ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2011

Ms. Rosa Miranda Baker
Records Management/Public Information Office
Tyler Independent School District
P.O. Box 2035
Tyler, Texas 75710

OR2011-07787

Dear Ms. Baker:

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# 419316.

The Tyler Independent School District (the "district") received a request for information relating to a request for proposals for telecommunications services. You inform us some of the requested information has been released. Although you take no position on the public availability of the submitted information, you believe the information may implicate the interests of Windstream NTI, Inc. ("Windstream"). You state Windstream was notified of this request for the submitted information and of its right to submit arguments to this office as to why the information should not be released.[1] We received arguments from Windstream under sections 552.104 and 552.110 of the Government Code. We have considered Windstream's arguments and reviewed the information you submitted.

We note the district did not comply with its ten-business-day deadline under section 552.301(b) of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) requires a governmental body to ask for the attorney general's decision and state any exceptions to disclosure it claims no later than the tenth

[1] *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us the district received the request for the submitted information on March 14, 2011; therefore, the district's ten-business-day deadline under section 552.301(b) was March 28. The district requested this decision on March 29.[2] *See* Gov't Code § 552.308(a) (prescribing requirements for timeliness of request for ruling submitted by United States mail). Thus, because the district did not comply with section 552.301, the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Accordingly, we will address Windstream's arguments against disclosure.

Among other things, Windstream states it identified its proposal as being confidential. We note information is not confidential under the Act simply because the party that submitted the information anticipated or requested that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Therefore, the submitted information must be released unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

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(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Therefore, because the district does not claim an exception to disclosure under section 552.104(a), the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and

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[2]We note the district submitted its request for this decision by facsimile on March 29 and by United States mail meter-marked March 29.

privileged or confidential by statute or judicial decision" and "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 Supreme Court of Texas 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 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 . . . . [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 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] *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude section 552.110(a) is applicable, however, 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. *See* Open Records Decision No. 402 (1983).

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[3]The 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 other 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 substantial competitive harm).

Windstream contends the district should withhold its entire proposal under section 552.110 of the Government Code. Windstream also claims both aspects of section 552.110 for customer, pricing and other specified information in its proposal. Having considered Windstream's arguments and reviewed the information at issue, we conclude the district must withhold Windstream's customer information under section 552.110(a) and its pricing information under section 552.110(b). We have marked the information the district must withhold under section 552.110. We find Windstream has not demonstrated any of the remaining information at issue constitutes a trade secret under section 552.110(a). We also find Windstream has not made the specific factual or evidentiary demonstration required by section 552.110(b) that release of any of the remaining information would cause Windstream substantial competitive harm. We therefore conclude the district may not withhold any of the remaining information under section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); ORD 552 at 5, 661 at 5-6; *see also* Open Records Decision Nos. 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 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, and qualifications and experience).

We note section 552.136 of the Government Code is applicable to some of the remaining information.[4] Section 552.136(b) 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device number for purposes of section 552.136. Therefore, the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.[5]

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[4]This office will raise section 552.136 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

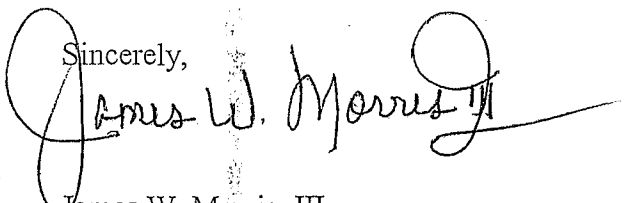
[5]We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an insurance policy number under section 552.136 of the Government Code.

In summary, the district must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The district must release the rest of the submitted information.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 419316

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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