



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 15, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
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OR2009-14623

Dear Ms. Alexander:

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# 356975.

The Texas Department of Transportation (the "department") received four requests for information pertaining to a specified request for proposals. The first and second requests seek the scoring criteria and the actual scores given to all vendors who responded to the request for proposals. The second request additionally seeks comments submitted by the evaluation team. The third request seeks all proposals received by the department in response to the specified request for proposals and the related score sheets. The fourth request seeks all information pertaining to the winning proposal and the related score sheets. Although you take no position as to the disclosure of the requested information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and have provided documentation showing, that the department notified: Grant Thornton, LLP ("Grant Thornton"), Transtech Management, Inc. ("Transtech"), Public Financial Management, Inc. ("Public Financial"), PLS Consulting, Inc. ("PLS"), TerraHealth, Inc. ("THI"), Adams Harris, Inc. ("Adams Harris"), CGN & Associates, Inc. ("CGN"), Alvarez & Marsal Public Sector Services, LLC ("A&M"), McKinsey & Company, Inc. ("McKinsey"), and Deloitte Consulting, LLP ("Deloitte"). *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 CGN, A&M, and McKinsey. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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 of the date of this decision, this office has received no correspondence from Grant Thornton, Transtech, Public Financial, PLS, THI, Adams Harris, or Deloitte. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. See *id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 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 of these companies' information on the basis of any proprietary interest that these companies may have in their information.

Next, we address CGN's argument that the release of its information could deter vendors such as CGN from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, CGN appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only CGN's interests in its information.

CGN, A&M, and McKinsey claim that portions of their information are excepted from disclosure under section 552.110 of the Government Code. 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). 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 [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). 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.¹ 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. 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. 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. *Id.*; *see also* ORD 661 at 5-6.

¹The following are the six factors that the Restatement gives 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 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

CGN, A&M, and McKinsey claim portions of their information qualify as trade secrets under section 552.110(a) of the Government Code. Upon review, we find CGN, A&M, and McKinsey have made a *prima facie* case that some of their client information is protected as trade secret information. We note, however, that CGN and A&M publish the identities of some of their clients on their websites. In light of CGN's and A&M's own publication of such information, we cannot conclude that the identities of these published clients qualify as trade secrets. Furthermore, we determine that CGN, A&M, and McKinsey have failed to demonstrate that any portion of their remaining information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the department must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We determine that no portion of the remaining submitted information is excepted from disclosure under section 552.110(a) of the Government Code.

CGN, A&M, and McKinsey claim portions of their information are subject to section 552.110(b). Upon review, we find A&M and McKinsey have demonstrated that release of their pricing information would cause them specific competitive harm. Thus, the department must withhold the pricing information we have marked under section 552.110(b) of the Government Code. As noted above, CGN and A&M published the identities of some of their customers on their websites. Thus, CGN and A&M have failed to demonstrate release of this information would cause them substantial competitive harm. Furthermore, upon review of CGN's, A&M's, and McKinsey's arguments, we find each company has provided conclusory arguments that release of their remaining information would result in substantial competitive harm to their companies. *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 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Accordingly, the department must only withhold the information we have marked under section 552.110(b) of the Government Code.

We note section 552.136 of the Government Code is applicable to some of the submitted information.² Section 552.136(b) provides that "[n]otwithstanding any other provision of [the Act], 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 id.* § 552.136(a) (defining "access device"). We have marked insurance policy numbers that must be withheld under section 552.136 of the Government Code.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

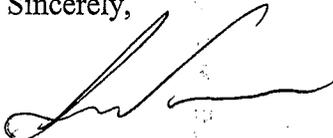
Finally, we note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection 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 (1) the client information we have marked under section 552.110(a) of the Government Code; (2) the pricing information we have marked under section 552.110(b) of the Government Code; and (3) the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released to the requestors, but any copyrighted information may only be released in accordance with copyright law.³

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/jb

³We note information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Ref: ID#356975

Enc: Submitted documents

c: 2 Requestors

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