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September 3, 2009

Ms. Anne M. Constantine
Legal Counsel
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OR2009-12451

Dear Ms. Constantine:

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# 354395.

The Dallas-Fort Worth International Airport Board (the "board") received a request for all bids submitted in response to a specified RFP and any resulting contracts or agreements. You state you have released portions of the requested information to the requestor. Although you raise no exceptions to disclosure of the remaining information on behalf of the board, you state you have notified Burson-Marsteller and Daniel J. Edelman, Inc. ("Edelman") of the request and of their opportunity to submit comments to this office as to why this information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). You state that the third parties object to the release of certain portions of the submitted information. We have received arguments from representatives of Burson-Marsteller and Edelman. We have reviewed the submitted information and considered the submitted arguments.

Initially, we note that Edelman seeks to withhold from public disclosure portions of its proposal that the board did not submit. This ruling does not address information that was not submitted by the board and is limited to the information submitted as responsive by the board. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Burson-Marsteller and Edelman contend that portions of their information are excepted from disclosure under section 552.110 of the Government Code. 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"

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* Open Records Decision No. 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 the exception is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). 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. *See id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing the submitted information and arguments, we conclude the board must withhold some of Burson-Marsteller and Edelman’s customer information, which we have marked, under section 552.110(a). We note, however, that Burson-Marsteller and Edelman make the identities of some of their current and past customers publicly available on their websites. In light of the companies’ own publication of such information, we cannot conclude that the identities of these customers qualify as trade secrets. Furthermore, we determine that Burson-Marsteller and Edelman failed to demonstrate that any of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for their remaining information. Accordingly, the board must only withhold the information we have marked pursuant to section 552.110(a).

Burson-Marsteller and Edelman also argue section 552.110(b) for some of their remaining information. Upon review, we determine that Burson-Marsteller and Edelman have demonstrated, based on a specific or factual evidentiary showing, that the release of some of their remaining information would result in substantial competitive harm. Accordingly, we have marked the information that must be withheld under section 552.110(b). However, as

noted above, Burson-Marsteller and Edelman have published the identities of some of their customers on their websites. Thus, Burson-Marsteller and Edelman have failed to demonstrate that release of these customers' information would cause the companies substantial competitive injury. Additionally, Burson-Marsteller and Edelman have made only conclusory allegations that the release of the remaining information would result in substantial damage to each company's competitive position. Thus, the companies have not demonstrated that substantial competitive injury would result from the release of any of their remaining information at issue. *See* Open Records Decision 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 is too speculative), 319 at 3 (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). Accordingly, none of Burson-Marsteller's and Edelman's remaining information may be withheld under section 552.110(b).

In summary, the board must withhold the information we have marked under section 552.110 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.

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, toll free, at (888) 672-6787.

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 354395

Enc. Submitted documents

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(w/o enclosures)

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