



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2013

Ms. Halfreda Anderson-Nelson
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2013-08917

Dear Ms. Anderson-Nelson:

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# 488610 (DART ORR 9739).

Dallas Area Rapid Transit ("DART") received a request for proposals submitted in response to solicitation number P-1021873. 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.¹ You inform us the interested third parties were notified of this request for information and of their right to submit arguments as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third parties 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 circumstances). We have received arguments submitted by Bytemark, SK, and Unwire. 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 under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this

¹The third parties notified pursuant to section 552.305 of the Government Code are: Accenture; American Eagle; Amor Group ("Amor"); Bytemark, Inc. ("Bytemark"); Globe Sherpa; Masabi; NTT Data ("NTT"); Pectra; SK C&C USA ("SK"); Skillnet Solutions ("Skillnet"); Trapeze Software ("Trapeze"); and Unwire.

letter, this office has not received comments from Accenture, American Eagle, Amor, Globe Sherpa, Masabi, NTT, Pectra, Skillnet, or Trapeze explaining why their requested information should not be released. Therefore, we have no basis to conclude that any of these parties has protected proprietary interests in the requested 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, DART may not withhold any portion of the submitted information based upon any interest these parties may have in the information.

SK argues that its submitted proposal is not responsive to the present request because the request excludes information deemed confidential by DART or responding parties. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, DART has reviewed its records and determined the documents it has submitted are responsive to the request. Thus, we find DART has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether DART must release the submitted information to the requestor under the Act.

Bytemark and SK both argue their information must be withheld because it is confidential and was provided with the expectation of confidentiality. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Bytemark, SK, and Unwire assert portions of their information 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. *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. 1957); *see also* ORD 552 at 2. Section 757 provides that 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) (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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 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

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

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 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find that Bytemark, SK, and Unwire have established a *prima facie* case that some of their information, which we have marked, constitutes trade secrets. Therefore, DART must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that Bytemark and Unwire have made the remaining customer information they seek to withhold publicly available on their websites. Because Bytemark and Unwire have published this information, they have failed to demonstrate this information constitutes trade secrets. Additionally, we 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 (citation omitted); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Further, pricing information of a winning bidder, as Unwire is in this case, is generally not excepted under section 552.110. *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). Upon review, we find Bytemark, SK, and Unwire have failed to demonstrate how any portion of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. Therefore, DART may not withhold any of Bytemark’s, SK’s, or Unwire’s remaining information pursuant to section 552.110(a) of the Government Code.

Bytemark, SK, and Unwire also claim portions of their information consist of commercial or financial information, release of which would cause substantial competitive harm to the companies. We find Bytemark and SK have established that release of some of their remaining information, which we have marked, would cause the companies substantial competitive injury. Therefore, DART must withhold the marked information under section 552.110(b) of the Government Code. However, we find Bytemark, SK, and Unwire have made only conclusory allegations that release of their remaining information at issue would result in substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because 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 (information relating to organization and personnel, professional

references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, as previously noted, Unwire was a 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). *See* ORD 514. *See generally* Dep't of Justice Guide to the Freedom of Information Act 344–45. Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Unwire and SK raise section 552.101 of the Government Code for portions of their remaining information. 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. Unwire alleges the information at issue is confidential pursuant to section 552.101 in conjunction with Danish law. However, Unwire has not pointed to any statutory confidentiality provision of Danish law, nor are we aware of any, that would make any of the information at issue confidential for purposes of section 552.101. Furthermore, SK has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of the remaining information confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, DART may not withhold any of the remaining information under section 552.101 of the Government Code.

Bytemark raises section 552.139 of the Government Code for portions of its remaining information.³ Section 552.139 provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized

³We understand Bytemark also raises section 552.305 of the Government Code; however, this section is not an exception to public disclosure under the Act. *See* Gov't Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *Id.*

access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). Bytemark states the information at issue describes credit card transaction and ticket verification security, protocols, and maintenance, and that release of the information would make Bytemark's system more vulnerable to attacks. However, Bytemark has not demonstrated how any of the information at issue relates to computer network security, or to the design, operation, or defense of the computer network as contemplated in section 552.139(a). Further, we find Bytemark has failed to explain how any of the submitted information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, DART may not withhold any of the submitted information under section 552.139 of the Government Code.

We note some of the remaining information is subject to section 552.136 of the Government Code.⁴ Section 552.136 provides, "[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); *see id.* § 552.136(a) (defining "access device"). Accordingly, DART must withhold the bank account numbers we have marked under section 552.136 of the Government Code.

⁴The 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).

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, DART must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released; however, any information subject to copyright law 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 488610

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Jens Sondergaard
Unwire
Vermundsgade 38
DK 2100 Copenhagen
(w/o enclosures)

Ms. Graciela Roggio
Pectra
2425 West Loop South, Suite 200
Houston, Texas 77027
(w/o enclosures)

Mr. Conrad M. Sheehan
NTT Data
325 North LaSalle
Chicago, Illinois 60654
(w/o enclosures)

Mr. Craig L. Sheldon
For SK C&C USA, Inc.
55 East 59th Street, 11th Floor
New York, New York 10022
(w/o enclosures)

Mr. Brian Beattie
Trapeze Software
8360 East Via De Ventura, Suite
L-200
Scottsdale, Arizona 85258
(w/o enclosures)

Mr. Darryl Heath
Accenture
5221 North O'Connor Boulevard,
Suite 1400
Irving, Texas 75039
(w/o enclosures)

Ms. Stephanie Murg
American Eagle
5605 North MacArthur Boulevard,
10th Floor
Irving, Texas 75038
(w/o enclosures)

Mr. Bryan Parker
Amor Group
2500 City West Boulevard
Houston, Texas 77042-3000
(w/o enclosures)

Ms. Rebecca Nutt
Masabi
56 Ayers Street
London
SE1 1EU
(w/o enclosures)

Mr. Nathaniel Parker
Globe Sherpa
2025 Northwest Overton Street
Portland, Oregon 97209
(w/o enclosures)

Mr. Theodore M. Sabety
For Bytemark, Inc.
Sabety & Associates, P.L.L.C.
8 West 40th Street, 12th Floor
New York, New York 10018
(w/o enclosures)

Prashant Kuduke
Skillnet Solutions
1501 Sonora Court, Suite 2
Sunnyvale, California 94086
(w/o enclosures)