



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2009

Ms. Cynthia J. Kreider
Contracting and Procurement Services Division
Texas Department of Information Resources
P.O. Box 13564
Austin, Texas 78711-3564

OR2009-13692

Dear Ms. Kreider:

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# 355052.

The Texas Department of Information Resources (the "department") received a request for information related to a specified contract and a specified request for offers. You state you have released portions of the responsive information to the requestor. Although you take no position with respect to the public availability of the submitted information, you state that the department believes the information may involve the proprietary interests of third parties.¹ Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the department has notified the interested third parties of the request and of their right to submit arguments to this office explaining why this information should not be released.² See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be

¹Although you also initially asserted section 552.104 of the Government Code, in subsequent correspondence with our office you have withdrawn your arguments under this exception.

²The notified third parties are: CSI Leasing, Inc.; Dell Marketing, L.P.; Dell; CDW Government, Inc. ("CDW"); Austin Ribbon & Computer Supplies, Inc.; PathMaker Group; RFD & Associates, Inc. ("RFD"); Accudata Systems, Inc.; CompuCom Systems, Inc.; PC Mall Gov, Inc.; SHI Government Solutions, Inc.; Grant Thornton, L.L.P.; DataXport; En Pointe Technologies; and Sales Inc.

released); *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 applicability of exception in certain circumstances). This office has received comments from CDW and RFD. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that in a letter dated August 5, 2009, the department stated that it wishes to withdraw its request for an open records decision with regard to Exhibit F and will release those records to the requestor. Accordingly, this information, which we have marked, is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request.

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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As we noted above, this office has received comments from CDW and RFD. However, as of the date of this letter, we have not received comments from any of the remaining third parties explaining why their submitted information should not be released. Therefore, we have no basis to conclude that any of these third parties have a protected proprietary interest in the submitted information. *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 department may not withhold any portion of the submitted information based upon the proprietary interests of the remaining third parties.

Next, we understand the department to assert that some of the submitted information is confidential because it 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 the 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, the submitted information may not be withheld unless it falls within an exception to disclosure.

CDW claims that portions of the submitted information are excepted under section 552.104 of the Government Code. Section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties; therefore we will not consider CDW's claim under section 552.104. *See* Open Records Decision No. 592 at 8 (1991). As the department no longer claims that any of the submitted information is excepted from

disclosure under section 552.104, we find that this section is not applicable to CDW's information. *See* ORD 592 (governmental body may waive section 552.104).

Next, we address RFD's arguments under section 552.110 of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). 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. 1957); *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); *see also Huffines*, 314 S.W.2d at 776. 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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. 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

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes 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 other 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).

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.* § 552.110(b); *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).

RFD argues that a portion of its information is excepted under section 552.110 of the Government Code. Upon review, we find RFD has not demonstrated that any of its information constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, the department may not withhold any of the information at issue under section 552.110(a) of the Government Code. However, we determine RFD has established that the release of certain pricing information would cause the company substantial competitive harm. Therefore, the department must withhold the information we have marked under section 552.110(b) of the Government Code. We note, however, RFD has failed to demonstrate that release of the remaining information it seeks to withhold would cause it substantial competitive harm. *See* Gov’t Code § 552.110; ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, we conclude that none of the remaining information may be withheld under section 552.110(b) of the Government Code.

We note some of the remaining submitted 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. Attorney General Opinion JM-672 (1987). A 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 department must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released, but any information protected by copyright 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, 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 355052

Enc. Submitted documents

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