



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 15, 2008

Ms. Kathleen Wells
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6000 Western Place Suite 200
Fort Worth, Texas 76107-4654

OR2008-11148

Dear Ms. Wells:

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# 319587.

The Fort Worth Independent School District (the "district"), which you represent, received a request for information pertaining to RFP #06-131, ERP System Acquisition and Implementation, including the awarded contract, submitted proposals, and "evaluation instruments."¹ You state that the evaluation instruments, if any, will be released. You assert that the requested contract and proposals are excepted under sections 552.101, 552.104, 552.110, and 552.136 of the Government Code. You also state that you notified the following third parties of the district's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: C. Innovations, Inc.; CherryRoad Technologies, Inc. ("CherryRoad"); Dell; eSped.com, Inc.; eVerge Group of Texas, Ltd.; IBM Global Business Services; NCS Pearson, Inc. ("Pearson"); Prologic Technology, Inc.; Skyward, Inc.; and Tyler Technologies, Inc. ("Tyler"). *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). CherryRoad, Pearson, and Tyler, in correspondence to this office, assert that some of their information is excepted under section 552.110 of the Government Code. We have reviewed the submitted arguments and information.

¹We note that the requestor, SunGard Bi-Tech, excluded its own proposal from the requested information.

Initially, we note that the proposals of the following companies were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-03376 (2008): C. Innovations, Inc.; CherryRoad Technologies, Inc.; eSped.com, Inc.; eVerge Group of Texas, Ltd.; IBM Global Business Services; Dell; NCS Pearson, Inc.; Prologic Technology, Inc.; and Skyward, Inc. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the district must continue to rely on that ruling as a previous determination and withhold or release these proposals in accordance with Open Records Letter No. 2008-03376.² See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

The district also acknowledges, and we agree, that it failed to comply with the procedural requirements of section 552.301 of the Government Code. A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.104 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). As such, it does not constitute a compelling reason to withhold information for purposes of section 552.302; therefore, in failing to comply with section 552.301, the district has therefore waived its claim under section 552.104. However, sections 552.101, 552.110, and 552.136 of the Government Code and the interests of Tyler can provide compelling reasons to overcome this presumption; therefore, we will consider whether the submitted information is excepted from disclosure on these grounds.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You state that the release of the requested contract and proposals "would cause substantial competitive injury to the other vendors, all of whom compete with each other, including SunGard." However, you do not cite to any specific law

²As our ruling is dispositive, we do not address the arguments of CherryRoad and Pearson to withhold any of this information.

that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, we conclude that the district may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Section 552.110 of the Government Code 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.” 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.³ Restatement of Torts § 757 cmt. b. 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

³The following are the six factors that the Restatement gives 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 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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). We also 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; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); ORD 319 at 3, 306 at 3.

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). However, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *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). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514.

Tyler asserts that the information in its "Response to Requirements" is excepted under section 552.110(a). The "Response to Requirements" information is a checklist of whether Tyler's software meets the software requirements that the district seeks. We find that Tyler has failed to establish a *prima facie* case that this checklist information is a trade secret. Therefore, the city may not withhold this information under section 552.110(a).

Although Tyler was awarded the contract at issue, Tyler also asserts that its pricing information is excepted under section 552.110. Tyler argues that its pricing information is a trade secret because the pricing contained in the proposal is based on a price guide and "deviation therefrom is rare and requires a number of steps of approval"; however, after review of Tyler's arguments and the documents at issue, we find Tyler has not established that its pricing information constitutes a process or device for continuous use in the operation of its business. *See* Restatement of Torts § 757 cmt. b. After review of Tyler's arguments, we conclude that Tyler has failed to establish a *prima facie* case that its pricing information is a trade secret. *See* ORD 319 at 3, 306 at 3. Tyler has also not established that release of

its pricing information would cause substantial competitive injury. The district has also failed to establish that any of the submitted information, including the submitted contract, is excepted under section 552.110(a) or 552.110(b). Accordingly, the district may not withhold any of the remaining information under section 552.110(a) or 552.110(b).

Tyler's proposal contains insurance policy numbers. Section 552.136(b) of the Government Code provides that "[n]otwithstanding 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." The district must withhold the insurance policy numbers in Tyler's proposal we have marked under section 552.136.

To conclude, the district must withhold the insurance policy numbers in Tyler's proposal that we have marked under section 552.136 of the Government Code, but must release the submitted contract and the remaining information in Tyler's proposal. The district must withhold or release the remaining information pursuant to Open Records Decision No. 2008-03376.

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).

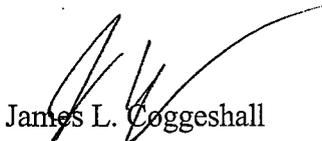
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



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Open Records Division

JLC/ma

Ref: ID# 319587

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