



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2009-16048

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# 361231.

The Texas Department of Transportation (the "department") received a request for all records pertaining to a specified solicitation. You state that you have released some of the requested information. We note you have marked social security numbers under section 552.147 of the Government Code.¹ You claim that portions of the remaining information are excepted from disclosure under section 552.104 of the Government Code. Further, you state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state that you notified Florida Traffic Device Solutions, Inc. ("Florida") and Siemens Energy and Automation, Inc. ("Siemens") of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *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 to disclosure under Act in certain circumstances). We have received comments from Florida and Siemens. We have considered the submitted arguments and reviewed the submitted information.

The department, Siemens, and Florida raise section 552.104 of the Government Code. However, 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 Siemens' and Florida's claims under section 552.104. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 excepts from required public disclosure "information that, if released, would

¹Section 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. *See* Gov't Code § 552.147(b).

give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* ORD 592. Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated that the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates that public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis). In this instance, you inform us that “[t]o maximize efficiency and save time and money, [the department] has instituted a ‘prequalification’ procedure that requires contractors to submit certain financial information in advance of any bid.” *See* 43 T.A.C. § 9.12(b)(1) (listing requirements for prequalification). You assert that the release of the submitted prequalification information “would adversely affect [the department’s] ability to compete for contractors with entities that do not have to release private financial information” and would, in effect, reduce competition on competitive bids. Based on your representations, we find you have demonstrated that public release of the information you have marked would cause specific harm to the department’s interests in particular competitive bidding situations. Therefore, the department may withhold the information you have marked from required public disclosure under section 552.104.²

We next consider the arguments of Florida and Siemens under section 552.110 of the Government Code, which protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and (2) “commercial 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(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be:

²Because the department’s section 552.104 assertion is dispositive, we do not consider arguments under section 552.110 from Florida or Siemens for this information.

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 a single or ephemeral event 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). This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.³ Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) 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* 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).

Upon review of the submitted arguments and the information at issue, we find that Siemens has established a *prima facie* case that information that identifies their customers is protected trade secret information. Thus, the department must withhold the information we have

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 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).

marked under section 552.110(a). However, we conclude Siemens has failed to establish a *prima facie* case that any of its remaining information at issue is a trade secret protected by section 552.110(a). *See* ORD 402.

We also find that Florida and Siemens have each made only conclusory allegations that release of the remaining information at issue would cause their respective companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Furthermore, we note Florida and Siemens were each a winning bidder in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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). Accordingly, the department may not withhold any of the remaining information at issue under section 552.110(b).

We note that sections 552.130 and 552.136 of the Government Code are applicable to some of the submitted information.⁴ Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(2). We note that section 552.130 does not encompass motor vehicle record information of other states. To the extent the license plate and vehicle identification numbers contained within Siemens remaining information consist of motor vehicle record information issued by an agency of the State of Texas, the department must withhold this information under section 552.130 of the Government Code. The department may not withhold any information that does not pertain to motor vehicle record information issued by an agency of the State of Texas under section 552.130.

Section 552.136(b) of the Government Code states 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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked information that the department must withhold under section 552.136.

In summary, the department may withhold the information it has marked under section 552.104 of the Government Code. The department must withhold the marked information under section 552.110 of the Government Code. To the extent the submitted license plate and vehicle identification numbers consist of motor vehicle record information issued by an agency of the State of Texas, the department must withhold this information

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

under section under section 552.130 of the Government Code. The department must also withhold the information we have marked under 552.136 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 Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 361231

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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