



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2008

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2008-05358

Dear Ms. Alexander:

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# 308094.

The Texas Department of Transportation (the "department") received two requests for information relating to a specified request for offers, including all of the submitted proposals and best and final offers.¹ You take no position on the public availability of the requested information. You believe, however, that the information may implicate the proprietary interests of fifteen private parties. You notified the interested parties of this request for information and of their right to submit arguments to this office as to why the information should not be released.² We received correspondence from an attorney for Texas Electronic Information and Computer Corporation ("TEICC").³ We have considered TEICC's arguments and have reviewed the information you submitted.

We note that an interested third party is allowed ten business days from the date of its receipt of a governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See*

¹You state that the department subsequently received clarification of these requests. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

³You inform us that the other interested parties are Austin Ribbon and Computer; CDW Government, Inc; Capitol Systems, Inc.; Checkpoint Services, Inc.; CompuCom Systems, Inc.; Computer Express; Dell Marketing, Inc.; GovConnection, Inc.; Howard Technology Solutions; Lenovo, Inc.; M&A Technology; Naknam, Inc.; Wallingford Computer Services; and xNet Systems, Inc.

Gov't Code § 552.305(d)(2)(B). As of the date of this decision, only TEICC has corresponded with this office. Thus, because the other interested parties have not demonstrated that any of the information at issue is proprietary for the purposes of the Act, the department may not withhold any of the submitted information on the basis of any proprietary interest that any of the other interested parties may claim. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address TEICC's claims under sections 552.101, 552.104, and 552.110 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. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In this instance, TEICC has not directed our attention to any law under which any of the submitted information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the department may not withhold any of the submitted information under section 552.101 of the Government Code.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties such as TEICC. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, because the department does not claim an exception to disclosure under section 552.104, none of the submitted information may be withheld under section 552.104 of the Government Code.

Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret 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." Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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, *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 [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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁴ *See* ORD 552 at 5. 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. *See* Open Records Decision No. 402 (1983).

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 information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

We understand TEICC to claim both aspects of section 552.110.⁵ Having considered the company's arguments and reviewed its information, we find that TEICC has not demonstrated that any of the information at issue qualifies as a trade secret under

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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).

⁵We note that TEICC's arguments encompass information that was not submitted to this office. This decision is applicable only to the information that the department submitted in requesting this decision. *See* Gov't Code § 552.301(e)(1)(D).

section 552.110(a). We also find that TEICC has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information at issue would cause TEICC substantial competitive harm. We therefore conclude that the department may not withhold any of TEICC's information under section 552.110 of the Government Code. *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 was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). With specific regard to TEICC's bid pricing, we note that pricing information pertaining to a specific contract with a governmental body 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982); 306 at 3 (1982). Likewise, the pricing information of a winning bidder such as TEICC is generally not excepted from disclosure under section 552.110(b). *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 at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

We note that some of the submitted information falls within the scope of section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of [the Act], 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."⁶ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked insurance policy numbers that the department must withhold under section 552.136.

We also note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the

⁶Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 at 8-9 (1990).

In summary, the department must withhold the marked insurance policy numbers under section 552.136 of the Government Code. The rest of the submitted information must be released. In releasing information that is protected by copyright, the department must comply with 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of 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).

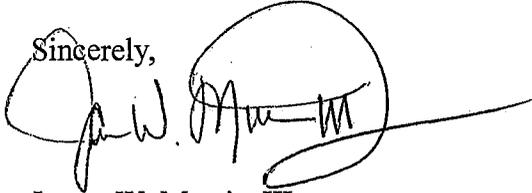
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', is written over a circular stamp. The signature is fluid and cursive.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 308094

Enc: Submitted documents

c: Ms. Amy Christman
Mr. Brian R. Davis
Dell Marketing, Inc.
One Dell Way
Round Rock, Texas 78682
(w/o enclosures)

Mr. Brad Plantz
Texas Electronic Information and Computer Corporation
6961 Brookhollow West Drive Suite 130
Houston, Texas 77040
(w/o enclosures)

Mr. John V. Rabel
McLeod, Alexander, Powel & Apffel
P.O. Box 629
Galveston, Texas 77553
(w/o enclosures)

Mr. Andrew Costenbader
Austin Ribbon and Computer
7320 North Mopac Expressway Suite 301
Austin, Texas 78731
(w/o enclosures)

Mr. Brian Gomez
CDW – Government, Inc.
120 South Riverside Plaza 4th Floor
Chicago, Illinois 60606
(w/o enclosures)

Mr. David Baley
Capitol Systems, Inc.
7020 Highway 290 East Building II Suite B
Austin, Texas 78723
(w/o enclosures)

Mr. Robert Martinez
Checkpoint Services, Inc.
1790 Commerce Park Suite A1
El Paso, Texas 79912
(w/o enclosures)

Mr. Raju Padole
CompuCom Systems, Inc.
7171 Forest Lane
Dallas, Texas 75230
(w/o enclosures)

Ms. Tabettha Trask
Computer Express
5563 De Zavala Road #100
San Antonio, Texas 78249
(w/o enclosures)

Ms. Meghan Flisakowski
Dell Marketing, Inc.
One Dell Way
Round Rock, Texas 78682
(w/o enclosures)

Mr. Gary Anderson
GovConnection, Inc.
706 Milford Road
Merrimack, New Hampshire 03054
(w/o enclosures)

Ms. Kristi Bush
Howard Technology Solutions
36 Howard Drive
Ellisville, Mississippi 39437
(w/o enclosures)

Ms. Lisa Salazar
Lenovo, Inc.
P.O. Box 643068
Pittsburgh, Pennsylvania 15264-3068
(w/o enclosures)

Mr. Marc Stuewe
M&A Technology
3370 Nacogdoches Road
San Antonio, Texas 78217
(w/o enclosures)

Mr. Neil Lazarow
Naknam, Inc.
P.O. Box 590399
Houston, Texas 77259
(w/o enclosures)

Ms. Christienne S. Wallingford
Wallingford Computer Services
6721 North Lamar Boulevard
Austin, Texas 78752
(w/o enclosures)

Mr. Barry Boland
xNet Systems, Inc.
14340 Torrey Chase Suite 140
Houston, Texas 77014
(w/o enclosures)