



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2014

Mr. Chad J. Lersch
Assistant General Counsel
Texas Department of Information Resources
P.O. Box 13564
Austin, Texas 78711-3564

OR2014-12976

Dear Mr. Lersch:

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# 530368.

The Texas Department of Information Resources (the "department") received a request for "all bid/response documents from vendors who have received contracts in response to DIR RFO DIR-SDD-TMP-199[,] including Best and Final Offers."¹ You state the department released some of the requested information. Although the department takes no position with respect to the remaining requested information, you assert its release may implicate the interests of third parties. Accordingly, you inform this office, and provide documentation demonstrating, the department notified the third parties of the request for information and of their right to submit arguments stating why their information should not be released.² *See*

¹You state the department sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²The third parties notified pursuant to section 552.305 are the following: ATScld - Automated Telecommunications; Blue River Information Technology, L.L.C. ("Blue River"); Cognizant Technology Solutions ("Cognizant"); Deloitte L.L.P.; Doublehorn Communications, L.L.C.; Environmental Intelligence, L.L.C.; General Dynamics Information Technology ("GDIT"); and KPMG L.L.P.

Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by Blue River, Cognizant, and NJVC, L.L.C., a subcontractor of GDIT ("NJVC").

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has received comments from only Blue River, Cognizant, and NJVC explaining why their information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate any of the remaining third parties' interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, we conclude the department may not withhold any of the submitted information on the basis of any interest the remaining third parties may have in the information.

Cognizant and NJVC raise section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Cognizant has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. Therefore, we conclude the department may not withhold any of Cognizant's information under that section.

NJVC argues its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the Defense Federal Acquisition Regulation Supplement ("DFARS"). *See* 48 C.F.R. ch. 2. DFARS applies to purchases and contracts by the United States Department of Defense (the "USDOD"). *See id.* § 201.104. In order to safeguard classified information, contracts under DFARS are required to have a clause found at section 252.204-7000 regarding the disclosure of information when "the contractor will have access to or generate unclassified information that may be sensitive and inappropriate for release to the public." *Id.* § 204.404-70(a). NJVC states it received a contract from an agency of the USDOD and the contract included the said required clause. Section 252.204-7000 prescribes the exact wording of the clause to be used:

Disclosure of Information

(a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless –

(1) The Contracting Officer has given prior written approval; [or]

(2) The information is otherwise in the public domain before the date of release[.]

...

(b) Requests for approval under paragraph (a)(1) shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 10 business days before the proposed date for release.

(c) The Contractor agrees to include a similar requirement, including this paragraph (c), in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

Id. § 252.204-7000. NJVC asserts its information is confidential pursuant to these DFARS provisions. However, these provisions require contractual disclosure of information clauses be used, but do not expressly make information confidential. As discussed above, statutory confidentiality requires express language making information confidential or stating information shall not be released to the public. *See* ORD 658, 478. Accordingly, the department may not withhold NJVC's information under section 552.101 of the Government Code in conjunction with these DFARS provisions.

Blue River and Cognizant claim some of their information is excepted under section 552.110 of the Government Code. Section 552.110 protects (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. Gov't Code § 552.110.

Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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 *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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

³There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (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).

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. *Id.* § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Blue River and Cognizant have each established a *prima facie* case that the customer information consisting of customer name and contact name, telephone number, and e-mail address 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 either company’s website, the department must withhold the customer information consisting of customer name and contact name, telephone number, and e-mail address in Blue River’s and Cognizant’s submitted information under section 552.110(a) of the Government Code. We also find Blue River has established a *prima facie* case that portions of its remaining information constitute trade secret information. Therefore, the department also must withhold the information we have marked under section 552.110(a) of the Government Code.⁴

However, we find Blue River and Cognizant failed to demonstrate how any of their remaining information constitutes a trade secret, nor has either company 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 department may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Blue River and Cognizant next assert portions of the remaining information, including any remaining customer information, consist of protected commercial and financial information under section 552.110(b) of the Government Code. To the extent any of the customer identities Blue River or Cognizant seeks to withhold have been published on its website, we find Blue River and Cognizant have failed to establish release of such information would cause either company substantial competitive harm. Further, we find Blue River and Cognizant have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the companies substantial competitive harm. *See* 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 is too

⁴As our ruling is dispositive for this information, we need not consider the remaining argument against its disclosure.

speculative), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the department may not withhold any of the remaining information under section 552.110(b).

We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person 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, to the extent the customer information at issue is not publicly available on either company's website, the department must withhold the customer information consisting of customer name and contact name, telephone number, and e-mail address in Blue River's and Cognizant's submitted information under section 552.110(a) of the Government Code. The department also must withhold the information we have marked under section 552.110(a) of the Government Code. The department must release the remaining information; however, any information protected by copyright 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.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,



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Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 530368

Enc. Submitted documents

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(w/o enclosures)

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