



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2010

Mr. David Daugherty
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2010-07649

Dear Mr. Daugherty:

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# 380999.

The Harris County Purchasing Department (the "department") received a request for the proposal and best and final offer for a specified company for RFP #09/0239, any contracts relating to this RFP, and evaluation and scoring that resulted in the award for this RFP. You state you have released a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also state release of this information may implicate the proprietary interests of a third party. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the department has notified American Cadastre LLC d/b/a AmCad ("AmCad") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in certain circumstances). We have received comments from AmCad. We have considered the submitted arguments and reviewed the submitted information.

You claim that the submitted information is subject to 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, you have not directed our attention to any law, nor are we aware of any law, that makes the submitted information 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 any of the submitted information under section 552.101 of the Government Code.

Next, although the department raises section 552.110 of the Government Code for the submitted information, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we will only address AmCad's arguments under section 552.110. 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. *See* 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 trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). 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 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 single or ephemeral events 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 Huffines*, 314 S.W.2d at 776. 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). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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. *See* 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.*; *see also* Open Records Decision No. 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).

AmCad contends that some of the submitted information constitutes trade secrets under section 552.110(a) of the Government Code. However, we conclude that AmCad has failed to demonstrate any portion of the submitted information constitutes a trade secret protected by section 552.110(a). *See* ORD 402. Thus, the department may not withhold any of the submitted information under section 552.110(a) of the Government Code.

AmCad seeks to withhold portions of its submitted information under section 552.110(b). Upon review, we determine that AmCad has established that release of some of its

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).

co-development process and client information would cause AmCad substantial competitive injury. Thus, the department must withhold the information in Section 13, pages 13-1 through 13-4, and most of the submitted client information under section 552.110(b). However, we note that AmCad has made some of the client information they seek to withhold publicly available on their website. Because AmCad has published this information, which we have marked for release, they have failed to demonstrate that release of this information would cause substantial competitive injury. As to the remaining submitted information, we find that AmCad has made only conclusory allegations that release of the remaining submitted information would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Furthermore, we note the pricing information of a winning bidder, such as AmCad, 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). Thus, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

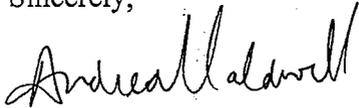
We note a portion of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of 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, with the exception of the information we have marked for release, the department must withhold AmCad's client information under section 552.110(b) of the Government Code. The department must also withhold Section 13, pages 13-1 through 13-4, under section 552.110(b) of the Government Code. The remaining information must be released, but any information subject to copyright may only be released in accordance with federal 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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 380999

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Robert Hickes
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(w/o enclosures)