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ATTORNEY GENERAL OF TEXAS

September 4, 2015

Mr. K. Scott Oliver
Corporate Counsel
San Antonio Water System
P.O. Box 2449
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OR2015-18600

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# 578296 (ORR No. 4166).

The San Antonio Water System (the "system") received a request for all competitive responses for a specified request for proposals. Although you take no position as to whether the requested information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of Western Union Global Consumer Financial Services a/k/a SpeedPay ("SpeedPay"); FormMaker Software, Inc. d/b/a Kubra ("Kubra"); Wells Fargo Merchant Services, LLC ("Wells Fargo"); Bank of America Merchant Services, LLC ("BOA"); U.S. Bank, N.A. ("U.S. Bank"); Platinum Age Merchant Services, Inc. ("PAMS"); CollectorSolutions, Inc. ("Collector"); and Value Payment Systems, LLC ("VPS"). Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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); *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 exception in the Act in certain circumstances). You state, and submit supporting documentation demonstrating, BOA, U.S. Bank, PAMS, Collector, and VPS informed the system they do not object to the release of their information. Thus, you state the system released the proposals of these third parties

with redactions made pursuant to section 552.136 of the Government Code.¹ We have received comments from SpeedPay and Kubra. We considered the submitted 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 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 received arguments from only SpeedPay and Kubra. Therefore, we have no basis to conclude Wells Fargo has protected proprietary interests 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 system may not withhold any of Wells Fargo's information on the basis of any proprietary interests it may have in the information.

SpeedPay asserts some of its information is protected under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *7 (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. SpeedPay states it has competitors. In addition, SpeedPay contends the release of the information it indicates regarding its services would "provide competitors with an unfair and unearned advantage." After review of the information at issue and consideration of the arguments, we find SpeedPay has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold SpeedPay's information we have marked under section 552.104(a).²

SpeedPay also raises section 552.102(a) of the Government Code for some of its remaining information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal

¹Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the information described in section 552.136(b). Gov't Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor).

²As our ruling is dispositive as to this information, we need not address SpeedPay's remaining argument against disclosure.

privacy[.]” Gov’t Code § 552.102(a). However, section 552.102(a) applies to information in the personnel file of a governmental employee. *See id.* None of SpeedPay’s information consists of information in the personnel file of a governmental employee. Therefore, section 552.102(a) is not applicable and the system may not withhold any of SpeedPay’s information on that basis.

Section 552.110 of the Government Code 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 id.* § 552.110. 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), *cert. denied*, 358 U.S. 898 (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 This

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

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. 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 661 at 5-6.

Kubra contends some of its information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Kubra has established a *prima facie* case its client information at issue constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent Kubra’s client information is not publicly available on its website, the system must withhold it under section 552.110(a). However, Kubra has failed to establish a *prima facie* case the remaining information at issue meets the definition of a trade secret. Moreover, we find Kubra has not demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. *See* ORD 402. Therefore, none of the remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Kubra also contends portions of the remaining information are commercial or financial information, release of which would cause substantial competitive harm to Kubra. Upon review of Kubra’s arguments under section 552.110(b), we conclude Kubra has established the release of its pricing information would cause the company substantial competitive injury. Accordingly, the system must withhold Kubra’s pricing information under section 552.110(b). However, to the extent Kubra’s client information is publicly available on its website and not excepted from disclosure under section 552.110(a), the system may not withhold such information under section 552.110(b). Further, we find Kubra has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of Kubra’s remaining information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (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 Kubra’s remaining information under section 552.110(b) of the Government Code.

We note portions of the remaining information are subject to section 552.136 of the Government Code.⁴ Section 552.136 states, “Notwithstanding any other provision of this chapter, 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 also id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, the system must withhold the insurance policy numbers in the submitted information section 552.136 of the Government Code.

SpeedPay raises section 552.137 of the Government Code for portions of its remaining information. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). We note section 552.137(c) provides section 552.137(a) does not apply to an e-mail address provided to a governmental body by a vendor who seeks a contractual relationship with the governmental body or to an e-mail address contained in a response to a request for bids or proposals. *Id.* § 552.137(c)(2)-(3). Upon review, we find SpeedPay has failed to demonstrate how section 552.137(a) applies to any of the information at issue. Thus, the system may not withhold any of the information at issue under section 552.137 of the Government Code.

We note some of the 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, the system may withhold SpeedPay’s information we have marked under section 552.104(a) of the Government Code. The system must withhold Kubra’s client information under section 552.110(a) of the Government Code to the extent it is not publicly available on the company’s website. The system must withhold Kubra’s pricing information under section 552.110(b) of the Government Code. The system must withhold the insurance policy numbers under section 552.136 of the Government Code. The remaining information

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).

must be released; however, any information subject to copyright must 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,



Mili Gosar
Assistant Attorney General
Open Records Division

MG/dls

Ref: ID# 578296

Enc. Submitted documents

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