



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 6, 2006

Mr. Keith A. Martin  
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San Antonio Water System  
P.O. Box 2449  
San Antonio, Texas 78298-2449

OR2006-00214

Dear Mr. Martin:

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# 239515.

The San Antonio Water System (the "system") received two requests for information submitted in response to a request for proposals for Laboratory Information Management System (LIMS) Software and Implementation, Bid No. 05-5014. You state that you are releasing some of the requested information. While you claim no exceptions to disclosure on behalf of the system regarding the remaining requested information, you state that it may contain proprietary information excepted from disclosure under the Act. Accordingly, pursuant to section 552.305(d) of the Government Code, you state, and provide documentation showing, that you notified the nine interested third parties of the requests and of their right to submit arguments to this office as to why the information at issue should not be released to the requestor.<sup>1</sup> 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received

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<sup>1</sup>The notified third parties are as follows: Zumatrix, Inc. ("Zumatrix"); Lablite, LLC ("Lablite"); Promium, LLC ("Promium"); LABLynx, Inc. ("LabLynx"); STARLIMS Corp. ("STARLIMS"); Quality Systems International Corp. ("Quality"); Nuvotec USA, Inc. ("Nuvotec"); PerkinElmer Life and Analytical Sciences ("PerkinElmer"); and Accelerated Technology Laboratories, Inc. ("Accelerated").

correspondence from LABLynx, STARLIMS, Nuvotec, and PerkinElmer. We have considered all submitted arguments and reviewed the submitted information.

Initially, we must address the system's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(b). While you indicate that the system received the first request for information on October 10, 2005, you did not request a decision from this office until October 27, 2005. Thus, with regard to the first request, the system failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third party interests can provide compelling reasons to withhold information, we will address whether the documents at issue must be withheld to protect the interests of third parties.

Next, we note that LABLynx seeks to withhold information that the commission has not submitted to this office for review. We do not reach LABLynx's arguments pertaining to information that has not been submitted by the system for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under Act must submit copy or representative samples of specific information requested).

We further 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, Zumatrix, Lablite, Promium, Quality, and Accelerated have not submitted any comments to this office explaining how release of the information at issue would affect their proprietary interests. Therefore, these companies have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g.,* 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. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the system may not

withhold any of the submitted information on the basis of any proprietary interest Zumatrix, Lablite, Promium, Quality, and Accelerated may have in this information.

STARLIMS and PerkinElmer argue that some of their information must be withheld from disclosure because it was provided to the system under the assumption of confidentiality. We note, however, that information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). A governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986)*. Consequently, the submitted information pertaining to STARLIMS and PerkinElmer must fall within an exception to disclosure under the Act in order to be withheld.

Next, PerkinElmer asserts that some of its information is excepted from disclosure under section 552.104 of the Government Code. We note, however, that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See Open Records Decision No. 592 at 8-9 (1991)*. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to the governmental body's interests in a particular competitive situation. *See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986)*. The system has not argued that the release of the submitted information would harm its interests in a particular competitive situation. Therefore, the submitted information relating to PerkinElmer may not be withheld pursuant to section 552.104.

We now address the arguments of LabLynx, STARLIMS, Nuvotec, and PerkinElmer under section 552.110 of the Government Code. This section 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.); 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:

- (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. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

Upon review of the submitted information, we conclude that LABLynx has made a *prima facie* case that some of its information, which we have marked, qualifies as a trade secret under section 552.110(a). We have received no arguments that rebut this claim as a matter of law. Thus, the system must withhold this information pursuant to section 552.110(a). However, LABLynx has failed to show any of its remaining information is excepted from disclosure as a trade secret under section 552.110(a). Additionally, we find that STARLIMS, Nuvotec, and PerkinElmer have failed to show that any of their information meets the definition of a trade secret. *See* Restatement of Torts § 757 cmt. b (1939) (defining trade secret); *see also* Huffines, 314 S.W.2d at 776 (defining trade secret). Therefore, none of the submitted information pertaining to STARLIMS, Nuvotec, and PerkinElmer may be withheld under section 552.110(a).

We also find that Nuvotec has made a specific factual or evidentiary showing that release of portions of its information, which we have marked, would cause it substantial competitive harm. Therefore, the system must withhold this marked information pursuant to section 552.110(b). With respect to its remaining information, Nuvotec has made only conclusory allegations that release of this information would cause it substantial competitive injury and has provided no factual or evidentiary showing to support such allegations. Similarly, we find that STARLIMS and PerkinElmer have failed to establish that release of any of their information would cause them substantial competitive injuries for purposes of section 552.110(b). *See* Open Records Decision Nos. 509 at 5 (1988) (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), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Thus, none of the remaining information at issue may be withheld pursuant to section 552.110(b).

We note that some of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common law privacy, which protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Indus. Found.*, 540 S.W.2d at 668. Prior decisions of this office have found that personal financial information not relating to a financial transaction between an individual and a governmental body is protected by

common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Accordingly, the system must withhold the personal financial information we have marked under section 552.101 in conjunction with common law privacy.

Finally, we understand LABLynx and STARLIMS to assert that some of their information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal copyright law. Upon review of the submitted information, we agree that some of this information, including documents pertaining to LABLynx and STARLIMS, does appear to be protected by copyright. We note, however, that copyright law does not make information confidential for purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999) (Federal Copyright Act does not make information confidential, but rather gives copyright holder exclusive right to reproduce his work, subject to another person's right to make fair use of it.). Thus, the system may not withhold the submitted information under section 552.101 in conjunction with the copyright law. The system must, however, permit inspection of copyrighted materials, unless an exception to disclosure is applicable to the information. *See* Attorney General Opinion JM-672 (1987). In doing so, however, the system also must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she 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 at 8-9 (1990).

In summary, the system must withhold the information we have marked pursuant to section 552.110 of the Government Code and section 552.101 of the Government Code in conjunction with common law privacy. The remaining information must be released, but any copyrighted 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).

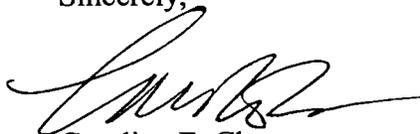
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Caroline E. Cho  
Assistant Attorney General  
Open Records Division

CEC/sdk

Ref: ID# 239515

Enc. Submitted documents

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