



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2004

Ms. Ashley D. Fourt
Assistant District Attorney
Tarrant County Courthouse
401 West Belknap
Fort Worth, Texas 76196-0201

OR2004-9430

Dear Ms. Fourt:

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# 212258.

The Tarrant County Purchasing Department (the "department") received a request for copies of all proposals submitted in response to Tarrant County for RFP No. 2004-136 (eRecruitment Solutions). Although you make no arguments and take no position as to whether the submitted information is excepted from disclosure, pursuant to section 552.305 of the Government Code, you notified the following interested third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released to the requestor: Recruitmax Software, Inc. ("Recruitmax"); SearchSoft Solutions, Inc. ("SearchSoft"); PeopleAdmin, Inc. ("PeopleAdmin"); Pecaso Americas, Inc. ("Pecaso"); Inobbar, L.L.C. d/b/a/ Novusolutions ("Novusolutions"); Neogov, Inc.

("Neogov"); and Recruiting Solutions International, Inc. ("RSI").¹ We have reviewed the submitted information and considered the submitted arguments.

Initially, we note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, SearchSoft, PeopleAdmin, Novusolutions and Neogov have not submitted comments to this office in response to the section 552.305 notice; therefore, we have no basis to conclude that these companies have a proprietary interest in the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the department must release the proposals of SearchSoft, PeopleAdmin, Novusolutions and Neogov.

Recruitmax, Pecasos and RSI have each submitted comments to this office contending that portions of their proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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.

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). Section 757 provides that a trade secret is

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

¹ *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

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). 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 *Id.* 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). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[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). 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. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

²The 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).

Recruitmax argues that the screen shots within its proposal are confidential as trade secrets pursuant to section 552.110(a). Based upon our review of the screen shots and arguments submitted by Recruitmax, we conclude that Recruitmax has established a *prima facie* case that the screen shots are protected trade secret information. Moreover, we have received no arguments that would rebut these claims as a matter of law. Thus, the department must withhold the screen shots pursuant to section 552.110(a). Recruitmax also argues that the pricing information within its proposal is confidential under section 552.110(b). Upon review, we find that Recruitmax has demonstrated that its pricing information is excepted from disclosure under section 552.110(b). Therefore, the department must withhold the information we have marked on that basis.

Pecaso argues that the information on pages 22, 23 and 24 of its proposal is confidential under section 552.110. Upon review, we find that Pecaso has neither shown that any of the information at issue in its proposal meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the information in Pecaso's proposal may be withheld under section 552.110(a). However, we conclude that Pecaso has demonstrated that a portion of its pricing information is excepted from disclosure under section 552.110(b). Thus, the department must withhold the information we have marked under section 552.110(b). Since Pecaso has not provided specific factual evidence substantiating its claims that release of the remaining information on pages 22 through 24 would result in substantial competitive harm to the company, we determine that the remaining information in Pecaso's proposal must be released. *See* Open Records Decision Nos. 661 (1999) (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).

Lastly, RSI argues that some of its responses to the department's RFP are confidential under section 552.110(b). Upon review, we conclude that RSI has demonstrated that a portion of this information is excepted from disclosure under section 552.110(b). Thus, the department must withhold the response we have marked under section 552.110(b). However, we find that RSI has not provided specific factual evidence substantiating their claims that release of the remaining responses in its proposal would result in substantial competitive harm to the company. Accordingly, we determine that none of the remaining responses in the proposal submitted by RSI may be withheld under section 552.110(b). *Id.*

In summary, within the proposal submitted by Recruitmax, the department must withhold the screen shots under section 552.110(a) and the pricing information under section 552.110(b). The department must withhold the marked information in the proposals submitted by Pecaso and RSI under section 552.110(b). The department must release all remaining information.

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,


Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/jh

Ref: ID# 212258

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