



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2012

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport
P.O. Box 619428
DFW Airport, Texas 75261-9428

OR2012-20726

Dear Ms. Constantine:

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# 474817.

The Dallas/Fort Worth International Airport Board (the "board") received two requests for all proposals submitted in response to solicitation 8004295 for designated aviation channeling services. You state you will release non-proprietary portions of the requested information to the requestors. Although you take no position on whether the submitted information is excepted from disclosure, you state release of this information may implicate the proprietary interests of MorphoTrust USA ("MorphoTrust"); Telos Identity Management Solutions ("Telos"); and Transportation Security Clearinghouse ("TSC"). Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d)* (permitting interested third party to submit to attorney general reasons why requested 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 reviewed the submitted information and considered the submitted arguments.

Initially, we note MorphoTrust and Telos argue against the release of information that was not submitted by the board. This ruling does not address information that was not submitted by the board and is limited to the information the board 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).

MorphoTrust, Telos, and TSC claim section 552.110 of the Government Code, which 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 Id.* § 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.¹ 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 Open Records Decision No. 552 at 5* (1990). 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).

¹The 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; *see Open Records Decision Nos. 319 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

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 (1999).

Upon review, we find MorphoTrust, Telos, and TSC have made a *prima facie* case that some of their information constitutes a trade secret. Accordingly, the board must withhold the methodologies and processes we have marked under section 552.110(a) of the Government Code.² However, we find MorphoTrust, Telos, and TSC have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret. *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 3 (1982) (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the board may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Upon further review, we find certain pricing information related to TSC constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the board must withhold TSC’s pricing schedule we have marked under section 552.110(b) of the Government Code. Although Telos also seeks to withhold its pricing information, we note Telos was the winning bidder with respect to the contract at issue, and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the 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 344–45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Furthermore, MorphoTrust seeks to withhold information regarding its personnel, stating release would harm it by allowing a competitor to solicit their employees. Upon review, we find MorphoTrust has made only conclusory allegations that release of the information at issue would cause it substantial competitive harm. *See* ORD 319. Accordingly, the board may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the board must withhold the information we have marked under section 552.110 of the Government Code. The board must release the remaining submitted information.

²As our ruling is dispositive, we do not address the remaining arguments against release of this information.

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 474817

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Mr. Mark Griffin
President
Telos Identity Management
Solutions, L.L.C.
19886 Ashburn Road
Ashburn, Virginia 20147
(w/o enclosures)

Mr. Carter Morris
Chief Operating Officer
Transportation Security Clearinghouse
601 Madison Street, Suite 400
Alexandria, Virginia 22314
(w/o enclosures)

Mr. Eric Juttelstad
Vice President - Business Development
MorphoTrust USA, Inc.
15 Century Boulevard, Suite 500
Nashville, Tennessee 37214
(w/o enclosures)