



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 25, 2009

Mr. Joe Gorfida, Jr.  
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.  
Attorney for City of Allen  
1800 Lincoln Plaza  
500 North Akard Street  
Dallas, Texas 75201

OR2009-11954

Dear Mr. Gorfida:

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# 353280.

The City of Allen (the "city"), which you represent, received two requests for all correspondence relating to Request for Proposals #2008-2-172-C. Although you take no position as to whether the submitted information is excepted under the Act, you state that release of this information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation reflecting, that you have notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released to the requestor.<sup>1</sup> See Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 comments from TriTech, Positron, New World, and SunGard. We have considered the submitted arguments and reviewed the submitted information.

---

<sup>1</sup>The interested third parties are TriTech Software Systems ("TriTech"), Integraph, InterAct, Positron Public Safety Systems ("Positron"), New World Systems ("New World"), Integrated Computer Systems, Inc. ("Integrated"), and SunGard Public Sector ("SunGard").

New World argues that its submitted proposal is not correspondence and therefore, not responsive to this request. We note that a governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). The city has submitted New World's proposal as information the city deems to be responsive to this request for information. Accordingly, we conclude the city has made a good-faith effort to relate this request to responsive information. Therefore, we will determine whether information in the proposal at issue must be released to the requestor. We note the city has also marked a portion of the submitted information as not responsive to the present request and some of the submitted documents were created after the date of the request. We find this marked information is not responsive to the request and this ruling does not address its public availability. Accordingly, the city need not release such information in response to the request.

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) of the Government Code 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 any arguments from Integraph, InterAct, and Integrated. We, thus, have no basis for concluding that any portion of the submitted information constitutes the proprietary information of Integraph, InterAct, and Integrated. *See id.* § 552.110; 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. Accordingly, the city may not withhold any of the submitted information based on the proprietary interests of Integraph, InterAct, and Integrated. We now turn to the arguments submitted by TriTech, Positron, New World, and Sungard for the submitted information.

TriTech and SunGard assert that their submitted information may not be disclosed because it was marked confidential or has been made confidential by agreement or assurances. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Positron argues that some of its submitted information is excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This section, however, only protects the interests of a governmental body, as distinguished from exceptions that 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 does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the information at issue. *See* ORD 592 (governmental body may waive section 552.104). Therefore, the city may not withhold any of the submitted information pursuant to section 552.104.

TriTech, New World, and SunGard raise section 552.110 of the Government Code for portions of their submitted information, and we understand Positron to also claim section 552.110 as an exception to disclosure for some of its information. 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. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects the proprietary 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"

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 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 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.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661 at 5-6.

TriTech asserts the release of its voluntarily provided information could discourage private parties from providing proprietary information needed by government officials, and would thus harm future procurement efforts by the city. This argument relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act (“FOIA”) to third-party information held by a federal agency, as announced in *National Parks*. 498 F.2d 765; *see also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). The *National Parks* test states that commercial and financial information is confidential if disclosure is likely to impair the government’s

ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain proposals from private parties is not a relevant consideration under section 552.110. *Id.* Therefore, we will only consider each third party's own interests in the information at issue.

Having considered the arguments of TriTech, Positron, New World, and SunGard, we find that Positron and SunGard have made a *prima facie* case that their customer list is protected as trade secret information. Accordingly, we have marked the information that must be withheld under section 552.110(a). We note, however, that New World has made the identities of the clients it seeks to withhold publicly available on its website. Thus, New World has failed to demonstrate that the information published on its website is a trade secret. Furthermore, we find that TriTech, Positron, New World, and SunGard have failed to establish that any of the remaining information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for their 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). We note that pricing information pertaining to a particular proposal or 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." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD Nos. 319 at 3, 306 at 3 (1982). Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

We further conclude that New World and SunGard have established that release of their pricing information would cause the companies substantial competitive harm. Accordingly, the city must withhold the information we have marked under section 552.110(b). However, we find that TriTech, Positron, New World, and SunGard have made only conclusory allegations that release of the remaining information at issue would cause their companies substantial competitive harm and have provided no specific factual or evidentiary showing to support such an allegation for purposes of section 552.110(b). See ORD Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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 section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Additionally, we note that the pricing information of a winning bidder, such as TriTech in this instance, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see 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). Moreover, 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); ORD 541 at 8 (public has interest in knowing terms of contract with state agency). Therefore, the city may not withhold any of the remaining information under section 552.110(b).

We note that a portion of the remaining information is excepted from disclosure under section 552.136 of the Government Code, which 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.”<sup>2</sup> Gov't Code § 552.136. Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note that the remaining information includes personal e-mail addresses. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked personal e-mail addresses that the city must withhold under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure or section 552.137(c) applies.

We note that some of the remaining information appears to be 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. Attorney General Opinion JM-672 (1987). A

---

<sup>2</sup>This office will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *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, the city must withhold the information we have marked under section 552.110(a) and section 552.110(b) of the Government Code. The city must withhold the information we have marked under section 552.136 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure or section 552.137(c) applies. The remaining information must be released in accordance with copyright law.

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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/rl

Ref: ID# 353280

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

c: Mr. Rusty Byers  
TriTech Software Systems  
9860 Mesa Rim Road  
San Diego, California 92121  
(w/o enclosures)

Mr. Charles Reeves  
Integraph  
170 Graphics Drive  
Madison, Alabama 35758  
(w/o enclosures)

Mr. Theodore J. Collins  
InterAct  
111 North Chestnut Street, Suite 200  
Winston-Salem, North Carolina 27101  
(w/o enclosures)

Ms. Valerie Taylor  
Positron Public Safety Systems  
1281 Beechwood Drive  
Kyle, Texas 78640  
(w/o enclosures)

Mr. Greg Wandrei  
New World Systems  
888 West Big Beaver, Suite 600  
Troy, Michigan 48084  
(w/o enclosures)

Mr. Tommy Galbraith  
Integrated Computer Systems, Inc.  
3499 FM 1461  
McKinney, Texas 75071  
(w/o enclosures)

Mr. Brian Pagels  
SunGuard Public Sector  
4000 OSSI Court  
High Point, North Carolina 27265  
(w/o enclosures)

Ms. Debra Morris  
Sungard Public Sector  
Allen City Hall  
305 Century Parkway  
Allen, Texas 75013  
(w/o enclosures)