



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2009

Ms. Patricia Fleming
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OR2009-03420

Dear Ms. Fleming:

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# 336079.

The Texas Department of Criminal Justice ("TDCJ") received a request for: (1) the current or most recent contract between Corrections Corporations of America ("CCA") and TDCJ's Mineral Wells facility; (2) CCA's bid/proposal submitted in response to the most recent RFP regarding the Mineral Wells facility; and (3) a sample of financial audits conducted on CCA from 2006 to 2008. You state that TDCJ has made or will make available portions of the requested information. You claim that other portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. You also state that the submitted information may be excepted from disclosure under section 552.110 of the Government Code, but take no position as to whether this information is excepted under this section. You have notified CCA, as an interested third party, of TDCJ's receipt of the request for information and of CCA's right to submit arguments to this office as to why the information at issue 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 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered

your arguments and arguments received from CCA pursuant to section 552.305(d) of the Government Code and have reviewed the submitted information.

Initially, we note that the submitted information consists of CCA's bid/proposal submitted in response to the most recent RFP regarding the Mineral Wells facility. TDCJ has not submitted information responsive to the portions of the request for the current or most recent contract between CCA and TDCJ's Mineral Wells facility or a sample of financial audits conducted on CCA from 2006 to 2008. Therefore, to the extent that TDCJ maintained any documents responsive to these items on the date TDCJ received the request, TDCJ must release such information to the requestor. *See* Gov't Code § 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply, then it must release information as soon as possible).

We next address TDCJ's argument that certain submitted documents are not responsive to the present request. TDCJ states that TDCJ's emergency and first responder documentation was unnecessarily included by CCA in CCA's bid and that these documents "were irrelevant to CCA's bid [and] were not considered by the evaluation team in its assessment of CCA's bid." These documents were nevertheless included in CCA's bid and therefore are responsive to the present request, regardless of the source of this information or of the necessity of its inclusion in CCA's bid. Accordingly, we will address both CCA's and TDCJ's arguments that this information is excepted from disclosure.

CCA raises section 552.104 of the Government Code with regard to certain portions of the submitted information.¹ Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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). Significantly, section 552.104 protects the interests of governmental bodies and is not designed to protect the interests of private parties that submit information such as bids and proposals to governmental bodies. *See id.* at 8-9. Thus, because section 552.104 is raised by CCA and not by TDCJ, none of the submitted information is excepted from disclosure on the basis of that section.

We next address CCA's section 552.110 arguments with regard to certain portions of the submitted information. Section 552.110 of the Government Code protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision

¹We note that CCA's brief also requests that "the staffing plan, wage scale, job family table and cost information included in CCA's December 12, 2003 best and final response and the contract also be excepted" under sections 552.104 and 552.110 of the Government Code. However, TDCJ has not submitted either CCA's December 12, 2003, best and final response or the contract to this office for review. Accordingly, this ruling does not address CCA's request that this information be excepted from disclosure.

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. Gov't Code § 552.110. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. *See id.* § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See 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. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939).² 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

²The 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).

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).

In this instance, CCA claims that the submitted post orders, training packages, staffing plans, wage scales, and job family tables were developed by CCA and are unique to CCA's operations, and thus constitute trade secrets that are excepted from disclosure by section 552.110(a). After reviewing CCA's arguments and the information at issue, we conclude that CCA has failed to establish a *prima facie* case that the information for which it asserts section 552.110(a) constitutes trade secrets. See Restatement of Torts § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"); Open Records Decision No. 319 at 2 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110).

Furthermore, CCA has not shown that release of any of the information at issue will cause CCA to suffer "substantial harm." See Open Records Decision No. 661 at 5-6 (section 552.110(b) requires specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of information). Moreover, this office considers the prices charged in government contract awards to be a matter of strong public interest; therefore, the pricing information of a winning bidder is generally not excepted from disclosure under section 552.110(b). See Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); 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). Therefore, we conclude that none of the information CCA seeks to withhold is excepted from disclosure under section 552.110 of the Government Code.

TDCJ and CCA both raise section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses sections 418.176 and 418.177 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Section 418.176 provides in part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a). Section 418.177 provides as follows:

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may be related to a governmental body's emergency response preparedness or security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

We note that sections 418.176 and 418.177 are applicable only to certain clearly defined types of information. In this instance, TDCJ asserts that the Mineral Wells facility call roster consists of information collected, assembled, or maintained by or for TDCJ for the purpose of responding to an act of terrorism or related criminal activity. TDCJ represents that this call roster contains information related to the staffing requirements, a tactical plan, or the pager or telephone numbers of an emergency response provider. *See id.* §§ 552.301(e)(1)(A), 418.176(a)(1)-(3). TDCJ and CCA also both assert that TDCJ's "Operations of the Emergency Action Center and Reporting Procedures for Serious or Unusual Incidents" directive (the "directive") provides the methods by which TDCJ responds to emergency crises, including acts of terrorism or related criminal activity. Based on TDCJ and CCA's arguments and our review of the information at issue, we conclude that TDCJ and CCA have established that the Mineral Wells facility call roster and the directive fall within the scope of the claimed provisions. Accordingly, TDCJ must withhold this portion of the submitted information under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

CCA also asserts section 552.101 in conjunction with the HSA and argues that the submitted drawing of the Bridgeport facility provides a detailed layout of the correctional facility

including entrances and exits. CCA argues that release of this document would result in harm. However, after review of the information at issue, we conclude that CCA has not established that this information is maintained by TDCJ "for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity." *See id.* § 418.177(1). Thus, CCA has not established the applicability of sections 418.176 and 418.177 of the Government Code and TDCJ may not withhold the drawing of the Bridgeport facility on the basis of these statutes.

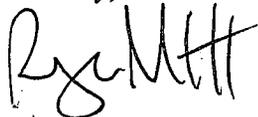
Finally, we note that some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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).

In summary, TDCJ must withhold the Mineral Wells facility call roster and the directive under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. TDCJ must release the remaining submitted information, but must comply with copyright law in so doing.

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,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/jb

Ref: ID# 336079

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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