



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2013

Mr. R. Brooks Moore
Managing Counsel, Governance
Office of General Counsel
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2013-15525

Dear Mr. Moore:

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# 498562 (SO-13-048).

The Texas A&M University System (the "system") received a request for the competitors' responses, evaluations, and final contract pertaining to a specified request for proposals. Although you take no position as to whether the submitted information is excepted under the Act, you inform us the release of this information may implicate the proprietary interests of Fugro Airborne Surveys ("Fugro") and SkyTEM Canada Inc. ("SkyTEM"). Accordingly, you notified Fugro and SkyTEM of the request for information and of their 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) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received comments from Fugro and SkyTEM. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you did not submit the requested contract for our review. Thus, to the extent the contract at issue existed on the date the system received the request, we assume you have released it. If you have not released the requested contract, 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).

Fugro asserts that its information is excepted 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, Fugro has not directed our attention to, and we are not aware of, any law under which any of its information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). In addition, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990). Therefore, we conclude that the system may not withhold Fugro's information under section 552.101 of the Government Code.

Fugro and SkyTEM raise section 552.104 of the Government Code for their information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the system does not argue section 552.104 is applicable, we will not consider these companies' claims under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the system may not withhold any of the submitted information under section 552.104 of the Government Code.

Fugro and SkyTEM also raise section 552.110 of the Government Code for their information. 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 552 at 5 (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.¹ RESTATEMENT OF TORTS § 757 cmt. b. 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). 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1990) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Fugro and SkyTEM contend their information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Fugro has established its customer information and SkyTEM has established some of its customer information constitutes trade secrets. Therefore, the system must withhold this information, which we have marked, under section 552.110(a). However, we note SkyTEM has made some of its customer information publicly available on its website. Because SkyTEM itself published this information, we are unable to conclude such information is proprietary. Upon further review, we find Fugro and SkyTEM failed to establish a *prima facie* case that any of the

¹The following are the six factors 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

remaining information at issue is a trade secret protected by section 552.110(a). *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We note pricing information pertaining to a particular 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.” RESTATEMENT OF TORTS § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Therefore, the system may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Fugro and SkyTEM also claim their remaining information constitutes commercial or financial information that, if released, would cause the companies substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find Fugro has established release of its pricing information and SkyTEM has established release of some of its remaining information would cause them substantial competitive harm. Therefore, the system must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we note SkyTEM was awarded the contract at issue. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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 a cost of doing business with government). Moreover, because SkyTEM has published its remaining customer information on its website, the company has failed to demonstrate how release of this information would cause it substantial competitive harm. Furthermore, we find Fugro and SkyTEM have not demonstrated how release of their remaining information would cause them substantial competitive harm and have provided no specific factual or evidentiary showing to support such assertions. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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). Consequently, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136(b) of the Government Code 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.”² Gov’t Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Therefore, the system must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code.

In summary, the system must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/akg

Ref: ID# 498562

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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