



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2009

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton, 3rd Floor
Fort Worth, Texas 76102

OR2009-11873

Dear Ms. Byles:

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# 353127 (Fort Worth Request Nos. 0687-09, 1992-09, 3964-09, 4315-09, 4400-09).

The City of Fort Worth (the "city"), received five requests for records pertaining to RFP 08-161 and scoring sheets, bid evaluations, and related information. You state the city is releasing some of the requested information. You do not take a position as to whether the submitted proposals are excepted under the Act; however, you state their release may implicate the proprietary rights of the third parties who submitted the proposals. You state, and provide documentation showing, that you have notified GC Services Limited Partnership ("GC Services"); T-2 Systems Inc. ("T-2 Systems"); NCO Financial Systems, Inc.; Linebarger, Goggan, Blair & Sampson, L.L.P.; American Municipal Services ("AMS"); Municipal Services Bureau; Perdue, Brandon, Fielder, Collins & Mott L.L.P.; Premier Recovery Inc. ("Premier"); Penn Credit Corporation; Credit Systems International Inc. ("CSII"), and National Recovery Agency of their right to submit arguments to this office as to why the submitted proposals should not be released. *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 correspondence from GC Services, T-2 Systems, AMS, Premier, and CSII. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, that the city failed to comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential by law. *See* Open Records Decision No. 150 (1977). Because the proprietary interests of third parties are at stake, we will consider the submitted arguments against disclosure.

Next, we note that 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received correspondence from NCO Financial Systems; Linebarger, Goggan, Blair & Sampson; Municipal Services Bureau; Perdue, Brandon, Fielder, Collins & Mott; Penn Credit Corporation; or National Recovery Agency explaining why their information should not be released. Thus, we have no basis for concluding that any portion of the submitted information pertaining to these third parties constitutes proprietary information, and the city may not withhold any portion of their information on that basis. *See* 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).

Next, we note that both CSII and GC Services argue against the release of portions of their information that were not submitted by the city. We note that our ruling is limited to what the city has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Therefore, we will only address CSII's and GC Services' arguments for the information that was submitted to our office.

We understand CSII to assert that the names of its "Key Management Team" employees are confidential under common-law privacy. Section 552.101 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 common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types

of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we determine that no portion of the information at issue is protected by common-law privacy and it may not be withheld under section 552.101 on that basis.

AMS, Premier, and CSII contend that portions of their information are protected under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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 city did not submit arguments in support of withholding information pursuant to section 552.104, the city may not withhold any of CSII's, AMS's, and Premier's information pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

CSII, GC Services, Premier, T-2 Systems, and AMS each contend that section 552.110 of the Government Code is applicable to portions of their proposals. Section 552.110 of the Government Code 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. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552. 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. *See* Open Records Decision No. 402 (1983). We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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. *See id.* § 552.110(b); *see also* ORD 661 at 5-6.

We find that GC Services, AMS, and CSII have established that their client information is a trade secret under section 552.110(a) of the Government Code.¹ Therefore, the city must withhold the information we have marked under section 552.110(a). However, GC Services and CSII have not demonstrated that any of their remaining information, and T-2 Systems and Premier have not demonstrated that any of their information, constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 com. b (1939) (defining a trade secret as a process or device for continuous use in the operation of the business); ORD 552 at 5-6. Thus, the city may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Next, we determine that GC Services and CSII have established that the release of the information we have marked would cause the companies substantial competitive harm. Accordingly, the city must withhold the information we have marked under section 552.110(b) of the Government Code. Upon review, however, we find that T-2 Systems, CSII, and GC Services have not made the specific factual and evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause their companies substantial competitive harm. *See* Open Records Decision Nos. 661, 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 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 is too speculative). Accordingly, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

CSII contends that its bank contact information is confidential under section 552.136 of the Government Code. Section 552.136 of the Government Code provides that “[n]otwithstanding 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(b); *see also* § 552.136(a) (definition of “access device number” includes account numbers). Upon review, we find that section 552.136 is not applicable to the information CSII seeks to withhold; thus the city may not withhold this information on that basis.

T-2 Systems raises section 552.137 of the Government Code for a portion of its information. Section 552.137 provides in relevant part:

¹Our ruling is dispositive of AMS’s claim under section 552.110.

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . . [.]

Gov't Code § 552.137(a), (c)(3). We note that the e-mail addresses T-2 Systems seeks to withhold are contained in its response to a request for bids or proposals. This information is not excepted under section 552.137 and may not be withheld on that basis.

In summary, the city must withhold the information we have marked under section 552.110(a) and (b). 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, 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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/eb

Ref: ID# 353127

Enc. Submitted documents

c: Requestors
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