



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2006

Ms. Paula Alexander
General Counsel
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

OR2006-00724

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 240726.

The Metropolitan Transit Authority of Harris County ("METRO") received a request for information relating to RP-050006, specifically, a copy of the request for proposal, the list of respondents, the procurement evaluation notes, and all submitted proposals. You state that METRO has released copies of the request for proposal, the list of respondents, and the procurement evaluation notes. Although you take no position with respect to the remaining information, you claim that the requested information may contain proprietary information subject to exception under the Act. Pursuant to section 552.305(d) of the Government Code, METRO states that it has notified the interested third parties, Ipsos-Insight, Dikita Management Services ("Dikita"), Quest Corporation of America, Inc. ("Quest"), Lieberman Research Group ("Lieberman"), Creative Consumer Research ("CCR"), Suma Partners, L.P. ("Suma"), Gelb Consulting Group, Inc. ("Gelb"), and Market Study International, Inc. ("Market Study"), of METRO's receipt of the request and of their right to submit arguments to us as to why any portion of the submitted information should not be released. *See* Gov't Code §552.305(d); *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 to disclosure under the Act in certain circumstances). We have considered all arguments received and have reviewed the submitted information.

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, only CCR has submitted arguments to this office explaining how release of the information at issue would affect its proprietary interests. Because Ipsos-Insight, Dikita, Quest, Lieberman, Suma, Gelb, and Market Study have not submitted comments in support of withholding their information from disclosure, we have no basis upon which to conclude that any of these companies has a protected proprietary interest in any of 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, we conclude that METRO may not withhold any portion of the submitted information on the basis of any proprietary interest that Ipsos-Insight, Dikita, Quest, Lieberman, Suma, Gelb, or Market Study may have in the information.

Because CCR submitted comments to this office in support of withholding its information, we will address its arguments. CCR asserts that portions of the submitted information are exempted under section 552.101 of the Government Code because they are "confidential by judicial decision." Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However, CCR has failed to establish that any judicial decision directly makes these specific documents confidential. Nor has CCR shown us any statutory authority outside of the Act that would make its information confidential. Accordingly, we cannot find that CCR's information falls under section 552.101.

Section 552.110 of the Government Code 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 governmental body, or interested third party, raising this exception 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 National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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 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).¹ 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). After reviewing CCR's arguments and the information at issue, we conclude that CCR has established a *prima facie* case that its customer list information at pages 9 through 15 constitutes a trade secret. Because we have received no argument to rebut CCR's claim as a matter of law, you must withhold this information under section 552.110(a). However, we do not find that the remainder of CCR's information falls within section 552.110(a). We note that pricing information pertaining 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).

¹The 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).

CCR also argues that portions of its information falls within the scope of section 552.110(b) of the Government Code. 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 section 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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). Upon review of CCR’s arguments and the remaining submitted information, we find that CCR has established that pages 22 through 37 are excepted under section 552.110(b). However, we find that CCR has not established that release of the remaining submitted information would cause the company substantial competitive injury and has not provided specific factual evidence to support this allegation. *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 is too speculative), 319 at 3 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110).

We note that some of the submitted information contains insurance policy numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. METRO must, therefore, withhold the insurance policy numbers that we have marked under section 552.136.²

In summary, METRO must withhold pages 9 through 15 of CCR’s proposal as protected trade secret under section 552.110(a) of the Government Code. Pages 22 through 37 of CCR’s proposal must be withheld under section 552.110(b) of the Government Code. We have marked the insurance policy numbers that must be withheld under section 552.136 of the Government Code. The remaining information must be released.

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

²The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/AEC/segh

Ref: ID# 240726

Enc. Submitted documents

c: Mr. Tom Bazan
P.O. Box 2786
Houston, Texas 77252
(w/o enclosures)

Mr. Patrick J. Dyer
Wilshire Scott & Dyer
1221 McKinney Street, Suite 3000
Houston, Texas 77010-2011
(w/o enclosures)

Mr. Joseph P. Raia
Ipsos-Insight
820 Gessner, Suite 830
Houston, Texas 77027
(w/o enclosures)

Ms. Evalynn A. Warren
Dikita Management Services
1420 West Mockingbird Lane, Suite 600
Dallas, Texas 75247
(w/o enclosures)

Ms. Sharlene Francois
Quest Corporation of America, Inc.
3837 Northdale Boulevard, Suite 242
Tampa, Florida 33624
(w/o enclosures)

Mr. Harvey Rosen
Lieberman Research Group
98 Cutter Mill Road
Great Neck, New York 11021
(w/o enclosures)

Ms. Andrea Kates
Suma Partners, L.P.
1302 Waugh, Suite 842
Houston, Texas 77019
(w/o enclosures)

Mr. John B. Elmer
Gelb Consulting Group, Inc.
10260 Westheimer Road, Suite 240
Houston, Texas 77042
(w/o enclosures)

Mr. Naghi Namakforoosh
Market Study International, Inc.
9700 Richmond Avenue, Suite 108
Houston, Texas 77042
(w/o enclosures)