



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2011

Ms. Tiffany N. Colunga
Chief Civil Prosecutor
Comal County Criminal District Attorney's Office
150 North Seguin, Suite 307
New Braunfels, Texas 78130

OR2011-18341

Dear Ms. Colunga:

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# 438578 (File No. 11-OR-077).

The Comal County Purchasing Department (the "county") received a request for information related to request for proposals number 040-2011-370 for inmate telephone service, including competitors' bids, scoring documents, communications, and the county's contract with the winning bidder. Although you take no position on the public availability of the requested information, you believe the submitted information may implicate the proprietary interests of Inmate Calling Solutions, LLC ("ICS"); NCIC Inmate Phone Service; Securus Technologies, Inc. ("Securus"); Synergy Telecom Service Company, Inc.; and Value-Added Communications, Inc. You inform us the interested parties were notified of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released.¹ We received correspondence from ICS and Securus. We have considered their arguments and reviewed the submitted information.² We assume

¹See 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).

²We note the submitted information includes the requestor's company's proposal. As we have no indication you provided the requestor with notice pursuant to section 552.305 of the Government Code, we do not understand the requestor to seek access to her company's proposal. Thus, we do not address the public availability of that information, and the county need not release it in response to the request.

the county has released any other information that is responsive to this request, to the extent such information existed when the county received the request. If not, then any such information must be released immediately.³ See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We first note the county did not comply with its fifteen-business-day deadline under section 552.301(e) 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(e) requires a governmental body to submit the information at issue to this office no later than the fifteenth business day after the date of the governmental body's receipt of the written request for information. See *id.* § 552.301(e)(1)(D). 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 county received the request for the submitted information on September 22, 2011; therefore, the county's fifteen-business-day deadline under section 552.301(e) was October 14. The county submitted the information at issue on November 30. See Gov't Code § 552.308(a) (prescribing requirements for timeliness of submission of documents by common or contract carrier). Thus, because the county 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 determine whether the county must withhold any of the submitted information to protect the interests of the third parties.

We note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, only ICS and Securus have submitted arguments to this office. Thus, because the other third parties involved have not demonstrated that any of the information at issue is proprietary for purposes of the Act, the county may not withhold any of the submitted information on the basis of any interest the other parties may have in the information. See *id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

³We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Next, we address the arguments we received from ICS and Securus. Among other things, both ICS and Securus state that they designated information they seek to withhold from the requestor as being proprietary and/or 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 information submitted to the county by ICS and Securus must be released unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Both ICS and Securus claim section 552.110 of the Government Code for portions of their proposals. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and 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.⁴ *See* ORD 552 at 5. 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).

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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause substantial competitive harm).

Securus contends portions of its proposal are trade secrets for purposes of section 552.110(a). Securus also claims section 552.110(b) for the company's history, information relating to its fiscal responsibility, and its financial statements. ICS also contends its financial statements are excepted from disclosure under section 552.110(b). Having considered the parties' arguments and reviewed the information at issue, we find Securus has not established any of the information in its proposal constitutes a trade secret under section 552.110(a). We also find that neither Securus nor ICS has made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information at issue would cause the companies substantial competitive harm. We therefore conclude the county may not withhold any of the submitted 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).

⁴The 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).

We note sections 552.130 and 552.136 of the Government Code are applicable to some of the submitted information.⁵ Section 552.130 excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). The county must withhold the motor vehicle information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides in part 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. The county must withhold the bank account, bank routing and insurance policy numbers we have marked under section 552.136 of the Government Code.

Lastly, the county notes some of the submitted information appears to be subject to copyright law. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1977); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials 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.

In summary, the county must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The county must release the rest of the submitted information, but any copyrighted information may only be released in accordance with copyright law.

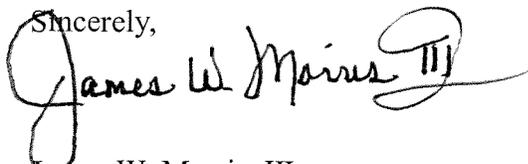
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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, 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

⁵This office will raise sections 552.130 and 552.136 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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# 438578

Enc: Submitted documents

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