



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 3, 2009

Ms. Monica Ogilvie
Assistant Attorney General
Public Information Coordinator's Office
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2009-01405

Dear Ms. Ogilvie:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 333897 (PIR No. 08-023730).

The Office of the Attorney General (the "OAG") received a request for the following information concerning Statement of Work #2 under Project Services Project: Medical Support Data Synchronization: 1) the winning proposal of Ciber, Inc.; 2) the evaluation sheets for all vendors; and 3) the pricing sheets for all vendors. The OAG states it will release some of the information but argues some of the remaining information is excepted from disclosure under section 552.104 of the Government Code. In addition, the OAG states some information may implicate the proprietary interest of Ciber and thus has notified Ciber of the request for information. Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have considered the OAG's claimed exception and have reviewed the submitted information.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive

bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Section 552.104 generally does not except information relating to competitive bidding after a contract has been awarded and executed. *See* Open Records Decision No. 541 (1990). However, this office has determined that in some circumstances, section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id* at 5.

The OAG explains it solicited the procurement of technological services after its Child Support Division (“CSD”) received an exemption from the Texas Department of Information Resources (“DIR”) to procure such services until August 31, 2008. Furthermore, if DIR grants additional exemptions, the term of the procurement will extend to August 31, 2009. The OAG informs this office DIR has granted CSD an additional exemption, and thereby, the term of the procurement is extended to August 31, 2009. Finally, the OAG explains:

six vendors were pre-qualified and awarded a “zero dollar purchase order.” Each vendor had submitted pricing schedules with a “not to exceed price” for future CSD technology services projects. The procurement for those projects is an on-going competition among the six awardees. The CSD will issue statements of work, and the awardees will compete by submitting solutions and prices at or below their respective “not to exceed” pricing schedules. . . . Once a project under the PSP purchase order is awarded to one or more of the six awardees, a purchase order change notice . . . will be issued. [Footnote omitted.]

The OAG asserts release of the pricing information “will enable the competing awardees to adjust their bids based upon the pricing models and “not to exceed” schedules of their respective competitors” and jeopardize the OAG’s future ability to obtain the best offer for renewal of the same contracts. Based on these representations, we conclude the OAG has shown actual or specific harm in a particular competitive situation if the information were to be released. Thus, the OAG may withhold columns C, D, and H in Exhibits B and C under section 552.104.

Next, we consider Ciber’s assertion to withhold portions of its information under section 552.110(a) of the Government Code. Section 552.110(a) protects the property interests of private persons by excepting from disclosure trade secrets 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.), *cert. denied*, 358 U.S. 898 (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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ 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 exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

After reviewing Ciber's arguments and the information at issue, we conclude Ciber failed to demonstrate its information is a trade secret. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (1982) (information relating to organization and personnel, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110); 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). Accordingly, the OAG may not withhold Ciber's information under section 552.110(a).

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(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.

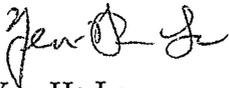
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

In summary, the OAG may withhold columns C, D, and H in Exhibits B and C under section 552.104. The OAG must release the remainder.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 333897

Enc: Submitted documents

c: Requestor
(w/o enclosures)