



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 7, 2006

Ms. Renee Mauzy  
General Counsel  
Texas Department of Information Resources  
P.O. Box 13564  
Austin, Texas 78711

OR2006-08846

Dear Ms. Mauzy:

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# 254734.

The Texas Department of Information Resources (the "department") received a request for information pertaining to "RFP TAVIS1105," which was issued by BearingPoint, Inc. ("BearingPoint"), a department contractor. You state that the department has released some of the requested information. You also inform us that the department does not have possession of or access to some of the requested information. You indicate that release of the submitted information may implicate BearingPoint's proprietary interests. Accordingly, you inform us, and provide documentation showing, that you notified BearingPoint of the request and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party 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 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 considered the submitted arguments and reviewed the submitted information.

Initially, we address your claim that the department does not have possession of or access to some of the requested information. A governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds.

Open Records Decision No. 561 (1990). However, the Act generally does not require a governmental body to obtain information not in its possession or create new information in response to an open records request. *See* Open Records Decision Nos. 599 (1992), 534 (1989). You state that the department does not possess or have a right of access to some of the requested information. *See* Gov't Code § 552.002 ("Public information" subject to disclosure under Act includes information collected, assembled, or maintained by governmental body, or to which governmental body has right of access). You have submitted the department's contract agreement with BearingPoint which also indicates that the department has no right of access to the information at issue. Thus, based on your representations and our review of the contract agreement, we conclude that the requested information which the department does not possess or have a right of access to is not subject to the Act and need not be released. *See generally* Open Records Decision No. 635 (1995) (stating certain factors that are considered when determining whether information is subject to the Act).

Next, we note that you have submitted some information that was created after the request was received. This information, which we have marked, is thus not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release that information in response to the request.

Next, BearingPoint contends that some of the submitted information is not public information subject to the Act. As we noted above, the Act defines "public information" as information collected, assembled, or maintained by a governmental body, or to which a governmental body has right of access. *See* Gov't Code § 552.002. Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information subject to the Act. *See id.* In this case, the information at issue is in the physical possession of the department. Nevertheless, BearingPoint contends that the submitted "TAVIS Vendor Briefing" and subcontractor agreement are not subject to the Act because under its contract with the department, BearingPoint is not required to provide the department with this information. After our review, however, we find that the submitted "TAVIS Vendor Briefing" and subcontractor agreement are maintained by the department in connection with the transaction of official business. As such, this information is public information subject to the Act and must be released, unless it is excepted from disclosure under the Act or made confidential under other law.

BearingPoint contends that the "TAVIS Vendor Briefing" and portions of the subcontractor agreement are excepted from disclosure under section 552.110(a) of the Government Code. 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 id.* § 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; *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 exempted 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).

BearingPoint states that the "TAVIS Vendor Briefing" contains a proprietary ranking system used to evaluate subcontractor proposals. BearingPoint contends that this system was developed "over many years in the public sector consulting business" and is a trade secret. Upon review of BearingPoint's brief and the submitted information, we find that BearingPoint has established that the criteria used to evaluate subcontractors constitutes trade secret information. This information, which we have marked, must be withheld under section 552.110(a). We find, however, that BearingPoint has not demonstrated that any of the remaining information at issue meets the definition of a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (information is generally not trade secret if 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"). Accordingly, the department must only withhold the information we have marked under section 552.110(a) of the Government Code.

Next, we note that section 552.117 of the Government Code may be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The department may not withhold information under section 552.117(a)(1) if a timely election was not made. We have marked the information that must be withheld under section 552.117 if that section is applicable.

Finally, the department notes that some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990).

In summary, the trade secret information we have marked must be withheld under section 552.110 of the Government Code. The personal information we have marked must be withheld under section 552.117 of the Government Code if the employee at issue made a timely election under section 552.024 of the Government Code. The remaining responsive information must be released in accordance with any applicable copyright laws.

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,



James A. Person III  
Assistant Attorney General  
Open Records Division

JAP/dh

Ref: ID# 254734

Enc. Submitted documents

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