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ATTORNEY GENERAL OF TEXAS

March 30, 2016

Ms. Joey Moore
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Walsh, Gallegos, Treviño, Russo & Kyle, P.C.
P.O. Box 2156
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OR2016-07033

Dear Ms. Moore:

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# 603708.

The Birdville Independent School District (the "district"), which you represent, received a request for all requests for bids and any bids or contracts by or between the district and a named vendor related to a specified service. Although you take no position as to whether the requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of a third party.¹ Accordingly, you state, and submit documentation demonstrating, the district notified Construction Zone International, L.P. ("CZI") of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 reviewed the submitted information and the arguments submitted by CZI.

¹You acknowledge, and we agree, the district failed to comply with the procedural requirements of section 552.301(b) of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b) (requiring governmental body to ask for ruling and state exceptions that apply within ten business days of receiving written request). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977). Because a third party's interests are at stake in this instance, we will consider the arguments against disclosure of the submitted information.

We understand CZI to raise section 552.110 of the Government Code for some of its information.² 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.³ 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

²Although CZI does not raise section 552.110 of the Government Code in its brief, we understand it to raise this exception based on the substance of its arguments.

³The 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).

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).

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.*; Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CZI claims portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find CZI has established a *prima facie* case its customer and reference information constitute trade secret information. Accordingly, to the extent CZI’s customer and reference information within the submitted information are not publicly available on CZI’s website, the district must withhold the customer and reference information at issue under section 552.110(a). To the extent CZI’s customer or reference information is publicly available on the company’s website, the district may not withhold such information under section 552.110(a). We also conclude CZI has failed to establish a *prima facie* case any portion of its remaining information at issue meets the definition of a trade secret. We further find CZI has not demonstrated the necessary factors to establish a trade secret claim for this information. Therefore, none of CZI’s remaining information at issue may be withheld under section 552.110(a).

CZI argues some of the remaining information consists of commercial or financial information, the release of which would cause the company substantial competitive harm under section 552.110(b). To the extent CZI’s customer information is publicly available on the company’s website and not excepted from disclosure under section 552.110(a), the district may not withhold such information under section 552.110(b). Upon review, we find CZI has not made the specific factual or evidentiary showing required by section 552.110(b) the release of CZI’s remaining information would cause the company substantial competitive harm. *See* ORD 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, and pricing). We therefore conclude the district may not withhold the remaining information at issue under section 552.110(b).

We note some of the remaining information appears to be subject to copyright law. 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, to the extent CZI's customer and reference information are not publicly available on the company's website, the district must withhold CZI's submitted customer and reference information under section 552.110(a) of the Government Code. The district must release the remaining information; however, any information protected by copyright 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.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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MT/dls

Ref: ID# 603708

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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