



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2008

Ms. Marianna M. McGowan
Abernathy Roeder Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2008-10288

Dear Ms. McGowan:

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# 317161.

The McKinney Independent School District (the "district"), which you represent, received four requests from different requestors for information pertaining to RFP# 2008-422 for a Food Services POS System. You state that the district has released some of the requested information. Although you take no position as to the disclosure of the remaining 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: Cybersoft Technologies, Inc. ("Cybersoft"); LunchByte Systems, Inc. ("LunchByte"); Horizon Software International, LLC ("Horizon"); Meals Plus; MCS Software, LLC ("MCS"); PCS Revenue Control Systems, Inc. ("PCS"); and Systems Designs of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *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 correspondence from Horizon, LunchByte, MCS, Meals Plus, and PCS.¹ We have considered the submitted arguments and reviewed the submitted information.

¹We note that the district submitted to this office e-mail correspondence it received from LunchByte, MCS, Meals Plus, and PCS.

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 § 552.305(d)(2)(B). We note that you have submitted correspondence from LunchByte stating that it does not object to release of its requested information. Accordingly, the district may not withhold any portion of the information at issue on the basis of any proprietary interest that LunchByte may have in it. In addition, as of the date of this decision, this office has received no correspondence from Cybersoft Technologies or Systems Designs. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110(b) (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 result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret) 542 at 3 (1990). Accordingly, the district may not withhold any of the submitted information on the basis of any proprietary interest that Cybersoft Technologies or Systems Designs may have in the information at issue.

We understand Horizon to argue that its information is excepted from public disclosure because it was provided to the district under an agreement of confidentiality, and MCS to argue that its information is confidential. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Consequently, unless Horizon's or MCS's information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, we consider PCS's claim under section 552.104. 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 PCS. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, because the district does not claim this exception, none of the submitted information may be withheld under section 552.104 of the Government Code.

Horizon and PCS claim that portions of their information are excepted from disclosure under sections 552.110(a) and 552.110(b) of the Government Code. In addition, we understand Meals Plus to claim its submitted information is excepted from disclosure under sections 552.110(a) and 552.110(b), and MCS to claim its submitted information is excepted from disclosure under section 552.110(a). Section 552.110 of the Government Code 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* 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). We note that pricing information pertaining to a particular contract 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.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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 National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661 at 5-6.

Having considered the arguments submitted by Horizon, MCS, Meals Plus, and PCS, we find that Horizon and PCS have each established a *prima facie* case that portions of their submitted information, which we have marked, constitute trade secrets. Therefore, the district must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note that Horizon has published the identities of some of its customers on its website. Thus, Horizon has failed to demonstrate that the information it has published on its website is a trade secret. Further, we find that Horizon and PCS have failed to demonstrate that the remaining information at issue constitutes trade secrets; thus, the remaining information may not be withheld under section 552.110(a) of the Government Code. In addition, we find that MCS and Meals Plus have failed to demonstrate that any portion of the submitted information meets the definition of trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for their information. We therefore determine that no portion of MCS’s or Meals Plus’s information is excepted from disclosure under section 552.110(a) of the Government Code.

Having considered Horizon’s, Meals Plus’s, and PCS’s arguments and reviewed the information at issue, we also conclude that Horizon, Meals Plus, and PCS have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause any of these companies substantial competitive harm. *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 any information relating to Horizon, Meals Plus, or PCS under section 552.110(b).

Finally, we note that some of the remaining 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 materials that are subject to copyright protection 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 district must withhold the information we have marked under section 552.110(a) of the Government Code. The district must release the remaining submitted information, but any information protected by copyright must 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). If the governmental body does not file suit over 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

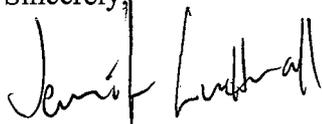
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/mcf

Ref: ID# 317161

Enc. Submitted documents

c: Mr. Bhasker Patel
Cybersoft Technologies, Inc.
4422 FM 1960 West, Suite 300
Houston, Texas 77068-3411
(w/o enclosures)

Mr. Jeff Fillmore
Cybersoft Technologies, Inc.
4422 FM 1960 West, Suite 300
Houston, Texas 77068-3411
(w/o enclosures)

Mr. John Tatham
Horizon Software
International, L.L.C.
2915 Premiere Parkway, Suite 300
Duluth, Georgia 30097
(w/o enclosures)

Mr. Jeff Flynn
Meals Plus
(Education Management Systems, Inc.)
4110 Shipyard Boulevard
Wilmington, North Carolina 24803-5716
(w/o enclosures)

Mr. Michael Williamson
Horizon Software
International, L.L.C.
2915 Premiere Parkway, Suite 300
Duluth, Georgia 30097
(w/o enclosures)

Mr. David Yaniv
PCS Revenue Control Systems, Inc.
560 Sylvan Avenue
Engelwood Cliffs, New Jersey 07632
(w/o enclosures)

Mr. Michael Leplane
LunchByte Systems,
Inc. (Nutrikids)
550 Latona Road, Building F
Rochester, New York 14626
(w/o enclosures)

Mr. David Starling
Systems Designs
3765 Saturn
Corpus Christi, Texas 78413
(w/o enclosures)

Ms. Cheryl Meral
MCS Software, L.L.C.
1133 Brook Court
Mandeville, Louisiana 70448-6504
(w/o enclosures)