



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 9, 2009

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

OR2009-17444

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# 363729.

The Texas Department of Transportation (the "department") received a request for the bid proposal, purchase order, and contract documents for six specified bid solicitations regarding mailing services, as well as specified invoices pertaining to one of the bid solicitations. You state the department has provided some of the requested information to the requestor. You also state some of the requested information has been destroyed according to the department's record retention guidelines.¹ Although you state the department takes no position with respect to the public availability of the submitted bid proposals, you state their release may implicate the proprietary interests of PrintMailPro.com ("PMP"); MailMax Direct ("MMD"); International Mailing System; Finishing & Mailing Center, LLC ("FMC"); ADS MB Corporation d/b/a The Mail Box; Lason, Inc.; Mail Processing Center, Inc. ("MPCI"); Business Ink, Co. ("BI"); and List Brokers, Inc. Accordingly, you state the department notified each company of the request and of its right to submit arguments to this office as to why the submitted bid proposals should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered comments from PMP and reviewed the submitted information.

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 letter, we have received comments from only PMP explaining why its information at issue should not be released. Therefore, we have no basis to conclude any of the remaining notified companies have protected proprietary interests in their 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 these companies' bid proposals on the basis of any proprietary interest they may have in them.

PMP claims part of its information is excepted under section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code. This office, however, has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Therefore, we will consider PMP's claims under only section 552.110 of the Government Code.

PMP claims specified portions of its submitted proposal are excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure 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).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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

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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

PMP claims some of its information, including customer, work plan, and organization and personnel information, constitutes trade secrets under section 552.110(a). Upon review, we

²The 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).

find PMP has established its customer information, which we have marked, constitutes a trade secret and must be withheld under section 552.110(a). PMP explains the work plan information it seeks to withhold consists of the company's detailed work plans using PMP's capabilities, equipment staffing, and processes for the projects at issue. Based on PMP's explanation the work plan information is specific to the projects at issue, we find PMP has failed to demonstrate the work plan information meets the definition of a trade secret. Furthermore, PMP has not demonstrated how the remaining information it seeks to withhold, including organization and personnel information, meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (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). Consequently, the department may not withhold any of the remaining information PMP seeks to withhold under section 552.110(a) of the Government Code.

PMP also claims the remaining information it seeks to withhold constitutes commercial information that, if released, would cause substantial competitive harm to the company. We find, however, PMP has made only general conclusory assertions that release of its remaining information at issue would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *See* Open Records Decision Nos. 661, 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. Therefore, the department may not withhold any of the remaining information PMP seeks to withhold under section 552.110(b) of the Government Code.

We note MPCCI's submitted proposal contains information that may be excepted under section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release.³ Gov't Code § 552.130(a)(1), (2). We have marked Texas license plate numbers, types, and expiration dates in MPCCI's proposal. The department must withhold the marked Texas motor vehicle record information under section 552.130 of the Government Code.

We also note PMP's, MMD's, FMC's, and MPCCI's proposals contain insurance policy numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or

³The 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).

instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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. We conclude the insurance policy numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the department must withhold the marked insurance policy numbers under section 552.136 of the Government Code.

A portion of BI's submitted proposal 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 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). Accordingly, BI's information must be released to the requestor in accordance with copyright law.

In summary, the department must withhold the marked customer information under section 552.110(a) of the Government Code; the marked Texas license plate numbers, types, and expiration dates under section 552.130 of the Government Code; and the marked insurance policy numbers under section 552.136 of the Government Code. The remaining information must be released, but BI's information 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/cc

Ref: ID# 363729

Enc. Submitted documents

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