



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2013

Ms. Sara Abbott McEown
Jackson Walker, LLP
901 Main Street, Suite 6000
Dallas, Texas 75202

OR2013-18036

Dear Ms. McEown:

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# 502569.

The Fort Worth Transportation Authority (the "authority"), which you represent, received a request for all proposals submitted in response to the authority's request for proposals number 13-T021, Mobile Data Terminals for Paratransit Services. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also state the requested information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified GreyHawk Technologies ("GreyHawk"), StrataGen Systems, Inc. ("StrataGen"), and Trapeze Software Group, Inc. ("Trapeze") of the request and of their right to submit comments to this office as to why the requested information should not be released to the requestor. *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 Trapeze. We have considered the submitted arguments and reviewed the submitted information.

You argue portions of the submitted proposals are excepted from disclosure under section 552.110 of the Government Code. We note, however, section 552.110 is designed to protect the interests of third parties not the interests of a governmental body. Thus, we will not consider the authority's arguments under section 552.110. 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 letter, we have not received comments from GreyHawk or StrataGen on why their submitted information should not be released. Therefore, we have no basis to conclude GreyHawk or StrataGen 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 authority may not withhold any portion of the submitted information on the basis of any proprietary interest GreyHawk or StrataGen may have in it.

Section 552.110 of the Government Code 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.¹ This office must accept a claim that

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;

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 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.

Upon review, we find Trapeze has established a *prima facie* case that some of the company’s information, which we have marked, constitutes trade secrets. Therefore, the authority must withhold the information we have marked pursuant to section 552.110(a) of the Government Code.² However, we find Trapeze has failed to demonstrate how any portion of the company’s remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for the remaining information. *See* ORD 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). Therefore, the authority may not withhold any of Trapeze’s remaining information pursuant to section 552.110(a) of the Government Code.

Trapeze contends some of its remaining information is commercial or financial information, release of which would cause substantial competitive harm to the company. Upon review, we find Trapeze has established that some of its remaining information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the authority must withhold the information we have marked under section 552.110(b) of the Government Code. However, upon review, we find Trapeze has not established any of the remaining information

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- (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).

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the authority may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information is subject to section 552.136(b) of the Government Code, which 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.”³ Gov’t Code § 552.136(b). This office has determined an insurance policy number is an access device number for purposes of section 552.136. Therefore, the authority must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

The authority asserts portions of the submitted information may be excepted from disclosure under section 552.101 of the Government Code on the basis of federal copyright law. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. However, copyright law does not make information confidential for purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). 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. Accordingly, the authority may not withhold any of the submitted information under section 552.101 in conjunction with copyright law, but any information that is protected by copyright may only be released in accordance with copyright law.

In summary, the authority must withhold the information we have marked under section 552.110 of the Government Code and the insurance policy numbers we have marked under section 552.136 of the Government Code. The authority must release the remaining information; however, any information subject to copyright may be released only in accordance with copyright law.

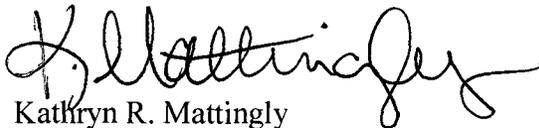
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴Section 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.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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/tch

Ref: ID# 502569

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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