



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2005

Mr. Paul Mallett
Executive Director
Commission on State Emergency Communications
333 Guadalupe Street, Suite 2-212
Austin, Texas 78701

OR2005-01564

Dear Mr. Mallett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 218255.

The Commission on State Emergency Communications (the "commission") received a request for a copy of the E911 database vendor contract between Intrado, Inc. ("Intrado") and the commission. The commission takes no position with regard to the release of the requested information. You assert, however, that the request for information may implicate the proprietary interests of Intrado. You have notified Intrado of the request for information pursuant to section 552.305 of the Government Code. *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 Public Information Act (the "Act") in certain circumstances). We also received correspondence from Intrado. We have considered these arguments and have reviewed the submitted information.

Initially, we note that the submitted documents fall within the purview of section 552.022(a)(3) and 552.022(a)(18) of the Government Code. Section 552.022(a)(3) provides that information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is not excepted from required disclosure unless they are made expressly confidential by law. Section 552.022(a)(18) makes public a settlement agreement to which a governmental body is a party, unless the agreement contains

information that is expressly confidential under other law. The submitted information consists of a contract relating to the expenditure of funds by a governmental body, and includes a settlement agreement. Therefore, as prescribed by section 552.022, this information must be released to the requestor unless it is confidential under other law. This office has determined, however, that section 552.110 of the Government Code makes information confidential; thus, it is "other law" for purposes of section 552.022. Intrado claims that portions of its contract with the commission, as well as the settlement agreement, are excepted from disclosure under section 552.110. Therefore, we will address Intrado's argument under section 552.110.¹

Intrado states that some of the requested information has been previously ruled upon by this office and that Open Records Letter Nos. 99-0647 (1999) and 99-1387 (1999) should be relied on as previous determinations. However, the governmental body involved in these two previous rulings was the Texas Buildings and Procurement Commission, formerly the General Services Commission. Because the instant request for information was received by a different governmental body, Open Records Letter Nos. 99-0647 and 99-1387 cannot be relied on as previous determinations. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, the first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Intrado, as well as the commission, also state that some of the requested information has been previously ruled upon by this office in Open Records Letter No. 02-6138 (2002) and that this ruling should be relied on as a previous determination. In Open Records Letter No. 02-6138, we ruled that portions of the submitted E911 database vendor contract between Intrado and the commission were excepted from disclosure under section 552.110 of the Government Code. Therefore, assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the commission must rely on our decision in Open Records Letter No. 02-6138 and withhold or release the information requested in this instance that was previously ruled upon in that decision.² We note that the only information submitted by the commission to this office as responsive to the request that was not covered by the previous determination, and for which Intrado makes arguments against disclosure, are the documents titled "Amendment 1 to

¹Intrado submitted to this office a copy of the information it believed to be responsive to the request for information which differs in some respects from the information submitted by the commission. This decision only addresses the information that the commission submitted to this office as responsive to the request. *See* Gov't Code § 552.301(e)(1).

²We note that the contract between Intrado and the commission has been amended since Open Records Letter No. 02-6138 (2002).

Amendment 3 to the Purchase Agreement, GSC No. 303-9-0875,” and “Settlement Agreement for Wireless Dispute.” Therefore, we address Intrado’s arguments under section 552.110 only for these documents.³

In regard to Intrado’s arguments 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). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov’t Code § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

³We note that Intrado does not object to the release of the following documents submitted by the commission: 1) Purchase Agreement Between the Texas General Services Commission and SCC Communications Corp. for Enhanced 9-1-1 Database Management Services; 2) Request for Offers: General Services Commission (GSC) in Conjunction with the Advisory Commission for State Emergency Communications (ACSEC), Database & AIN Network Services; 3) Exhibit F: Letter of Agency; 4) Amendment # 2 to the Purchase Agreement GSC No. 303-9-0875 Between the Texas General Services Commission and SCC Communications Corp. for Enhanced 9-1-1 Database Management Service; and 5) Renewal Addendum #1. Furthermore, Intrado makes no argument against the disclosure of the document entitled ASM Notification and Update Guidelines.

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (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) 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

After carefully reviewing the arguments presented to us by Intrado and the information at issue; we find that Intrado has not adequately demonstrated that any portion of this information qualifies as a trade secret under section 552.110(a). In this regard, we note that pricing information that pertains 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 (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, we conclude Intrado has not established a *prima facie* case that the information

pertaining to the pricing information is a trade secret. *See* Open Records Decision No. 402 (1983). Thus, the pricing information may not be withheld under section 552.110(a). In addition, we note that 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). We also note that federal cases applying the analogous Freedom of Information Act exemption to prices in awarded government contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Accordingly, we determine that the commission may not withhold any portion of the documents titled "Amendment 1 to Amendment 3 to the Purchase Agreement, GSC No. 303-9-0875," and "Settlement Agreement for Wireless Dispute" under section 552.110(b) of the Government Code. Therefore, this information must be released to the requestor.

In summary, assuming that the four criteria for a "previous determination" have been met, the commission must rely on our decision in Open Records Letter No. 02-6138 and withhold or release the information requested in this instance that was previously ruled upon in that decision. The remaining submitted information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the

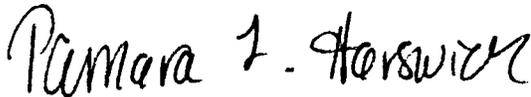
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *Tex. 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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Open Records Division

TLH/sdk

Ref: ID# 218255

Enc. Submitted documents

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