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ATTORNEY GENERAL OF TEXAS

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Mr. Steve Smeltzer
Assistant General Counsel
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P.O. Box 4004
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OR2015-19426

Dear Mr. Smeltzer:

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# 579734.

The Texas Department of Criminal Justice (the "department") received nine requests from the same requestor for contracts and memorandums of understanding for services and activities related to nine department facilities, including the invitation to bid or request for proposal, all responsive materials provided by the winning bidder, the responses of other bidders, the current contract, all exhibits, and all amendments. You claim some of the submitted information is excepted from disclosure under section 552.108 of the Government Code. You further state release of some of the submitted information may implicate the proprietary interests of Avalon Correctional Services, Inc. & Subsidiaries ("Avalon"); Corrections Corporation of America ("CCA"); Correctional Systems, Inc. c/o The GEO Care, Inc. ("CSI"); the GEO GROUP, Inc. ("GEO"); and LaSalle Southwestern Corrections ("LaSalle"). Accordingly, you state you notified the affected third parties 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 comments from Avalon, CCA, and

GEO.¹ We have considered the submitted comments and reviewed the submitted information.

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 not received arguments from CSI or LaSalle explaining why their information at issue should not be released. Therefore, we have no basis to conclude CSI and LaSalle have 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 department may not withhold the submitted information on the basis of any proprietary interests CSI or LaSalle may have in the information.

Avalon and CCA both generally raise section 552.101 of the Government Code for portions of the submitted information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, neither company has pointed to any confidentiality provision, and we are not aware of any, that would make this information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the department may not withhold any of Avalon's or CCA's information under section 552.101 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention.

¹GEO seeks to withhold only the detailed staffing plans for the Sanders Estes Correctional Center, and has no objection to the release of the remainder of its information.

See Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). Furthermore, by its terms, section 552.108 applies only to a law enforcement agency or a prosecutor.

Avalon and CCA seek to withhold portions of their information under section 552.108 of the Government Code. Neither company is a law enforcement agency. Accordingly, we do not address their arguments under section 552.108. However, the department, which is a law enforcement entity, also raises section 552.108. Therefore, we will address the department's claim.

You explain the submitted information includes the detailed staffing plans for units in department facilities that were provided by the winning bidders. You contend the information at issue "denotes the number and placement of certain correctional officers within the unit and whether a particular post is manned on a particular shift." You argue the information "reflects staffing requirements developed by [the department] specifically for the purpose of preventing, detecting, and responding to acts of terrorism or related criminal activity" and the release of the information "could be useful to inmates in their future attempts to circumvent the security of the prison unit."

We note the information you seek to withhold under section 552.108 is contained in submitted proposals, and we are unable to determine whether this information pertains to features that have been or will be implemented at a department facility. Accordingly, to the extent the detailed staffing plans at issue have been or will be implemented at a department facility, we find you have demonstrated release of the information would interfere with law enforcement or crime prevention, and the department may withhold the information at issue under section 552.108(b)(1) of the Government Code. However, to the extent the information at issue pertains to staffing plans that have not been and will not be implemented at a department facility, we find release of this information does not interfere with law enforcement or crime prevention, and the department may not withhold it under section 552.108(b)(1) of the Government Code.

Avalon seeks to withhold portions of its submitted information under section 552.104 of the Government Code. Section 552.104(a) of the Government Code 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.

Avalon states it has competitors. In addition, Avalon states release of the information at issue “is likely to cause substantial harm to the competitive position of Avalon” because the information will provide the company’s competitors “with valuable insights into [Avalon’s] operations and finances and give these competitors an unfair advantage in future bidding contests. Avalon seeks to withhold some terms of the contract. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 2015 WL 3854264, at *1, *8. After review of the information at issue and consideration of the arguments, we find Avalon has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude Avalon may withhold the information at issue, which we have indicated, under section 552.104(a) of the Government Code.²

CCA claims its customer information, pricing, and cost data constitute trade secret information under section 552.110(a) of the Government Code, which 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

²As we reach this conclusion, we do not address Avalon’s remaining claims.

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* 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). 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 (1980), 232 (1979), 217 (1978).

Upon review, we find CCA has established a *prima facie* case that its customer information constitutes trade secret information. Accordingly, to the extent the customer information is not publicly available on the company's website, the department must withhold CCA's customer information under section 552.110(a) of the Government Code. However, we find CCA has failed to demonstrate its remaining information at issue meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for

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).

this information. Accordingly, the department may not withhold any of CCA's remaining information under section 552.110(a) 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."⁴ 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. *See* Open Records Decision No. 684 at 9 (2009). Upon review, we conclude the department must withhold the insurance policy numbers in the submitted information under section 552.136 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, provided the detailed staffing plans at issue have been or will be implemented at a department facility, the department may withhold the submitted detailed staffing plans under section 552.108(b)(1) of the Government Code. Avalon may withhold the information we have indicated under section 552.104(a) of the Government Code. To the extent CCA's customer information is not publicly available on the company's website, the department must withhold CCA's customer information under section 552.110(a) of the Government Code. The department must withhold the insurance policy numbers in the submitted information under section 552.136 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/>

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[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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CN/dls

Ref: ID# 579734

Enc. Submitted documents

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