



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2012

Mr. K. Scott Oliver
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2012-18349

Dear Mr. Oliver:

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# 471004.

The San Antonio Water System (the "system") received five requests from different requestors for information regarding a specified solicitation, including all submitted proposals, any change orders associated with the awarded contract, and all other associated documents.¹ You state you have released some of the requested information to some of the requestors. Although you take no position on the public availability of the submitted information, you state the submitted information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified RG-3 Utilities, LLC ("RG-3"); Corix Utilities (US), Inc. ("Corix"); Kentrel, Inc. ("Kentrel"); Grid One Solutions ("Grid One"); Contract Callers, Inc. ("Contract Callers"); Vanguard Utility Service, Inc. ("Vanguard"); and Utility Partners of America ("Utility Partners") of the request and of their right to submit comments to this office as to why the submitted information should not be released to the requestors. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from Grid One, Corix, and Utility Partners. We have considered the submitted arguments and reviewed the submitted information.

¹We note the system sought and received clarification from one of the requestors regarding the request. *See Gov't Code § 552.222(b)* (stating if information requested is unclear to governmental body or if 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).

Initially, we note you have not submitted information responsive to the request for any change orders associated with the awarded contract and other associated documents. To the extent information responsive to this portion of the request existed on the date the system received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from RG-3, Kentrel, Contract Callers, or Vanguard on why the submitted information should not be released. Therefore, we have no basis to conclude RG-3, Kentrel, Contract Callers, and Vanguard have protected proprietary interests 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 system may not withhold any portion of the submitted information on the basis of any proprietary interest RG-3, Kentrel, Contract Callers, and Vanguard may have in it.

Next, we note Corix argues against the release of information that was not submitted by the system. This ruling does not address information that was not submitted by the system and is limited to the information the system has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Utility Partners is concerned with one of the requestor's intended use of the requested information. We note, however, this office has determined the Act does not permit the consideration by a governmental body or this office of a requestor's intended use of information when responding to open records requests. *See id.* § 552.222(a) (stating governmental body may not inquire into purpose for which information will be used); *see also* Open Records Decision Nos. 508 at 2 (1988) (motives of a person seeking information under the Act are irrelevant), 51 (1974). Therefore, the system may only withhold the submitted information if it is excepted from disclosure under the Act.

Grid One raises section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Grid One has not directed our attention to any law, nor are we aware of any law, under which any of its submitted information is considered to be confidential for purposes of section 552.101 of the

Government Code. See Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the system may not withhold any of Grid One's information under section 552.101 of the Government Code.

Grid One, Corix, and Utility Partners raise 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. 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, which holds a trade secret to be:

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 *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 This office must accept a claim that

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

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) of the Government Code 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 ORD 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).

Grid One, Corix, and Utility Partners assert their submitted information contains trade secrets. Upon review, we find Grid One, Corix, and Utility Partners have failed to demonstrate any of their submitted information meets the definition of a trade secret, nor have Grid One, Corix, or Utility Partners demonstrated the necessary factors to establish a trade secret claim for this information. We further note pricing information pertaining to a particular proposal or 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.” See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Accordingly, the system may not withhold any of Grid One’s, Corix’s, or Utility Partners’s information under section 552.110(a) of the Government Code.

Utility Partners and Corix contend some of their information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we find Corix has established that some of the company’s submitted information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the system must withhold the information we have marked under section 552.110(b) of the Government Code. However, upon review, we find Utility Partners and Corix have not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Accordingly, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

The remaining information contains driver’s license information. Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s license

or driver's license issued by an agency of this state or another state or country is excepted from public release.³ Gov't Code § 552.130(a)(1). Upon review, we find the system must withhold the driver's license information we have marked in the remaining information under section 552.130 of the Government Code.⁴

Section 552.136(b) of the Government Code states "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b). This office has determined an insurance policy number is an access device for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, the system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁵

We note some of the information at issue 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 system must withhold the information we have marked under sections 552.110, 552.130, and 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.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note, section 552.130(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the motor vehicle record information described in subsections 552.130(a)(1) and (a)(3). *See* Gov't Code § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.130(c) to attorney general and governmental body withholding information pursuant to section 552.130(c) must provide certain notice to requestor).

⁵We note, section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 471004

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

c: Corix Utilities (US). Inc.
c/o Ms. Deborah J. Bullion
Gascoyne & Bullion, P.C.
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