



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 27, 2015

Ms. Elisabeth D. Nelson
Counsel for the Lewisville Independent School District
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2015-15244

Dear Ms. Nelson:

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# 572927.

The Lewisville Independent School District (the "district"), which you represent, received a request for all bids submitted in response to request for proposals number 2393-15. You claim some of the submitted information is excepted from disclosure under section 552.136 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Ricoh USA, Inc. ("Ricoh"); Strategic Technology Partners of Texas ("STP"); and Xerox Corporation ("Xerox").¹ Accordingly, you state, and provide documentation showing, you notified Ricoh, STP, and Xerox of the request for information and of the right of each 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

¹We note the district did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because section 552.136 of the Government Code and third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider the submitted arguments against disclosure of the submitted information. *See id.* §§ 552.007, .302, .352.

exception in the Act in certain circumstances). We have received comments from Ricoh and Xerox. We have reviewed the submitted information and the submitted arguments.

Initially, we note 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from STP explaining why the submitted information should not be released. Therefore, we have no basis to conclude STP 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, 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 district may not withhold the submitted information on the basis of any proprietary interest STP may have in the information.

Ricoh raises section 552.104 of the Government Code for its information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. A private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264 (Tex. June 19, 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at *9. Ricoh states it has competitors. In addition, Ricoh asserts its competitive position will be harmed if a competitor can gain access to its proposal, and argues such access would "destroy all of the independent and customized work Ricoh did to prepare and present its proposal to the [d]istrict." Ricoh argues the requestor is its competitor, and the information at issue, if released, would give the requestor an unfair advantage. Ricoh states release of the information would allow its competitor to use Ricoh's information as a point of reference to "shave" its own proposal[,] thereby creating an unfair competitive playing field. After review of the information at issue and consideration of Ricoh's arguments, we find Ricoh has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold Ricoh's information under section 552.104(a) of the Government Code.²

Xerox argues portions of its information are 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

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

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.³ 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 the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). 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). 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."

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 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).

RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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. *Id.*; *see also* Open Records Decision No. 661 at 5 (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).

Xerox asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Xerox has established a *prima facie* case its customer information constitutes trade secret information. Accordingly, to the extent Xerox’s customer information is not publicly available on Xerox’s website, the district must withhold Xerox’s customer information under section 552.110(a). However, we conclude Xerox has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Xerox has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, the district may not withhold any of Xerox’s remaining information under section 552.110(a).

Xerox argues due to the sensitive nature of its information, if the information were disclosed, other vendors would be less likely to provide the information to the government in the future. In advancing this argument, Xerox relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). The *National Parks* test provides commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in future. 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration showing the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of Gov’t Code § 552.110(b))

by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Xerox's interests in withholding its information.

Xerox further argues portions of its information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Xerox has failed to demonstrate the release of any of its remaining information 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 that 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). Accordingly, the district may not withhold any of Xerox's remaining information under section 552.110(b).

Section 552.136 of the Government Code provides, "Notwithstanding 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." 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. Accordingly, the district must withhold the insurance policy numbers you have marked under section 552.136 of the Government Code.

We note some of the materials at issue 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, the district must withhold Ricoh's information under section 552.104(a) of the Government Code. To the extent Xerox's customer information is not publicly available on Xerox's website, the district must withhold Xerox's customer information under section 552.110(a). The district must withhold the insurance policy numbers you marked under section 552.136 of the Government Code. The district 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 572927

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Katie Lester
Senior Counsel
Ricoh USA, Inc.
70 Valley Stream Parkway
Malvern, Pennsylvania 19355
(w/o enclosures)

Mr. Chris Stoner
Strategic Technology Partners of Texas
101 North Austin
Denton, Texas 76201
(w/o enclosures)

Ms. Karen Yankosky
Senior Counsel
Xerox Corporation
8260 Willow Oaks Corporate Drive,
Suite 600
Fairfax, Virginia 22031
(w/o enclosures)