



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 2, 2013

Ms. Gretchen Reuwer
Officer for Public Information
New Braunfels Utilities
P.O. Box 310289
New Braunfels, Texas 78131-0289

OR2013-05188

Dear Ms. Reuwer:

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# 482976.

New Braunfels Utilities ("NBU") received a request for the winning bid for request for proposal number 02219. You claim the requested information is excepted from disclosure under section 552.101 of the Government Code.¹ In addition, you state release of the submitted information may implicate the proprietary interests of High Cotton USA, Inc. ("High Cotton"). Accordingly, you state you have notified High Cotton of the request and the company's right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from High Cotton. We have considered the submitted arguments and reviewed the submitted information.

¹Although you cite to "Section 551.101" of the Government Code, we understand you to claim section 552.101. In addition, although you also raise sections 552.104 and 552.133 of the Government Code, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

Initially, we must address NBU's procedural obligations under the Act. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under an exception to disclosure is required to submit to this office within fifteen business days of receiving the request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). NBU received the request for information on January 11, 2013. Accordingly, NBU's ten-business-day deadline was January 28, 2013, and NBU's fifteen-business-day deadline was February 4, 2013. We note NBU did not raise section 552.101 of the Government Code until February 11, 2013. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail). Furthermore, although NBU submitted some of the information in a timely manner, we note the remaining submitted information was not provided until February 11, 2013. *See id.* Therefore, with respect to section 552.101 of the Government Code and the additional information, we conclude NBU failed to comply with the procedural requirements set out under section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). As section 552.101 can provide a compelling reason to overcome this presumption and third party interests are at stake, we will address your argument under section 552.101 and the submitted third-party arguments against disclosure.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments or tax payments, . . . or any other data,

received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, we find NBU must withhold the tax return information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. However, we find NBU has failed to demonstrate any portion of the remaining information is subject to section 6103(a) of title 26 of the United States Code. Therefore, NBU may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

High Cotton raises section 552.110 of the Government Code for some of its information. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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) excepts from disclosure “[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 section requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

High Cotton raises section 552.110(a) for its submitted information. Upon review, we find High Cotton has established some of its process and customer information constitutes trade secrets. Therefore, NBU must withhold this information, which we have marked, under section 552.110(a) of the Government Code.³ However, we note High Cotton has made the identities of some of its customers, which it seeks to withhold, publicly available on its website. Thus, High Cotton has failed to demonstrate the information published on its website is a trade secret. Further, we conclude High Cotton has not demonstrated how any of the remaining information at issue meets the definition of a trade secret, nor has High Cotton demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b; ORD 402 (section 552.110(a) does not apply unless

²The following are the six factors that the Restatement gives 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).

³As our ruling for this information is dispositive, we need not address your remaining argument against its release.

information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). We note pricing information pertaining to a particular proposal or contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Thus, NBU may not withhold any of the remaining information under section 552.110(a) of the Government Code.

High Cotton also raises section 552.110(b) for its remaining information. Upon review, we find High Cotton has established that its financial statements, which we have marked, constitute commercial or financial information, the release of which would cause the company substantial competitive harm. Thus, NBU must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find High Cotton has made only conclusory allegations the release of the remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661, 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 is too speculative). Further, we note the pricing information of a winning bidder, such as High Cotton, is generally not excepted under section 552.110(b). This office considers 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* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Consequently, NBU may not withhold any of the remaining information under section 552.110(b) of the Government Code.

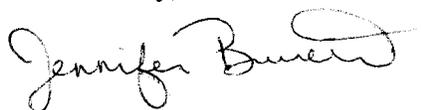
High Cotton asserts its remaining information is excepted under section 552.133 of the Government Code, which excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." *See* Gov't Code § 552.133(b). Section 552.133 only protects the competitive interest of a public power utility. This exception does not protect the interests of third parties, such as High Cotton. *See* Open Records Decision No. 666 at 2 (2000) (statutory predecessor to section 552.133 enacted to protect municipally owned utilities from public disclosure of competitive matters). Thus, we find High Cotton has failed to demonstrate the applicability of section 552.133 to its remaining information, and NBU may not withhold it on that basis.

In summary, NBU must withhold the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and the information we have marked under section 552.110 of the Government Code. NBU must release the remaining 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 482976

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Mr. James W. Wright, Jr.
Counsel for High Cotton USA, Inc.
Bradley Arant Boult Cummings, L.L.P.
1819 Fifth Avenue North
Birmingham, Alabama 35203-2119
(w/o enclosures)