



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 7, 2008

Ms. Michelle T. Rangel
Assistant County Attorney
Fort Bend County, Texas
301 Jackson Street, Suite 728
Richmond, Texas 77469-3108

OR2008-15395

Dear Ms. Ranger:

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# 327507.

Fort Bend County (the "county") received a request for information related to RFP Nos. 08-080 and 08-081. You claim that a portion of the submitted information is excepted from disclosure under section 552.136 of the Government Code. You also indicate that release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, that you have notified BI Behavioral Interventions, Inc. ("BI"); BioMetric Corp. ("BioMetric"); iSECUREtrac; Pro Tech Monitoring, Inc. ("Pro Tech"); Satellite Tracking of People ("Satellite"); and Sentinel of the request and of their opportunity to submit comments to this office as to why the submitted information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). A representative from Pro Tech has submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, BI, BioMetric, iSECUREtrac, Satellite, and Sentinel have not submitted comments to this office explaining why any portion of the submitted information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to these companies would implicate their proprietary interests, and the county may not withhold any portion of the submitted information on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business

enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

Pro Tech raises section 552.110 of the Government Code for portions of its information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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. 1957); *see also* ORD 552 at 2. 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a

¹The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *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. 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* ORD 661 at 5.

Pro Tech contends that its proposal contains information protected under section 552.110(a). After reviewing the submitted information and arguments, we conclude that the county must withhold some of Pro Tech’s customer information, which we have marked, under section 552.110(a). We note, however, that Pro Tech publishes the identities of some of its current and past customers on its website. In light of Pro Tech’s own publication of such information, we cannot conclude that the identities of these customers qualify as trade secrets. Furthermore, we determine that Pro Tech has failed to demonstrate that any other information in its proposal meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the county must only withhold the information we have marked pursuant to section 552.110(a).

Pro Tech also raises section 552.110(b). Upon review, however, we find that Pro Tech has not demonstrated that any portion of its remaining information is excepted under section 552.110(b). *See* Open Record Decision Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Moreover, we note that the pricing information of a winning bidder, such as Pro Tech, is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors) (public has interest in knowing prices charged by government contractors), 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also 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). We therefore conclude that the county may not withhold any of the remaining information in Pro Tech’s proposal pursuant to section 552.110(b).

Finally, we address the county's argument under section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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 the remaining documents do not contain any information encompassed by this exception. Therefore, the county may not withhold any portion of the remaining information under section 552.136 of the Government Code.

In summary, the county must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released.

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,



Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 327507.

Enc. Submitted documents

c: Mr. Michael E. Hankard
BI Behavioral Interventions
6400 Lookout Road
Boulder, Colorado 80301
(w/o enclosures)

Mr. Mark Contestabile
Sentinel
220 Technology Drive, Suite 200
Irvine, California 92618
(w/o enclosures)

Ms. Rose Carter
Biometric Corp.
15443 Knoll Trail, Suite 230
Dallas, Texas 75248
(w/o enclosures)

Mr. Robert Bierman
iSECUREtrac
5078 South 11th Street
Omaha, Nebraska 68137
(w/o enclosures)

Mr. Jason Abernathy
Pro Tech Monitoring, Inc.
2549 Success Drive
Odessa, Florida 33556
(w/o enclosures)

Ms. Lisa Tauser
Satellite Tracking of People
1212 North Post Oak Road, #100
Houston, Texas 77055
(w/o enclosures)

Mr. Leo Carson
G4S Justice Services, Inc.
30201 Aventura
Rancho Santa Margarita, California 92688
(w/o enclosures)