of the request and of their right to submit arguments to this office explaining why their 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); *see also* 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

¹You state the city sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

circumstances). We have received arguments from Raytheon and Telvent. We have considered the submitted arguments and reviewed the submitted information.

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 letter, we have not received arguments from FST. Thus, FST has failed to demonstrate it has a protected proprietary interest in any of the 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 authority may not withhold the submitted information on the basis of any proprietary interest FST may have in the information.

Next, we note the cost proposal Raytheon seeks to withhold was not submitted by the authority for our review. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the authority, this ruling does not address Raytheon's arguments against its disclosure.

Raytheon asserts its technical proposal is excepted from public disclosure under section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, this section only protects the interests of a governmental body. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). Because section 552.104 does not protect the interests of third parties, and the authority does not claim this section applies to the submitted information, the authority may not withhold any portion of the submitted information under section 552.104 of the Government Code.

Telvent and Raytheon assert section 552.110 of the Government Code for portions of the submitted information. 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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) 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, that 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)*.

²The following are the six factors the Restatement gives 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)*.

Raytheon and Telvent assert portions of the submitted information consist of trade secrets. Upon review, we find Raytheon has made a *prima facie* case that some of the information in its proposal, which we have marked, constitutes trade secrets under section 552.110(a). Accordingly, the authority must withhold the information we have marked under section 552.110(a). However, we determine Raytheon and Telvent have failed to demonstrate any portion of the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. See ORDs 402, 319 at 2. 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; ORDs 319 at 3, 306 at 3. Therefore, the authority may not withhold any of the remaining information under section 552.110(a).

Raytheon and Telvent argue release of their remaining information would cause substantial harm to their competitive positions. In advancing this argument, Telvent relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interests Raytheon and Telvent in the information at issue.

Raytheon and Telvent claim release of some of their remaining information would cause the companies substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find Raytheon and Telvent have not demonstrated how release of the information at issue would cause their companies substantial competitive harm, and have provided no specific factual or evidentiary showing to support such assertions. See Open Records Decision Nos. 661, 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), 319 at 3. Further, we note the pricing information of a winning bidder, such as Telvent, is generally not excepted under section 552.110(b). This office considers 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 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Consequently, the authority may not withhold any of the information at issue under section 552.110(b) of the Government Code.

We note some of the submitted 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. 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 authority must withhold the information we have marked under section 552.110(a) of the Government Code. The authority must release the remaining information, 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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 469326

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Neil Richman
Legal Counsel
Telvent USA Corporation
1390 Piccard Drive, Suite 200
Rockville, Maryland 20850
(w/o enclosures)

Mr. Jon Ramirez
Vice President, Business Development and Marketing
Federal Signal Technologies
6 Venture, Suite 120
Irvine, California 92618
(w/o enclosures)

Ms. Cheryl M. Tindle
Contracts Manager
Network Centric Systems
Raytheon Company
1801 Hughes Drive
Fullerton, California 92834
(w/o enclosures)