



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2010

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

Attorney General of Texas

OR2010-06000

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# 377161.

The Texas Department of Transportation (the "department") received a request for all proposals submitted in response to, and bid tabulation or other evaluation documents for; request for offers number Q442009025184000, Data Entry and Validation Services. 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 Data Direction, Inc. ("Data Direction"), HDI Solutions, Inc. ("HDI"), Open Portal Solutions ("OPS"), PDS, Inc. d/b/a Priority Data ("PDS"), Rely Services, Inc. ("Rely"), and Sourcecorp BPS, Inc. ("Sourcecorp"). Accordingly, you state, and provide documentation showing, the department notified these companies of the request and of each company's 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 statutory 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 received comments from HDI and PDS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the part of the request for bid tabulation or other evaluation documents. To the extent information responsive to that portion of the request existed on the date the department received this request, we

assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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 not received comments from Data Direction, OPS, Rely, or Sourcecorp explaining why their submitted proposals should not be released. Therefore, we have no basis to conclude these 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. Consequently, the department may not withhold Data Direction's, OPS's, Rely's, or Sourcecorp's proposals on the basis of any proprietary interests they may have in the information.

HDI claims its financial statements in its submitted proposal are confidential under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, HDI has not directed our attention to any law, nor are we aware of any law, that makes HDI's submitted financial statements confidential. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the department may not withhold HDI's financial statements under section 552.101 of the Government Code. As HDI has not claimed any other exceptions to disclosure for this information, it must be released.

HDI and PDS claim portions of their submitted bid proposals 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.¹ 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.

~~PDS claims its submitted customer information, security plan, and disaster recovery plan constitute trade secrets under section 552.110(a). Upon review, we find PDS has established its customer information, which we have marked, constitutes trade secrets. Therefore, the department must withhold this information under section 552.110(a) of the Government~~

¹The 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).

Code. We find, however, PDS has not demonstrated how its security plan and disaster recovery plan meet 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, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the department may not withhold PDS's security plan or disaster recovery plan under section 552.110(a) of the Government Code. As PDS has not claimed any other exceptions to disclosure for this information, it must be released.

PDS also claims some of its remaining information, and HDI claims portions of its information, constitutes commercial information that, if released, would cause each company substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find PDS has established release of its financial statements, balance sheets, and bank letter would cause the company substantial competitive injury. Therefore, the department must withhold this information, which we have marked, under section 552.110(b). We find, however, PDS and HDI have made only general conclusory assertions that release of the remaining information at issue, including HDI's pricing information, would cause it substantial competitive injury, and have provided no specific factual or evidentiary showing to support such assertions. *See generally* 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 (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). Furthermore, we note HDI was the winning bidder in this instance and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *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). Therefore, the department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

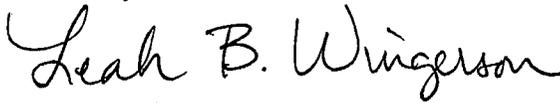
In summary, the department must withhold the customer information we have marked under section 552.110(a) of the Government Code and the financial information we have marked under 552.110(b) of the Government Code. The remaining information must be released.²

²We note Rely's submitted information 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.

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/dls

Ref: ID# 377161

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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