



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2005

Ms. Lisa Villarreal
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2005-10681

Dear Ms. Villarreal:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 237004.

The Office of the Attorney General (the "OAG") received a request for information relating to the OAG's request for proposal for the Texas VINE Program. The OAG has submitted portions of Appriss, Inc.'s proposal. To the extent the remaining requested information exists, we assume the OAG has released it. *See* Gov't Code §§ 552.301, .302. Although the OAG takes no position as to the disclosure of the submitted information, you assert that its release may implicate the proprietary interests of Appriss. Accordingly, you notified Appriss of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting third party with proprietary interest to submit to attorney general reasons why requested information should not be released); *see also* 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 to disclosure under Public Information Act in certain circumstances).

First, the OAG acknowledges it did not comply with section 552.301(e) of the Government Code. *See* Gov't Code § 552.301(e) (governmental body must submit certain required items within fifteen business days of receipt of written request). The OAG's delay in this matter results in the presumption that the requested information is public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ). In order to overcome the presumption that the requested information is public, a governmental body

must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Because a third party's interest is affected, a compelling reason exists to overcome the presumption of openness.

Appriss asserts portions of its proposal are excepted from public disclosure under sections 552.101 and 552.110 of the Government Code.¹ Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (b) 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. In order to withhold information under section 552.110(b), the interested third party must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Appriss explains that it competes with the requestor in the market for victims notification systems. Appriss further argues that “[i]f a competitor obtains this material, it would be able to directly identify APPRISS’ customers, and to undercut APPRISS’ pricing strategy to particular customers.” Thus, Appriss contends release of the information would result in substantial competitive harm. After reviewing the information and Appriss’ arguments, we agree the OAG must withhold the information we have marked pursuant to section 552.110(b). However, we note that the submitted information includes three different pricing proposals. Here, Appriss was awarded the contract. The pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We therefore find that if any of the pricing information that we have marked is the contracted price, it is not excepted from disclosure under section 552.110(b).

Next, we consider Appriss’ section 552.110(a) arguments for the remaining information. 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.

¹We note that Appriss seeks to withhold the “Key Contract Issues” section found in the Revised Pricing Model Chapter of its Hybrid Business Model. However, the OAG did not submit this information to this office. Thus, this ruling does not address the public nature of such materials.

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 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² 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). We note that pricing information 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.*, 314 S.W.2d at 776, *see also* Open Records Decision Nos. 319 at 3 (1982) (information relating to organization, personnel, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 306 at 3 (1982). After reviewing the company's arguments and the information at issue, we conclude that Appriss has not established a *prima facie* case that the remaining information is a

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).

trade secret. Thus, the OAG may not withhold the remaining information under section 552.110(a).

Lastly, Appriss asserts that the personal information of its employees and board of directors is excepted under section 552.101 in conjunction with common-law privacy. Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. After reviewing the information, we find that none of the remaining information contains private, personal information. Thus, the information is not protected by common-law privacy.

In summary, the OAG must withhold the information we have marked pursuant to section 552.110(b). However, if any of the marked pricing information is the contract price, the OAG must release such pricing information as well as the rest of the submitted 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, 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

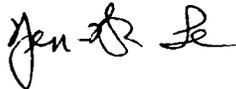
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *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 Office of the Attorney General 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 237004

Enc: Marked documents

c: Ms. Minnie Walker
T-NETIX, Inc.
14651 Dallas Parkway, 6th Floor
Dallas, Texas 75254-7476
(w/o enclosures)

Mr. Dewey Brackin
Counsel to Appriss, Inc.
Gardere Wynne Sewell, L.L.P.
600 Congress Avenue, Suite 3000
Austin, Texas 78701-2978
(w/o enclosures)