



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 19, 2008

Ms. Christine Badillo  
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2008-17276

Dear Ms. Badillo:

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# 330446.

The Witchita Falls Independent School District (the "district"), which you represent, received a request for all bid proposals, excluding the requestor's proposal, all evaluation documents, and the contract awarded for the "Solicitation: Student & Administrative Software Package—RFP # 07-01." You state you have provided some of the requested information to the requestor pursuant to our ruling in Open Records Letter No. 2008-11700 (2008). *See Gov't Code* § 552.301(a); *Open Records Decision No. 673 at 7-8 (2001)*. Although you take no position with respect to the remaining submitted contract and bid proposals, you claim the documents may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, you notified Prologic Technology Systems, Inc. ("Prologic"), Skyward, Inc. ("Skyward"), Tyler Technologies, Inc. ("Tyler"), and Windsor Management Group ("Windsor") of the district's receipt of the request for information and of each company's right to submit arguments 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)* (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 Tyler and reviewed the submitted information.

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). As of the date of this letter, we have not received comments from Prologic, Skyward, or Windsor explaining why their submitted information should not be released. Therefore, we have no basis to conclude these companies have protected proprietary interests in their submitted information. *See id.* § 552.110; *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 (1990). Accordingly, the district may not withhold Prologic's contract or Skyward's and Windsor's bid proposals on the basis of any proprietary interest they may have in them.

Tyler claims sections 1.8 and 11 of its bid proposal are excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure 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." See 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 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 a single or ephemeral event 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 *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the 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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. See ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.<sup>1</sup> Open Records Decision No. 402 (1983).

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<sup>1</sup> The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, 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).

Tyler contends the technical requirements and pricing portions of its bid proposal, sections 1.8 and 11, respectively, qualify as trade secret information under section 552.110(a). Tyler explains the district's RFP lists technical requirements for the project at issue and the proposing business responds in a checklist format showing which requirements it meets. Based on Tyler's explanation the technical specifications checklist in section 1.8 of its proposal is specific to the project at issue, we find Tyler has failed to demonstrate the checklist meets the definition of a trade secret. Furthermore, we find Tyler has failed to demonstrate its pricing information in section 11 of its proposal meets the definition of a trade secret. Therefore, the district may not withhold any of the information in section 1.8 or section 11 of Tyler's bid proposal under section 552.110(a) of the Government Code.

Tyler also claims the information in sections 1.8 and 11 of its bid proposal is excepted under section 552.110(b). Based on Tyler's arguments and our review, we find Tyler has established release of its pricing information in section 11 would cause it substantial competitive injury. Therefore, the district must withhold the pricing information we have marked in section 11 of Tyler's proposal under section 552.110(b). We find, however, Tyler has provided no specific factual or evidentiary showing release of the remaining information in section 11 or the information in section 1.8 would cause the company substantial competitive injury. Therefore, the district may not withhold the remaining information in section 11 or any part of section 1.8 of Tyler's bid proposal under section 552.110(b).

We note the remaining information in Tyler's bid proposal contains insurance policy numbers. Section 552.136 of the Government Code provides:

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- (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).

(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. We conclude the insurance policy numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the district must withhold the marked insurance policy numbers under section 552.136 of the Government Code.

We note part 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 copyrighted materials 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). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

In summary, the district must withhold the pricing information we have marked in section 11 of Tyler's bid proposal under section 552.110 of the Government Code, and the insurance policy numbers we have marked in Tyler's bid proposal under section 552.136 of the Government Code. The remaining information 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).

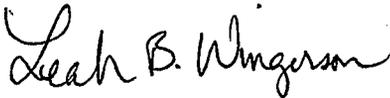
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/ma