



ATTORNEY GENERAL OF TEXAS  
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February 12, 2008

Ms. Zindia Thomas  
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Office of the Attorney General  
P.O. Box 12548  
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OR2008-01290A

Dear Ms. Thomas:

This ruling examines Open Records Letter No. 2008-01290 (2008) and whether certain information is subject to required public disclosure under chapter 552 of the Government Code.

The Office of the Attorney General (the "OAG") received four requests for the proposals submitted by all companies in response to the OAG's Project Services Project, requisition number 315062, a copy of the request for proposal, the evaluations, the six contracts awarded, and any statements of work concerning the project services. The OAG states it released some of the information but argues some of the remaining information is excepted from disclosure under section 552.104 of the Government Code and some information may implicate the proprietary interests of the responding companies. The OAG has notified the ten companies that responded to the request for proposal of the request for information. 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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). In Open Records Letter No. 2008-01290, we concluded the OAG may not withhold any of Deloitte Consulting LLP's ("Deloitte") information because it failed to submit arguments why its information should be withheld.

We have re-examined our ruling in Open Records Letter No. 2008-01290 and determined that we made an error in that Deloitte did submit arguments. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of this chapter). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on January 28, 2008.

Before we consider the OAG's claimed exception and the submitted sample of information,<sup>1</sup> we first note the OAG failed to submit portions of the proposals by the fifteenth-business-day deadline prescribed by section 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) 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). This office has held that a compelling reason exists to withhold information when the information affects a third party's interest. *See* Open Records Decision No. 150 (1977). Because the proposals may implicate the responding companies' interests, we will consider the companies' arguments for this information.

Next, we consider the OAG's assertion under section 552.104, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

The OAG explains the procurement of technological services is an ongoing process through 2008 and may be extended through 2011. Furthermore, the OAG explains:

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

six vendors were pre-qualified and awarded a "zero dollar purchase order." Each vendor had submitted pricing schedules with a "not to exceed price" for future [Child Support Division] technology services projects. The procurement for those projects is an ongoing competition among the six awardees. The [Child Support Division] will issue statements of work, and the awardees will compete by submitting solutions and prices at or below their respective "not to exceed" pricing schedules. . . . Once a project under the PSP purchase order is awarded to one or more of the six awardees, a purchase order change notice . . . will be issued. [footnote omitted]

The OAG asserts release of the information would prevent it from receiving the most favorable offers from vendors and obtaining a price below the "not to exceed" schedules because "[r]eleasing the pricing information regarding the six awardees will enable the competing awardees to adjust their bids based upon the pricing models and "not to exceed" schedules of their respective competitors." Lastly, the OAG argues releasing any competitors' pricing models and its own evaluations would jeopardize its future ability to obtain the best offer for renewal of the same contracts. Based on these representations, we conclude the OAG has shown actual or specific harm in a particular competitive situation were the information to be released. Thus, the OAG may withhold Exhibits B and C under section 552.104.<sup>2</sup>

As for the remainder of the information, four companies did not submit arguments in response to the section 552.305 notice. Therefore, we have no basis to conclude that these companies' information is excepted from disclosure, and the OAG must release it to the requestor. *See* Open Records Decision Nos. 639 at 4 (1996) (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), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). However, we will consider the arguments from the following companies that submitted comments: Deloitte; RFD & Associates, Inc. ("RFD"); TGL; Protech Solutions, Inc. ("Protech"); and Allied.

RFD, Allied, and TGL all assert section 552.110(b) of the Government Code excepts from disclosure their financial assurance information, which consists of 1) a Dun & Bradstreet Comprehensive Insight Report and 2) financial statements consisting of the balance sheets, income statements, and statements of cash flow. Section 552.110(b) protects the property

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<sup>2</sup>Because the OAG's section 552.104 assertion is dispositive, we do not consider arguments from Allied Consultants, Inc. ("Allied"); Policy Studies Inc. ("PSI"); Deloitte; and Texas GovLink, Inc. ("TGL") for their pricing information found in Form B. We also note that the remaining information PSI asserts is excepted under section 552.110(b) is not maintained by the OAG. Thus, this decision does not address such information, which we have marked.

interests of private persons by excepting from disclosure 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 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 Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). After reviewing the three companies' arguments, we agree they have shown how release of their financial assurance information would result in substantial competitive injury to the three companies. Thus, pursuant to section 552.110(b), the OAG must withhold the financial assurance information we marked in the proposals of RFD, Allied, and TGL.<sup>3</sup>

Protech asserts section 552.110(b) excepts from disclosure portions of its proposal. Although Protech makes this conclusory assertion, it has not provided a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of its information. Thus, the OAG must release Protech's information because it has not demonstrated the applicability of section 552.110(b).

Lastly, Deloitte asserts section 552.110(a) of the Government Code excepts portions of its proposal from public disclosure. Section 552.110(a) protects the property interests of private persons by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. 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.

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<sup>3</sup>Because section 552.110(b) is dispositive, we do not address Allied's and TGL's privacy arguments.

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).<sup>4</sup> 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 Deloitte's arguments and the information at issue, we conclude that Deloitte has established a *prima facie* case that the information we have marked is a trade secret. Because we have received no argument to rebut the Deloitte's claim as a matter of law, the OAG must withhold the marked information under section 552.110(a). However, Deloitte has failed to demonstrate that the rest of its proposal constitutes trade secrets under section 552.110(a). Accordingly, the OAG must release the remainder.

In summary, the OAG may withhold Exhibits B and C under section 552.104. In addition, the OAG must withhold the financial assurance information we marked in the proposals of RFD, Allied, and TGL and the information we marked in Deloitte's proposal. The OAG must release the remaining information. Open Records Letter No. 2008-01290 is overruled to the extent it conflicts with this ruling.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of

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<sup>4</sup>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.

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).

such a challenge, 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 challenge 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,



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YHL/sdk

Ref: ID# 300593

Enc: Marked documents

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