



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 7, 2014

Dr. Fernando C. Gomez
Vice Chancellor and General Counsel
The Texas State University System
208 East 10th Street, Suite 600
Austin, Texas 78701-2407

OR2014-13758

Dear Dr. Gomez:

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# 532010.

The Texas State University System (the "system") received a request for all bids submitted in response to a specified request for proposals, excluding the bid submitted by the requestor's company. Although you take no position with respect to the public availability of the requested information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you state, and provide documentation demonstrating, you notified DoubleMap, Inc. ("DoubleMap"); ETA Transit Systems ("ETA"); NextBus, Inc.; TransLoc, Inc.; and Trapeze Software Group, Inc. of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 received arguments submitted by DoubleMap and ETA. We have considered these arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the

date of this letter, we have not received arguments from any of the remaining third parties. Thus, none of these parties has demonstrated it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); 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, the system may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information other statutes make confidential. ETA asserts a portion of its information is protected by the Privacy Act of 1974, section 552a of title 5 of the United States Code (“Federal Privacy Act”). However, the Federal Privacy Act applies only to a federal agency. *See* 5 U.S.C. §§ 552(f), 552a(a). State and local government agencies are not covered by the Federal Privacy Act. *See Davidson v. Georgia*, 622 F. 2d 895, 896 (5th Cir. 1980); *see also* Attorney General Opinion MW-95 (1979). Because the system is not a federal agency, it is not bound by the Federal Privacy Act’s confidentiality provisions as would be a federal agency. *See* 5 U.S.C. §§ 552a(a)(1), 552(f) (defining “agency” for purposes of Federal Privacy Act). Therefore, none of the information at issue can be considered confidential by law pursuant to section 552.101 of the Government Code in conjunction with the Federal Privacy Act.

ETA further asserts a portion of its information is protected by the Procurement Integrity Act, chapter 21 of title 41 of the United States Code. Section 2102(a) of title 41 of the United States Code provides, in relevant part:

(1) In general.—Except as provided by law, a person described in paragraph (3) shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

...

(3) Application.—Paragraph (1) applies to a person that—

(A)(i) is a present or former official of the Federal Government; or

(ii) is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement; and

(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

41 U.S.C. § 2102(a)(1), (3). We note section 2102 applies only to information related to a “Federal agency procurement contract.” *See id.* § 2102(a)(1). Furthermore, this section applies only to “a present or former official of the Federal Government” or a person that “is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement.” *See id.* § 2102(a)(3)(A)(I), (ii). Because the system is not a federal agency, the system is not acting on behalf of the federal government, and the submitted information does not relate to a federal agency procurement, the Procurement Integrity Act does not apply to the submitted information. *See id.* § 2101(3), (4) (defining “Federal agency” and “Federal agency procurement” for purposes of Procurement Integrity Act). Therefore, none of the information at issue can be considered confidential by law pursuant to section 552.101 of the Government Code in conjunction with the Procurement Integrity Act.

DoubleMap and ETA present arguments under section 552.110 of the Government Code.¹ 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. *See Gov’t Code* § 552.110(a)–(b). 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, 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade

¹Although DoubleMap does not cite to a specific exception to disclosure, we understand it to raise section 552.110 based on the content of its arguments.

secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless a party shows its information meets the definition of a trade secret and it demonstrates the necessary factors 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 id.*; *see also* ORD 661 at 5.

DoubleMap and ETA argue portions of their information are trade secrets. 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978). Upon review, we find ETA has established a *prima facie* case its customer information constitutes trade secret information for purposes of section 552.110(a). Therefore, to the extent this information is not publicly available on ETA’s website, the system must withhold the customer information we have marked under section 552.110(a) of the Government Code.³ However, we find DoubleMap and ETA have failed to demonstrate the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for any of the remaining information. Thus, the system may not withhold any of the remaining information under section 552.110(a) of the Government Code.

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

³As our ruling is dispositive for this information, we need not address ETA’s remaining argument against its disclosure.

DoubleMap and ETA also argue the release of portions of their information would cause substantial competitive harm. We note DoubleMap was the winning bidder with respect to the contract at issue, and the pricing information of a winning bidder is generally not excepted under section 552.110(b) of the Government Code. This office considers the 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 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the system may not withhold any of DoubleMap's pricing information under section 552.110(b). Upon review, we conclude ETA has established the release of its pricing information would cause it substantial competitive injury. Accordingly, the system must withhold the pricing information we have marked under section 552.110(b). However, we find DoubleMap and ETA 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 either party substantial competitive harm. *See* ORD 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 system may not withhold any portion of the remaining information under section 552.110(b).

Section 552.136(b) of the Government Code provides, "[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."⁴ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Thus, the system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note some of the remaining information is 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). However, 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.

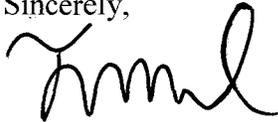
⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the system must withhold ETA's customer information to the extent this information is not publicly available on ETA's website under section 552.110(a) of the Government Code. The system must withhold the pricing information we have marked under section 552.110(b) of the Government Code. The system must withhold the information we marked under section 552.136 of the Government Code. The system must release the remaining information; however, any information that is subject to copyright may be released only 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,



Tim Neal
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Open Records Division

TN/bhf

Ref: ID# 532010

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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