



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2003

Ms. Rebecca L. Payne
Assistant General Counsel
Texas Department of Human Services
P. O. Box 149030
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OR2003-8573

Dear Ms. Payne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191858.

The Texas Department of Human Services (the "department") received two requests for a copy of the winning proposal as well as scoring and evaluation materials for a specified request for proposals, "requisition number 324-DS-3020 GSC classification 920-40." You state that the majority of the requested information will be made available to the requestors. Although the department has no objection to the release of the requested information, you claim that this information may be excepted under sections 552.101, 552.110, and 552.130 of the Government Code.¹ You state that you have contacted the five interested third parties whose information is implicated by these requests and notified these third parties of the requests. You state that three of the third parties, Ciber, Inc.; Geologics Corporation; and Piping Design Services, Inc., informed you they do not object to the release of their information. Therefore, pursuant to section 552.305 of the Government Code, you have notified the two remaining parties who do object to the release of their information, Adea Solutions ("Adea") and COMSYS, of the requests and of their right to submit briefing to this office. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney

¹Although you raise section 552.101 of the Government Code as a possible exception to disclosure, you do not explain how any of the submitted information would be so excepted. *See Gov't Code § 552.301(e)(1)(A)* (governmental body must submit written comments explaining why stated exceptions apply). Further, we do not find that any of the submitted information is excepted under sections 552.101.

general reasons why requested information should not be released); *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 in Public Information Act (the "Act") in certain circumstances). We have received correspondence from Adea and COMSYS. We have considered all arguments and reviewed the submitted information.

COMSYS and Adea both argue that portions of their information are excepted under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "[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(a)-(b).

The Texas Supreme Court has adopted the definition of a "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 a single or ephemeral event 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 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records

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 others involved in [the company's] business;

Decision No. 552 at 5 (1990). 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) 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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *see* 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).

Upon considering the submitted arguments and the information at issue, we conclude that both COMSYS and Adea have established that portions of their information constitute a trade secret for purposes of section 552.110. The department must withhold Appendices B, C, and D, and sections 3.2.3 and 3.3 of COMSYS's proposal under section 552.110. The department must also withhold section 2.0 and Appendix D of Adea's proposal under section 552.110. We find, however, that neither COMSYS nor Adea has established that the remaining information it seeks to withhold is excepted under either prong of section 552.110 of the Government Code. *See* Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see also* Restatement of Torts § 757 cmt. b (1939) (information is generally not trade secret if 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"); *see generally* Freedom of Information Act Guide & Privacy Act Overview 213-221 (2000) (disclosure of prices is cost of doing business with government); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). As our ruling is dispositive, we need not address any remaining arguments.

Lastly, some of the submitted information is 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 protected by copyright. Attorney General Opinion JM-672 (1987). A governmental

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

body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, except for the information we have identified above relating to COMSYS and Adea, the submitted information must be released in accordance with copyright law.

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 191858

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