



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 16, 2007

Ms. Cara Leahy White
Taylor, Olson, Adkins, Sralla, Elam, L.L.P.
600 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2007-06079

Dear Ms. White:

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# 278602.

The City of Southlake (the "city") received a request for the following documents pertaining to RFP 0607A106SJ00149: 1) submitted proposal and pricing documents; 2) RFP responses; 3) contract award documents. Although you take no position regarding the public availability of the requested information, pursuant to section 552.305 of the Government Code you have notified the interested third parties of the request and of each company's right to submit arguments to this office as to why the information should not be released.¹ *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 Act in certain circumstances). We have considered the arguments and 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code

¹The city notified the following third parties of the request for information: Cogsdale Corporation, Innoprise Software, Sunguard Data Systems Inc., and Tyler Technologies ("Tyler").

§ 552.305(d)(2)(B). As of the date of this letter, only Tyler Technologies (“Tyler”) has submitted to this office reasons explaining why their information should not be released. We thus have no basis for concluding that any portion of the remaining third parties’ information constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g.*, Gov’t Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3 (1990).

Tyler claims that portions of its MUNIS and INCODE proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). 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. 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); *see also Huffines*, 314 S.W.2d at 776. 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). The 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. *Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *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).

After reviewing the arguments and the information at issue, we conclude that Tyler has established a *prima facie* case that the marked portions of the following sections of its MUNIS proposal constitute trade secret information: Section 2.1.15 (Public Sector Installs); Section 3 (Technology); Section 4 (Implementation); Section 6 (Software Development and Updates); Section 8 (Checklist); Section 10 (Client References); Section 11 (Product Briefs); and Section 12 (Optional Products). Additionally, Tyler has established that the marked portions of the following sections of its INCODE proposal constitute trade secret information: Section 2 (General Company Information and Background); Section 3 (Software Maintenance and Support); Section 4 (Technology Infrastructure); Section 5 (Implementation Approach and Timeline); Section 6 (User and Technical Support); Section 7 (Software Upgrades and Enhancements); Section 10 (Licensing and Pricing); Section 11 (Checklist); and Section 12 (Additional Information). Therefore, the city must withhold this marked information under section 552.110(a). However, we note that Tyler has made some of the information it seeks to withhold, including some of its customers and its general product descriptions, publicly available on its MUNIS and INCODE websites. Because Tyler published this information, we find that Tyler failed to demonstrate that they treat this information as confidential proprietary information. Accordingly, the city may not withhold any information that has been published on Tyler's MUNIS or INCODE website. Further, upon review, we find that Tyler has not established that any of the remaining information, which consists of general company information, employee resumes, and information

particular to this bid, is excepted from disclosure as either trade secret information under section 552.110(a) or as commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”); Open Records Decision No. 319 at 2 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110); *see also* ORD 661 at 5-6 (section 552.110(b) requires specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of information). We also note that Tyler’s MUNIS proposal was the winning proposal in this instance, and that this office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *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). Thus, the city may not withhold any of the remaining information under section 552.110 of the Government Code.

Finally, some of the submitted information appears to 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 city must withhold the marked portions of sections 2.1.15, 3, 4, 6, 8, 10, 11, and 12 of Tyler’s MUNIS proposal, and the marked portions of sections 2, 3, 4, 5, 6, 7, 10, 11, and 12 of Tyler’s INCODE proposal. The remaining information must be released in accordance with applicable 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).

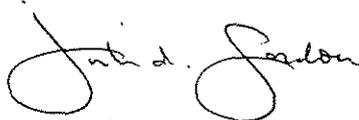
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink that reads "Justin D. Gordon". The signature is written in a cursive style with a large, looped initial "J".

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 278602

Enc. Submitted documents

c: Ms. Lisa Conte
Proposal Specialist
New World Systems
888 West Big beaver Road, Suite 600
Troy, Michigan 48084
(w/o enclosures)

Ms. Lori Dudley
Tyler Technologies, Inc.
5808 4th Street
Lubbock, Texas 79416
(w/o enclosures)

Mr. Tony Gonzalez
Sungard Data Systems, Inc.
1000 Business Center Drive
Lake Mary, Florida 32746
(w/o enclosures)

Mr. Jeff Peterson
Innoprise Software
11001 West 120th avenue, Suite 260
Broomfield, Colorado 80021
(w/o enclosures)