



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 22, 2013

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Assistant Public Information Coordinator  
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OR2013-08535

Dear Mr. Galindo:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 488114 (PIR No. 13-35675).

The Office of the Attorney General (the "OAG") received a request for the responses, including Pricing Submission Forms, bidders submitted in response to Bid Reference No. 302-0-0072, "dated June or July 2009." The OAG takes no position as to disclosure of the information. Rather, because release of the information may implicate the proprietary interests of the respondents, the OAG notified the bidders of the request and of their right to submit arguments to this office as to why their information should not be released. Gov't Code § 552.305(d) (permitting third party with proprietary interest 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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We will consider the responding third parties' comments, and we have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

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, Merrill Corporation ("Merrill"), Chandler & Company, LLC ("Chandler"), Esquire Deposition Solutions, LLC ("Esquire"), and Integrity Legal Support Solutions ("Integrity") have submitted arguments to protect their information. Because the remaining bidders have not submitted to this office any reasons explaining why their information should not be released, we have no basis to conclude release of the information will harm their proprietary interests. *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 (1990). Accordingly, the OAG may not withhold the information of bidders who have not submitted arguments to this office based on any proprietary interests they may have.

Merrill, Chandler, Esquire, and Integrity argue their pricing information is excepted from public disclosure under section 552.110 of the Government Code. We note the Pricing Submission Forms are subject to previous requests for information. In responding to the prior requests, the OAG notified these four companies of the requests pursuant to section 552.305. As a result of the prior requests, this office issued Open Records Letter Nos. 2009-17515 (2009) and 2010-03505 (2010), which concluded the OAG must withhold the forms submitted by Merrill and Chandler under section 552.110(b) of the Government Code and release the other companies' forms. With respect to the information pertaining to Merrill and Chandler, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the OAG must rely on Open Records Letter No. 2009-17515 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note although the OAG notified Esquire of the request for its information pursuant to section 552.305 of the Government Code in Open Records Letter No. 2009-17515, Esquire did not submit comments in response to the request at issue in the previous ruling. Further, although Integrity submitted arguments in Open Records Letter No. 2010-03505, we found it failed to demonstrate the applicability of section 552.110(b) of the Government Code to its pricing information. Accordingly, we determined in our previous rulings the OAG must release Esquire's and Integrity's pricing information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by

law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the OAG may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. In this instance, Esquire has submitted arguments to our office. Moreover, Integrity has submitted further arguments against release of information that was not withheld in the previous ruling. Esquire claims its pricing information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code and Integrity claims all of its proposal is excepted under sections 552.104 and 552.110. Section 552.104 is a discretionary exception that protects a governmental body's interest and does not make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Thus, the OAG may not withhold Esquire's and Integrity's pricing information under section 552.104. However, section 552.110 does make information confidential under the Act. Therefore, because circumstances have changed with respect to Esquire's and Integrity's pricing information, the OAG may not rely upon the prior rulings as previous determinations for their pricing information, and we will address their arguments against release of their pricing information under section 552.110. We will also consider Integrity's section 552.110 assertion for the rest of its proposal.

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.<sup>1</sup> 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 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 section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983). 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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).

As mentioned above, Esquire's and Integrity's pricing information were the subject of Open Records Letter Nos. 2009-17515 and 2010-03505. In the prior rulings, the OAG notified Esquire and Integrity pursuant to section 552.305, and Esquire failed to submit any arguments that its information was excepted from disclosure under the Act. Further, we held Integrity's pricing information is not excepted under section 552.110(b). Since the issuance of the previous rulings, neither Esquire nor Integrity disputed this office's conclusions

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<sup>1</sup>The 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

regarding the release of their pricing information, and we presume the OAG has released the information in accordance with these rulings. In this regard, we find neither Esquire nor Integrity has taken any measures to protect their information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Esquire or Integrity substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the OAG may not withhold Esquire's and Integrity's pricing information under section 552.110 of the Government Code.

Furthermore, only Integrity "objects to the release of all requested information under section[] . . . 552.110(a)-(b)." Although Integrity asserts section 552.110 for all of its information, it has provided arguments to withhold its pricing information only. Thus, Integrity failed to demonstrate the applicability of section 552.110 to the rest of its information. Hence, the OAG may not withhold Integrity's remaining information under section 552.110.

Integrity also asserts section 552.104 of the Government Code excepts its remaining information from public disclosure. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the OAG does not raise section 552.104, this section is not applicable to the remainder of Integrity's proposal. *Id.* (Gov't Code § 552.104 may be waived by governmental body). The OAG may not withhold Integrity's information under section 552.104.

Lastly, we note the information includes information made confidential by section 552.130 of the Government Code. Section 552.130(a)(2) excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(2). The OAG must withhold the vehicle identification numbers found on page 127 of the document entitled "13-35675.pdf" pursuant to section 552.130(a)(2).

In summary, the OAG must comply with Open Records Letter No. 2009-17515 as to the Pricing Submission Forms submitted by Merrill and Chandler and must withhold the vehicle identification numbers found on page 127 of the document entitled "13-35675.pdf" pursuant to section 552.130(a)(2). The OAG must release the remainder.

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](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,



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YHL/sdk

Ref: ID# 488114

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