



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 19, 2009

Ms. Neera Chatterjee  
Public Information Coordinator  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2009-11640

Dear Ms. Chatterjee:

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# 352735.

The University of Texas at Brownsville and Texas Southmost College (the "university") received a request for the vendor responses to RFP 747-112108-2009. You state you have released some of the requested information. Although you take no position as to the public availability of the submitted information, you state the submitted information may contain a third party's proprietary information subject to exception under the Act. Accordingly, you state that you have notified the interested third party, InnoSoft Canada, Inc. ("InnoSoft") of the request and of its right to submit arguments to this office as to why the submitted information should not be released. *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 exceptions to disclosure under the Act in certain circumstances). We have received comments from InnoSoft, and we have reviewed the submitted arguments and information.

Initially, we note, and you acknowledge, the university has not complied with the requirements of section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the information is public and must be released unless a governmental body demonstrates a compelling reason to overcome this presumption. *See City of Dallas v. Abbott*, 279 S.W.3d 806 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *see also* Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake

or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third-party interests are at stake, we will consider whether the submitted information must be withheld under the Act.

Next, we understand InnoSoft to assert that its proposal is confidential because the proposal is marked as confidential. We note, however, information is not made confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977); *see also* Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Consequently, InnoSoft's submitted information may not be withheld unless it falls within an exception to disclosure.

InnoSoft raises section 552.104 of the Government Code as an exception to disclosure. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that 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). As the university does not seek to withhold any information pursuant to this exception, none of the submitted information may be withheld on this basis.

InnoSoft also claims that portions of the submitted information are excepted from disclosure 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: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. *See* Gov't Code § 552.110. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret 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. 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 . . . [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.

RESTATEMENTS OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. There are six factors to be assessed in determining whether information qualifies as 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* ORD 319 at 2; *see also* Open Records Decision Nos. 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 5-6. 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) excepts from disclosure “[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. *See* Open Records Decision No. 661 at 5-6 (1999).

Having considered InnoSoft’s arguments and reviewed the information at issue, we conclude InnoSoft has not demonstrated that any information in its proposal qualifies as a trade secret under section 552.110(a), nor has InnoSoft demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience,

and pricing not excepted under section 552.110). However, we find that InnoSoft has established that release of its pricing information would cause it substantial competitive injury. Therefore, the university must withhold this information, which we have marked, under section 552.110(b). However, InnoSoft has not made the specific factual or evidentiary showing required by section 552.110(b) that the release of any of the remaining information in its proposal would cause the company substantial competitive harm. We therefore conclude that the university may not withhold any other information relating to InnoSoft under section 552.110. *See Gov't Code § 552.110(a)-(b); see also Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).* As no further exceptions to disclosure are raised, 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.

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](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,



Greg Henderson  
Assistant Attorney General  
Open Records Division

GH/rl

Ref: ID#352735

Enc. Submitted documents

c: Requestor  
(w/o enclosures)