



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2009

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2009-02120

Dear Ms. Smith:

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# 335118.

The Texas Department Public Safety (the "department") received a request for three categories of information pertaining to a recent Request for Offers to provide the department with an Automated Fingerprint Identification System. You state you have released a responsive contract to the requestor. Although you take no position as to the disclosure of the submitted proposal, you state that release of this information may implicate the proprietary interests of NEC Corporation of America ("NEC"). You state, and provide documentation showing, that you notified NEC of the request and of its opportunity to submit comments to this office as to why its 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). We have considered comments received from NEC, and we have reviewed the submitted information.

Initially, we note that, in addition to the contract you already released, the requestor also seeks purchase order information and a list of companies who submitted proposals to the department. However, you have only submitted a proposal for our review. Thus, to the extent it exists, we assume that you have released any other responsive information to the requestor. If not, you must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

NEC first raises section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. NEC acknowledges that section 552.104 protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). Nevertheless, NEC argues that release of its proposal could hinder future procurement efforts by the department. However, as the department does not seek to withhold any information pursuant to this exception, none of the NEC's proposal may be withheld under section 552.104.

NEC also raises section 552.110 of the Government Code for portions of the submitted proposal. Section 552.110 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. 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* 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

The 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.

Id.; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office must accept a 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 Nat’l Parks &*

Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

NEC has specified portions of its proposal it asserts are trade secrets subject to section 552.110(a). After reviewing the information at issue and the submitted arguments, we find that NEC has made a *prima facie* case that its customer information is protected as trade secret information. This information, which we have marked, must be withheld under section 552.110(a) of the Government Code. Although NEC discusses the six trade secret factors with regards to its pricing and personnel information, we find that NEC has failed to demonstrate that this information meets the definition of a trade secret. *See* ORD 319 at 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the department must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code.¹

NEC argues that release of its pricing and personnel information would cause it substantial competitive harm. However, you inform this office that NEC was the winning bidder and that the submitted proposal is an attachment to its contract with the department. We note that this office considers pricing information in government contracts to be a matter of strong public interest. *See generally* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); 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). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Finally, as stated above, personnel information is generally not excepted under section 552.110(b). *See* ORD 319 at 3. We therefore conclude the department may not withhold any portion of the submitted proposal under section 552.110(b) of the Government Code.

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

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.

¹As our ruling is dispositive, we need not address NEC's remaining arguments regarding its customer information.

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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 335118

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Barry Fisher
NEC Corporation of America
Identification Solution Department
10850 Gold center Drive, Suite 200
Rancho Cordova, California 95670
(w/o enclosures)