



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2006

Mr. W. Montgomery Meitler
Senior Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2006-13245

Dear Mr. Meitler:

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# 264719.

The Texas Department of Family and Protective Services (the "department") received a request for all proposals, including cost proposals and best and final offers submitted in response to RFP-2006-0002. You claim that a portion of the submitted information is exempted from disclosure under section 552.117 of the Government Code. You also state that the submitted information may contain proprietary information, and thus, pursuant to section 552.305 of the Government Code, you have notified Accenture LLP ("Accenture"), CGI-AMS, CMA Consulting Services ("CMA"), and Deloitte Consulting LLP ("Deloitte") of the request and of each company's right to submit arguments to this office as to why the 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 received correspondence from counsel for CMA and Deloitte. We have considered all of the submitted arguments and reviewed the submitted information.

Initially, we 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, this office has not received comments from Accenture or CGI-AMS explaining how the release of the submitted information will affect their proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of either Accenture or CGI-AMS. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Thus, none of the submitted information may be withheld based on the proprietary interest of either Accenture or CGI-AMS.

The department claims that the information it has marked in Deloitte's proposal is excepted from disclosure under section 552.117 of the Government Code. 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 received. *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 received. In this case you inform us that the employee whose information is at issue timely elected confidentiality under section 552.024. Therefore, the department must withhold the information you have marked under section 552.117(a)(1) of the Government Code.

We note that CMA claims that its proposal should be withheld under section 552.101 of the Government Code. 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. However, CMA does not cite to any specific law that makes any portion of its proposal confidential under section 552.101. Therefore, we conclude that the department may not withhold any portion of CMA's proposal under section 552.101 of the Government Code.

Both CMA and Deloitte claim that portions of each company's proposal are excepted from public disclosure 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 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. 1958); Open Records Decision Nos. 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 No. 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); Open Records Decision No. 661 (1999).

CMA claims that portions of its proposal should be withheld under section 552.110 of the Government Code. However, CMA has not submitted any arguments explaining how its 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”). Furthermore, CMA has not submitted any arguments explaining how its information at issue is commercial or financial information, the release of which would cause CMA substantial competitive harm. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Further, we note that the 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). Accordingly, none of CMA’s information may be withheld under section 552.110 of the Government Code.

Deloitte claims that its Project Approach Narrative, Project Organization, Project Management, Deliverables, Vender Experience Matrix and Narrative, References of the Vendor, Experience of the Subcontractors, HUB Subcontracting Plan, Financial Information, Vendor’s Cost Proposal, and Consulting Agreement and Contract Exceptions are trade secrets. Upon review, we find that the department must withhold Deloitte’s Project

Approach Narrative, Deliverables, References of the Vendor, and its Financial Information, as well as portions of its Vender Experience Matrix and Narrative, which we have marked, under section 552.110(a) of the Government Code. As to the remaining information at issue, however, we find that Deloitte has not demonstrated that it meets the definition of a trade secret. Accordingly, the department may not withhold Deloitte's remaining information at issue under section 552.110(a) of the Government Code.

Deloitte also claims that its remaining information at issue is commercial or financial information excepted under section 552.110(b) of the Government Code. However, Deloitte only makes a generalized allegation that the release this information would result in substantial damage to the competitive position of the company. Thus, Deloitte has not demonstrated that substantial competitive injury would likely result from the release of it remaining information at issue. *See* ORD No. 509 at 5. Accordingly, the department may not withhold any of Deloitte's remaining information under section 552.110(b) of the Government Code.

CMA also claims that its proposal should be withheld under section 552.131 of the Government Code. Section 552.131(a) excepts from public disclosure a business prospect's trade secret or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. Gov't Code § 552.131(a). We note, however, CMA has not submitted any arguments explaining how its information at issue is either protected trade secret information or commercial or financial information of a business prospect for the purposes of section 552.131(a). Accordingly, none of CMA's information may be withheld under section 552.131 of the Government Code.

We note that some of the materials at issue are 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 protected by copyright. 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 materials protected by copyright, 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 department must withhold the information you have marked under section 552.117(a)(1) of the Government Code. The department must withhold Deloitte's Project Approach Narrative, Deliverables, References of the Vendor, and its Financial Information, as well as portions of its Vender Experience Matrix and Narrative, which we have marked, under section 552.110(a) of the Government Code. As the department does not raise any other exceptions against disclosure, the remaining submitted information must

be released, but any copyrighted information may only be released in accordance with copyright law.

Although you request a previous determination regarding section 552.117(a)(1) information, we decline to issue such a ruling at this time. Accordingly, 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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/dh

Ref: ID# 264719

Enc. Submitted documents

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