



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 3, 2015

Mr. K. Scott Oliver
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2015-10862

Dear Mr. Oliver:

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# 566213.

San Antonio Water System ("SAWS") received a request for all proposals submitted in response to request for proposals number R-14-009-GC. Although you take no position with respect to the public availability of the requested information, you state its release may implicate the proprietary interests of certain third parties, namely: Castle Branch, Inc. ("Castle"); Kelmar Global, Inc. ("Kelmar"); Premier ISA ("Premier"); San Antonio Retail Merchants Association ("SARMA"); and Scott Roberts & Associates, L.L.C. ("Roberts"). Accordingly, you state, and provide documentation demonstrating, SAWS notified these third parties of the request for information and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305(d) (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 received comments from Castle, Kelmar, and Roberts, and you have provided copies of correspondence reflecting Premier and SARMA object to release of their information. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Premier has marked its proposal as confidential. However, information is not confidential under the Act simply because the party submitting the information requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S. W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract,

overrule or repeal provisions of the Act. 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 Gov’t Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Premier or SARMA explaining why the submitted information should not be released. Therefore, we have no basis to conclude Premier or SARMA has a protected proprietary interest in the submitted information. *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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, SAWS may not withhold the submitted information on the basis of any proprietary interest Premier or SARMA may have in the information.

Roberts raises section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). However, we note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Accordingly, we will not consider the third party’s claim under this section. Further, SAWS does not raise section 552.104 as an exception to disclosure. Therefore, SAWS may not withhold any portion of the submitted information under section 552.104 of the Government Code.

Castle, Kelmar, and Roberts state some of their information is excepted from disclosure 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. *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 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 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 claim 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 No. 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 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD No. 661 at 5 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

Castle, Kelmar, and Roberts each argue portions of the submitted information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find

¹The 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Castle, Kelmar, and Roberts have demonstrated the client information we have marked constitutes a trade secret. Thus, to the extent the client information at issue is not publicly available on each company's respective website, SAWS must withhold the information we have marked under section 552.110(a) of the Government Code.² However, we conclude Castle, Kelmar, and Roberts have failed to establish a *prima facie* case any portion of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for their remaining information. *See* ORD 402. Therefore, SAWS may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Castle, Kelmar, and Roberts further argue portions of the remaining information consist of commercial information, the release of which would cause substantial harm to the companies under section 552.110(b) of the Government Code. Upon review, we find Kelmar has demonstrated its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, SAWS must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Castle, Kelmar, and Roberts have not demonstrated the release of any of their remaining information, including their client information to the extent it is publicly available on each company's respective website, would result in substantial harm to its competitive position. *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 substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, SAWS may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136 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."³ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Upon review, we find SAWS must withhold the submitted insurance policy numbers under section 552.136 of the Government Code.

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

Roberts states its remaining information may 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 client information at issue is not publicly available on each company's respective website, SAWS must withhold the information we have marked under section 552.110(a) of the Government Code. SAWS must withhold the information we have marked under section 552.110(b) of the Government Code. SAWS must withhold the submitted insurance policy numbers under section 552.136 of the Government Code. SAWS must release the remaining information; however, SAWS may only release information subject to copyright 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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 566213

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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