OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

October 24, 2001

Ms. Ruth H. Soucy
Deputy General Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2001-4835

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153860.

The Comptroller of Public Accounts (the "comptroller") received two requests for information relating to the comptroller's Request for Offers for Application Programming and Support Services, 304-1-0936 MAR. You claim that a portion of the requested information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. In addition, pursuant to section 552.305 of the Government Code, you notified representatives of EDS Information Solutions ("EDS"), ACS Enterprise Solutions, Inc. ("ACS"), Allied Consultants, Inc. ("Allied"), DSQ Software Corporation ("DSQ"), and Decision Consultants, Inc. ("DCI") of the request for their information, and invited these entities to submit arguments to this office as to why the information at issue should not be released.[1] Representatives of ACS, EDS and DCI submitted arguments to this office, and contend that portions of the information contained in their proposals are excepted from required public disclosure pursuant to section 552.110 of the Government Code. We have considered the exceptions raised by all the parties and have reviewed the submitted information.

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[1] *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 that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

We first address your argument under section 552.137. You state that the submitted information contains e-mail addresses obtained from the public that are excepted from public disclosure. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.[2] Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

> Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.
>
> (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
>
> (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Section 552.137 requires the department to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that any of the parties whose e-mail addresses appear in the submitted materials have consented to their release, the comptroller must withhold the e-mail addresses in the submitted documents under section 552.137 of the Government Code.

Next, we address the applicability of section 552.110 to the requested information. Section 552.110 protects: (a) trade secrets, and (b) 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). 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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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. RESTATEMENT OF TORTS § 757

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[2]House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

cmt. b (1939).[3] This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

We first address the arguments submitted by ACS, the entity awarded the contract with the comptroller. ACS contends that information in its proposal consisting of financial statements, pricing schemes and cost projections is excepted as both trade secrets and as commercial or financial information under sections 552.110(a) and 552.110(b) respectively. Upon review of ACS's arguments, we find that ACS has established that certain financial information contained in its proposal is excepted from disclosure under section 552.110(b). We have marked this information (See green flags).[4] We find, however, that the information relating to costs and pricing is not excepted under section 552.110. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); 514 (1988) (public has interest in knowing prices charged by government contractors); 319 (1982) (stating that pricing proposals are entitled to protection *only during bid submission process*). The public has a strong interest in the release of prices in government contracts.

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[3]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (1) the extent to which the information is known outside of [the company]; (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 [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).

[4]We note that on the pages to be withheld, ACS refers to Appendices A and B containing annual reports, audited financial statements and letters of reference from creditors. The comptroller, however, did not submit this information to our office for review. Therefore, we have no basis for determining whether a compelling reason exists for withholding this information. Thus, to the extent it exists and is responsive to the request, we have no choice but to order the information released pursuant to section 552.302. If either the comptroller or ACS believes the information is confidential and may not lawfully be released, the ruling must be challenged in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

See Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company).

Upon review of the arguments submitted by DCI, we first find that the information pertaining to employees of DCI which DCI has marked within Exhibit F of its proposal is not excepted under section 552.110. *See* Open Records Decision No. 319 at 3 (1982) (stating that statutory predecessor to section 552.110 ordinarily does not protect information relating to organization and personnel, market studies, professional references, qualifications and experience). This information must be released to the requestor. We next find that DCI has established that it is entitled to protection under section 552.110(a) for the client information it has marked within Exhibit G of its proposal. *See* Open Records Decision No. 552 (1990). The comptroller must withhold this information from the requestor. With regard to the pricing and financial information contained in Exhibit H of the DCI proposal, we find that DCI has established that the disclosure of this information would result in substantial competitive harm to DCI and therefore, this information is excepted under section 552.110(b). Finally, we conclude that DCI has established that the proprietary technical information it has marked within Exhibit I of its proposal constitutes trade secrets of DCI, and therefore, this marked information must be withheld from disclosure under section 552.110(a).

Next, we address the arguments submitted to this office by EDS.[5] We first find that the information pertaining to personnel of EDS is not excepted under section 552.110. *See* Open Records Decision No. 319 at 3 (1982). We find, however, that EDS has established that the following information contained in the sections of its proposal it calls the Individual Schedules is excepted from disclosure under section 552.110(b) as commercial or financial information: in Schedule 1, pages 3-9, 10-18, 50, 51, and 54-65; in Schedule 2, pages 2-8, 9-17, 43, 44, 47-58; in Schedule 3, pages 3-10, 11-19, 90-100, and 103-114; and in Schedule 5, pages 3-9, 10-18, 36-44, and 49-60. We have marked the information to be withheld.

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[5]EDS informs us that it submitted a proposal to the comptroller dated June 25, 2001 that was composed of two binders entitled "EDS Consolidated Proposal" which "consolidates all of the technical schedules comprising the Proposal into a single proposal," and "EDS Individual Schedules," which breaks down the Proposal into four (4) technical schedules . . . ." EDS claims also to have submitted additional information to the comptroller on July 12, 2001 which it refers to as the "Additional Response to the State of Texas CPA" and for which it has submitted arguments against disclosure to this office. It appears that the comptroller has submitted to this office as responsive to the request only the technical schedules individually. We are not in receipt of a binder entitled "EDS Consolidated Proposal." In addition, we are unable to identify from the documentation submitted by the comptroller any information dated July 12, 2001 referred to as "Additional Response to the State of Texas CPA." Therefore, we only address the arguments submitted to this office by EDS for the information in what it refers to as the "Individual Schedules." To the extent the comptroller is in possession to the above-described information dated July 12, 2001, and to the extent the comptroller deems this information responsive to the request, we have no choice but to order the information released pursuant to section 552.302. If either the comptroller or EDS believes the information is confidential and may not lawfully be released, the ruling must be challenged in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

(See yellow flags). The remaining information pertaining to EDS must be released to the requestor.

Finally, we note that EDS asserts that the information it seeks to withhold was submitted to the comptroller with the intention that it be kept confidential. We note, however, that information is not confidential under the Public Information Act simply because the party submitting it anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987). Nor is information excepted from disclosure merely because it is furnished with the expectation that access to it will be restricted. Open Records Decision No. 180 (1977).

To summarize, the comptroller must withhold the e-mail addresses in the submitted documents under section 552.137 of the Government Code. In addition, the comptroller must withhold under section 552.110(a) the client information marked by DCI within Exhibit G of its proposal as well as the proprietary technical information it has marked within Exhibit I of its proposal. The information within DCI's Exhibit H must be withheld under section 552.110(b). The comptroller must withhold certain financial information we have marked in the proposal of ACS under section 552.110(b). The comptroller must also withhold certain financial information we have marked in the proposal of EDS under section 552.110(b). The remainder of the requested information must be released to the requestors.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 153860

Enc. Submitted documents

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