



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2008

Mr. Humberto F. Aguilera
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2008-07597

Dear Mr. Aguilera:

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# 312072.

The San Marcos Consolidated Independent School District (the "district"), which you represent, received a request for the bid summaries, evaluations, and proposal submissions for a specified request for proposals. Although you take no position on the requested information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the district notified Affiliated Telephone ("Affiliated"); Calence, LLC ("Calence"); Black Box Network Services ("Black Box"); The Telephone Connection ("Connection"); Globalscope Communications ("Globalscope"); CenturyTel; and Mercury Communications Services ("Mercury") of the request for information and of each company's right to submit arguments to this office as to why the requested information should not be released.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Black Box and CenturyTel. We have considered the submitted arguments and reviewed the submitted information.

¹We note that the requestor has a right of access to its own proposal.

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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Affiliated, Calence, Connection, Globalscope, and Mecury have not submitted to this office any reasons explaining why their submitted information should not be released. Therefore, these companies have not provided us with any basis to conclude that they have protected proprietary interests in any of the submitted information. *See* 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. Accordingly, we conclude that the district may not withhold any portion of the submitted information on the basis of any proprietary interest Affiliated, Calence, Connection, Globalscope, or Mecury may have in the information.

CenturyTel raises section 552.104 of the Government Code as an exception to disclosure. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the district did not submit any arguments in support of withholding any information pursuant to section 552.104, the district may not withhold any of CenturyTel's information pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Black Box and CenturyTel claim that portions of their information are excepted from 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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* ORD 232. 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. ORD 552. 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. *Id.* § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Having considered Black Box’s and CenturyTel’s arguments, we conclude that Black Box has established a *prima facie* case that a portion of its submitted information, which we have marked, constitutes a trade secret. Therefore, the district must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. CenturyTel, however, has failed to demonstrate that any portion of its information constitutes a trade secret. Additionally, Black Box has failed to demonstrate that its remaining information constitutes a trade secret. Thus, the remaining information at issue may not be withheld under section 552.110(a) of the Government Code.

Black Box and CenturyTel have established that release of some of the remaining information at issue would cause each company substantial competitive injury; therefore, the district must withhold this information, which we have marked, under section 552.110(b) of the Government Code. As to the remaining information at issue, we find that both Black Box and CenturyTel have made only conclusory allegations that release of this information would result in substantial damage to each company’s competitive position. Thus, neither Black Box nor CenturyTel has demonstrated that substantial competitive injury would result from the release of any the remaining information at issue. *See* Open Records Decision Nos. 661 (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 and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the district may not withhold the remaining information under section 552.110(b) of the Government Code.

We note that portions of the remaining information are subject to section 552.136 of the Government Code.² Section 552.136 of the Government Code states that “[n]otwithstanding

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

any other provision of this chapter, 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.” Gov’t Code § 552.136. Upon review, we find that the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We also note that a portion of the submitted information is 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 district must withhold the information we have marked under section 552.110 and the insurance policy numbers we have marked under section 552.136. The remaining information must be released, but any copyrighted information may only be released in accordance 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,

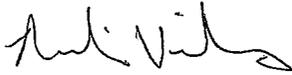
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jh

Ref: ID# 312072

Enc. Submitted documents

c: Ms. Barbara Santos
Trillion Partners, Inc.
9208 Waterford Centre Boulevard, Suite 150
Austin, Texas 78758
(w/o enclosures)

Mr. Jim L. Carter
Affiliated Telephone
2105 Donley Drive, #300
Austin, Texas 78758
(w/o enclosures)

Ms. Christine Ricker
Calence, LLC
1560 West Fountainhead Parkway, 2nd Floor
Tempe, Arizona 85282
(w/o enclosures)

Ms. Liz Thornburg
Black Box Network Services
1550 NE Loop 410 # 121
San Antonio, Texas 78209
(w/o enclosures)

Mr. David Floyd
The Telephone Connection
8868 Research Boulevard, Suite 303
Austin, Texas 78758
(w/o enclosures)

Ms. Isabel C. Gonzales
Globalscope Communications
7400 Blanco Road, Suite 200
San Antonio, Texas 78216
(w/o enclosures)

Mr. John Dreher
CenturyTel
208 South Guadalupe Street
San Marcos, Texas 78666
(w/o enclosures)

Mr. Stephen Talbert
Mercury Communication Service
7801 North Lamar, Suite F35
Austin, Texas 78752
(w/o enclosures)