



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2013

Ms. Debbie Lasker
Contracts Administrator
Office of the Harris County Purchasing Agent
1001 Preston, Suite 670
Houston, Texas 77002

Ms. Laurie Wainwright
Public Information Officer
Office of the Harris County Purchasing Agent
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OR2013-16208A

Dear Ms. Lasker and Ms. Wainwright:

This office issued Open Records Letter No. 2013-16208 (2013) on September 18, 2013. In that ruling, we stated the ruling did not address the required public disclosure of certain information one of the interested third parties, BI, Inc. (“BI”), sought to withhold from public disclosure because we understood that the Office of the Harris County Purchasing Agent (the “county”) had not submitted the information to this office for review. You now resubmit the information at issue and have renumbered BI’s information to identify the information BI seeks to withhold.¹ We now understand the county has submitted for our review all of the information for which BI seeks protection. Accordingly, we have determined the prior ruling should be corrected. *See* Gov’t Code. §§ 552.306, .352. Consequently, this decision is a substitute for Open Records Letter No. 2013-16208 and serves as the correct ruling. *See generally id.* § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the “Act”), chapter 552 of the Government Code). This ruling was assigned ID# 507970.

¹The renumbered pages consist of BI’s Disaster Recovery Plan and a document entitled “Security Policies and Procedures[.]”

The county received two requests for information related to request for proposals number 12/0047, including responses, evaluations and scoring documents, and the awarded contract. Although you take no position as to whether the submitted information is excepted under the Act, you inform us release of this information may implicate the proprietary interests of BI; Consumer Safety Technology, L.L.C. (“CST”); iSECUREtrac Corp. (“iSt”); Satellite Tracking of People, L.L.C. (“STOP”); and SecureTracks GPS, a subsidiary of Synergy Telecom Service Co., Inc. (“SecureTracks”). Accordingly, you notified these third parties of the requests for information 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); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received comments from BI and STOP; the county has forwarded us comments from CST and SecureTracks asserting that portions of their information be excepted from disclosure. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the county did not submit any information responsive to the portions of the requests for evaluations and scoring documents or the executed contract for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. To the extent such information existed on the date the county received the requests, we presume you have released it. If not, you must do so at this time. *See* Gov’t Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

We next 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* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, iSt has not submitted comments to this office explaining why its information should not be released. Therefore, we have no basis to conclude that iSt has a protected proprietary interest 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. Thus, the county may not withhold any portion of the requested information based upon the proprietary interests of iSt.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, including federal law. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Attorney General Op. MW-372 (1981). Section 6103(b) defines the term “return information” as “a

taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). We have marked the tax return information in the submitted documents that is confidential under section 6103(a) of title 26 of the United States Code. Therefore, the county must withhold the marked information under section 552.101 of the Government Code on that ground.

CST argues some of its submitted information is confidential under section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code. Section 262.030(c) of the Local Government Code provides a competitive proposal procedure for the purchase of high technology items by a county, and states as follows:

(c) If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such.

Local Gov't Code § 262.030(c). In general, section 552.101 only excepts information from disclosure where the express language of a statute makes certain information confidential or states that information shall not be released to the public. Open Records Decision No. 478 (1987). The plain language of section 262.030(c) does not expressly make bid proposals confidential. Section 262.030(c) only requires a governmental body to take adequate precautions to protect bid proposals from competing bidders. Accordingly, we determine the information at issue is not confidential pursuant to section 262.030(c). Thus, the county may not withhold any of CST's information pursuant to section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code.

SecureTracks does not raise a specific provision of the Act to withhold its information at issue. *See* Gov't Code § 552.305. However, we understand from the context of its arguments that SecureTracks asserts portions of its information are excepted from disclosure under section 552.110 of the Government Code. BI, CST, and STOP assert some of their information is excepted from public 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. *Id.* § 552.110.

Section 552.110(a) of the Government Code protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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 *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must

²There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (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).

accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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). 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.” RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776.

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.* § 552.110(b); 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 SecureTracks has demonstrated that substantial competitive harm would result from the release of its pricing information. Therefore, the county must withhold the pricing information we have marked in the SecureTracks documents under section 552.110(b) of the Government Code. However, SecureTracks, STOP, and BI have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information at issue would cause the companies substantial competitive harm. *See* ORDs 509 at 5, 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience). Consequently, the county may not withhold any of the remaining information of these companies under section 552.110(b).

Upon further review, we find BI, CST, SecureTracks, and STOP have failed to demonstrate that any of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Therefore, the county may not withhold any portion of the remaining information pertaining to these companies under section 552.110(a).

Section 552.136 of the Government Code states, “Notwithstanding any other provision of this chapter, 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.”³ Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136.⁴ Accordingly, the county must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁵

In summary, the county must withhold (1) the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, (2) the information we have marked under section 552.110 of the Government Code, and (3) the insurance policy numbers we have marked under section 552.136 of the Government Code. The county must release the remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/bhf

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴*See* Open Records Decision No. 684 at 9 (2009) (insurance policy number is an access device number for purposes of section 552.136)

⁵Section 552.136(c) authorizes a governmental body to redact information protected by section 552.136(b) without requesting a decision. *See id.* § 552.136(d)-(e) (providing requestor may appeal governmental body’s decision to withhold information under section 552.136(c) to attorney general, and governmental body withholding information pursuant to section 552.136(c) must provide notice to requestor).

Ref: ID# 507970

Enc. Submitted documents

c: Requestors
(w/o enclosures)

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