



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 20, 2009

Mr. Frank J. Garza  
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OR2009-16566

Dear Mr. Garza:

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# 360649.

The Brownsville Public Utility Board (the "board"), which you represent, received a request for all responses received from vendors answering a specified request for proposals ("RFP"). You state that some responsive information will be released to the requestor. You claim that a portion of the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state that a portion of the submitted information may be excepted from disclosure under section 552.110 of the Government Code, but you take no position as to whether the information is excepted under this section. Accordingly, you submit documentation showing that you provided a notice statement to all parties involved pursuant to the Act. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exception you claim, and reviewed the submitted information. We have received comments from Fiserv, Paymentus Corporation ("Paymentus"), Landmark Clearing, Inc. ("Landmark"), and CSG Systems ("CSG"), and have reviewed the submitted arguments.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular

competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded and is in effect. *See id.* at 5.

You state the submitted information pertains to the board's RFP for a system for online, telephone, and kiosk bill payments. You assert that release of the submitted pricing information would "give the competitor an unfair advantage in any upcoming competitive proposals issued" by the board, and would have a "chilling effect" on attracting qualified vendors to respond to the board's future RFPs. However, you have not provided any arguments explaining how the release of the submitted pricing information would cause a specific threat of actual or potential harm to the board's interests in a specific competitive situation. Thus, we conclude you have failed to establish the applicability of section 552.104 to the submitted information, and none of it may be withheld on that basis.

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 requested information relating to that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, only Fiserv, Paymentus, Landmark, and CSG have submitted comments to this office regarding how the release of their submitted information will affect their proprietary interests.<sup>1</sup> Thus, we have no basis to conclude that the release of any portion of the remaining third parties' submitted information would implicate their proprietary interests. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, the board may not withhold any portion of the submitted information on the basis of any proprietary interest the third parties who did not submit comments to this office may have in the information.

Fiserv, Paymentus, Landmark, and CSG assert that portions of the submitted information are excepted 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. 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"

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<sup>1</sup>Although we understand that U.S. Payments, LLC ("U.S. Payments") notified the board that it objects to the release of its information, we have received no arguments in support of U.S. Payments' objections to disclosure. *See* Gov't Code. § 552.301(e)(1)(A) (providing that written comments must be submitted stating reasons why exceptions to disclosure apply).

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* 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.

Open Records Decision No. 552 at 2 (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. *Id.* § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Paymentus argues that its pricing information is a protected trade secret. 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 319 at 3, 306 at 3. Therefore, we find that Paymentus has failed to establish that its pricing information is a trade secret. Fiserv, Paymentus, Landmark, and CSG also assert 552.110(a) for portions of their remaining information. Upon review, we find that Fiserv, Paymentus, Landmark, and CSG have established prima facie cases that portions of their submitted information, which we have marked, constitute trade secrets. Accordingly, the board must withhold the information pursuant to section 552.110(a). However, Fiserv, Paymentus, Landmark, and CSG failed to demonstrate that any portion of the remaining information at issue constitutes a trade secret. Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Fiserv, Paymentus, Landmark, and CSG also seek to withhold portions of their submitted information under section 552.110(b). Upon review, we conclude Fiserv, Landmark, and CSG have established the release of their respective pricing information would cause them substantial competitive injury; therefore, the board must withhold this information, which we have marked, under section 552.110(b). However, we note that Paymentus was the 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). We find that Fiserv, Paymentus, Landmark, and CSG have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining

information would cause the companies substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude that the board may not withhold any of the remaining information under section 552.110(b) of the Government Code.

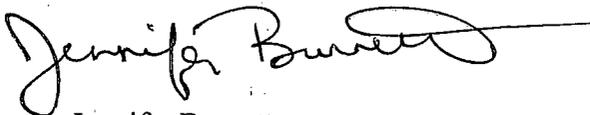
We note that portions of the information at issue are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted 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 board must withhold the information we have marked under section 552.110(a) and section 552.110(b) of the Government Code. However, the board must release the remaining information, but any information subject to copyright may only 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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/eeg

Ref: ID# 360649

Enc. Submitted documents

c: Requestor  
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