



ATTORNEY GENERAL OF TEXAS
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July 25, 2014

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OR2014-12943

Dear Ms. Wood:

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# 531144.

The McKinney Independent School District (the "district"), which you represent, received a request for information pertaining to upgrading or replacing the district's voice communication systems, including all requests for proposals and responses to request for proposals, purchase orders, meeting minutes and votes, memoranda, and e-mails. You state the district is releasing some of the requested information. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Affiliated Communications ("Affiliated"); ShoreTel c/o AT&T ("AT&T"); Cisco c/o Presidio ("Cisco"); CloudVoice c/o Encore Technology Group, L.L.C. ("CloudVoice"); Flowroute, L.L.C. ("Flowroute"); Insight Public Sector, Inc. ("Insight"); INX, L.L.C. ("INX"); Jive Communications, Inc. ("Jive"); Netrix, L.L.C. ("Netrix"); Netsync Network ("Netsync"); Optus, Inc. ("Optus"); Polycom c/o Consolidated ("Polycom"); and Windstream. Accordingly, you state, and provide documentation showing, you notified Affiliated, AT&T, Cisco, CloudVoice, Flowroute, Insight, INX, Jive, Netrix, Netsync, Optus, Polycom, and Windstream of the request for information and of the right of each 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 the Act in certain circumstances). We have received comments from Affiliated, AT&T, CloudVoice, Insight, Jive, Netrix, Optus, and Polycom.¹ We have reviewed the submitted information and the submitted arguments.

¹Netrix and Polycom each states it does not object to release of its information.

Initially, you state the district has requested clarification of portions of the request for information. You state the district has not received clarification of the information at issue. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, for those portions of the request for which the district has not received clarification, the district is not required to release information. However, if the requestor clarifies any portion of the remainder of the request for information, the district must seek a ruling from this office before withholding any responsive information from the requestor.

Next, we 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Cisco, Flowroute, INX, Netsync, or Windstream explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of these third parties has a protected proprietary interest 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 district may not withhold the submitted information on the basis of any proprietary interest Cisco, Flowroute, INX, Netsync, or Windstream may have in the information.

CloudVoice raises section 552.104 of the Government Code for its information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the district does not argue section 552.104 is applicable, we will not consider CloudVoice's claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, the district contends the submitted information is 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). We note section 552.110 protects the interests of private parties that provide information to governmental bodies, not the interests of governmental bodies

themselves. *See generally* ORD 592. Accordingly, we do not consider the district's arguments under section 552.110.

Affiliated, AT&T, CloudVoice, Insight, Jive, and Optus each states portions of the information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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.² 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

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

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* ORD 661 at 5.

Affiliated, AT&T, CloudVoice, Insight, Jive, and Optus each asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Affiliated, AT&T, CloudVoice, and Insight have established a *prima facie* case that their customer lists constitute trade secret information. Accordingly, to the extent Affiliated, AT&T, CloudVoice, and Insight’s customer information is not publicly available on their respective websites, the district must withhold the customer information of Affiliated, AT&T, CloudVoice, and Insight under section 552.110(a).³ However, we conclude Affiliated, CloudVoice, Insight, Jive, and Optus have each failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Affiliated, CloudVoice, Insight, Jive, and Optus have not demonstrated the necessary factors to establish a trade secret claim for the remaining information. *See* ORD 402. Therefore, the district may not withhold any of the remaining information under section 552.110(a).

Affiliated, CloudVoice, Insight, Jive, and Optus further argue portions of the remaining information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Affiliated, CloudVoice, Insight, and Jive has each demonstrated its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the district must withhold the pricing information of Affiliated, CloudVoice, Insight, and Jive, which we have marked, under section 552.110(b) of the Government Code. However, we find Affiliated, CloudVoice, Insight, Jive, and Optus has each failed to demonstrate the release of any of its remaining information would result in substantial harm to its competitive position. *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 costs, bid specifications, and circumstances would change for future contracts, assertion that

³As our ruling is dispositive for the information AT&T seeks to withhold, we need not address additional arguments against its disclosure.

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, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Furthermore, we note the contract related to request for proposals number 001207138 was awarded to Optus. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, the district may not withhold any of the remaining information under section 552.110(b).

The remaining documents include information that is subject to section 552.136 of the Government Code.⁴ Section 552.136 of the Government Code provides, "Notwithstanding 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the district must withhold the insurance policy numbers from the remaining documents under section 552.136 of the Government Code.

We note some of the materials at issue 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, the district must withhold the customer information of Affiliated, AT&T, CloudVoice, and Insight under section 552.110(a) of the Government Code, to the extent such information is not publicly available on the respective website of each of these third parties. The district must withhold the pricing information of Affiliated, CloudVoice,

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).

Insight, and Jive, which we marked, under section 552.110(b) of the Government Code. The district must withhold the insurance policy numbers from the remaining documents under section 552.136 of the Government Code. The district must release the remaining information; however, any information that is subject to copyright may be released only 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.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,



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CVMS/ds

Ref: ID# 531144

Enc. Submitted documents

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