



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2014

Mr. Stephen R. Alcorn
Assistant City Attorney
City of Grand Prairie
P.O. Box 534045
Grand Prairie, Texas 75053-4045

OR2014-05606

Dear Mr. Alcorn:

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# 518825.

The City of Grand Prairie (the "city") received a request for records pertaining to a specified city request for proposals, including the proposal submitted by SunGard Public Sector, Inc. ("SunGard"), and the final awarded contract. The city claims some of the submitted information is excepted from disclosure under section 552.110 of the Government Code. In addition, the city states release of this information may implicate the proprietary interests of SunGard. Thus, you state you notified SunGard of the request and of the company's right to submit arguments to this office pursuant to section 552.305 of the Government Code, as to why its information should not be released. Gov't Code § 552.305(d); *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 to disclosure under the Act in certain circumstances). We have received comments from SunGard. We have considered the submitted arguments and reviewed the submitted information.¹

We note information subject to the Act is not confidential simply because the parties submitting the information anticipate or request that it be kept confidential. *See Indus.*

¹We note the city did not submit a copy of the software licenses and service agreement within the fifteen-business-day deadline and therefore failed to comply with the requirements of section 552.301(e) of the Government Code with respect to that information. *See id.* § 552.301(e). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake in this instance, we will consider whether the information at issue must be withheld under the Act.

Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 677 (Tex. 1976). In other words, governmental bodies or third-parties cannot, through an agreement or contract, overrule or repeal provisions of the Act. 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 does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

SunGard raises section 552.102 of the Government Code for portions of its proposal.² Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The Texas Supreme Court held that section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find that no portion of the submitted information is subject to section 552.102(a). Therefore, we find section 552.102 is not applicable to SunGard’s information, and the city may not withhold any of the submitted information on that basis.

SunGard also raises section 552.104 of the Government Code for portions of its proposal. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” 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). Accordingly, we will not consider Sungard’s claim under this section. See *id.* (section 552.104 may be waived by governmental body). Therefore, because the city does not raise section 552.104, the city may not withhold any of the submitted information under section 552.104 of the Government Code.

Although the city argues some of the submitted information is excepted under section 552.110 of the Government Code, this section is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city’s argument under section 552.110. However, we will address SunGard’s claims that portions of its proposal and the software licenses and service agreement are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure (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).

²Although SunGard cites to section 552.112 of the Government Code in its brief, we understand it to raise section 552.102 based on its argument.

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 a “trade secret” from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 defines 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 a single or ephemeral event 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) (citation omitted); *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.³ This office will accept a claim that information subject to the Act is excepted as a trade secret under section 552.110(a) if a *prima facie* case for the exception is made, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable 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. 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. *See* ORD 661 at 5-6 (business must show by

³The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

specific factual evidence that release of particular information at issue would cause substantial competitive injury).

SunGard asserts that portions of its information constitute protected trade secrets under section 552.110(a) of the Government Code. Upon review, we find SunGard has established a *prima facie* case that the customer information consisting of "Agency Name and Address" in section 3, pages 3-1 and 3-2, of its proposal constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information at issue is not publicly available on SunGard's website, the city must withhold the customer information consisting of "Agency Name and Address" in section 3, pages 3-1 and 3-2, of SunGard's proposal under section 552.110(a) of the Government Code. However, we find SunGard failed to demonstrate how any of its remaining information constitutes a trade secret, nor has SunGard demonstrated the necessary factors to establish a trade secret claim for its remaining information. 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 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the city may not withhold any of the remaining information under section 552.110(a) of the Government Code.

SunGard next asserts portions of the remaining information, including any remaining customer information, consists of protected commercial and financial information under section 552.110(b) of the Government Code. We note SunGard was the winning bidder in this instance. 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 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3); Open Records Decision No. 541 at 8 (1990). Further, to the extent any of the customer identities SunGard seeks to withhold have been published on its website, we find SunGard has failed to establish release of such information would cause the company substantial competitive harm. Upon review, we find SunGard has not established any of the remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* ORD 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). Therefore, the city may not withhold any of SunGard's remaining information under section 552.110(b).

In summary, to the extent the customer information at issue is not publicly available on SunGard's website, the city must withhold the customer information consisting of "Agency Name and Address" in section 3, pages 3-1 and 3-2, of SunGard's proposal under section 552.110(a) of the Government Code. The city 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.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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 518825

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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