



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 8, 2016

Ms. Halfreda Anderson-Nelson
Public Information Officer
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 78711

OR2016-07659A

Dear Ms. Anderson-Nelson:

Our office issued Open Records Letter No. 2016-07659 (2016) on April 5, 2016. We have determined the prior ruling should be corrected. *See* Gov't Code §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on April 5, 2016. *See generally id.* § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 620277 (DART ORR W000-458-011116).

Dallas Area Rapid Transit ("DART") received a request for all bidding documents relating to a specified request for quotes. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Accenture, LLP ("Accenture"); Init Innovations in Transportation ("Init"); Mitac Information Technology Corp. ("Mitac"); Thales USA, Inc. ("Thales"); Trapeze Software Group, Inc. ("Trapeze"); Vix Technology ("Vix"); and Xerox. Accordingly, you state, and provide documentation showing, you notified the named 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); *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). We have received arguments from Accenture, Init, Vix, and Xerox. We have considered the exceptions claimed and reviewed the submitted information.

We note the responsive information was the subject of two previous requests for a ruling, as a result of which this office issued Open Records Letter Nos. 2015-25565 (2015) and 2016-00325 (2016). In Open Records Letter No. 2015-25565, we determined DART must withhold a portion of Xerox's information under section 552.110(a) of the Government Code, but may not withhold any of Xerox's remaining information under section 552.110(b) of the Government Code. Additionally, we determined DART may withhold a portion of Thales' information under section 552.104(a) of the Government Code and must withhold information under section 552.136 of the Government Code, but must release Mitac's and Trapeze's information. In Open Records Letter No. 2016-00325, we determined DART must withhold some of Vix's information under section 552.110(b) of the Government Code, but may not withhold any of Vix's remaining information under section 552.110(a) of the Government Code. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, DART must continue to rely on Open Records Letter Nos. 2016-00325 and 2015-25565 as previous determinations and withhold or release the information at issue in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your arguments for the submitted information not subject to the previous rulings.

Initially, we note Init seeks, in part, to withhold information DART has not submitted to this office for review.¹ This ruling does not address information that was not submitted by DART and is limited to the information submitted as responsive by DART. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Thus, we will not address Init's argument as to the information not submitted by DART.

Init asserts the names of its employees are excepted from public disclosure under section 552.102(a) of the Government Code. This section excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, section 552.102(a) is applicable to information in the personnel file of a government employee. We find the information at issue does not consist of information in the personnel

¹DART did not submit Init's pricing premiums for our review.

file of a government employee. Therefore, DART may not withhold any of Init's information under section 552.102(a) of the Government Code.

Init seeks to withhold portions of its submitted information under section 552.104(a) of the Government Code. This section 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*, 466 S.W.3d 831 (Tex. 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 841. Although Init raises section 552.104 for portions of the submitted information, we find Init has failed to demonstrate the release of the information at issue would give advantage to a competitor or bidder. Thus, DART may not withhold the information at issue under section 552.104(a).

Accenture and Init claim portions of their information are excepted under section 552.110 of the Government Code, which 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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. 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.² 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. See 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 Record 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 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).

Accenture and Init assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Accenture has established a *prima facie* case that portions of its information constitute trade secret information. However, to the extent any of the customer information Accenture seeks to withhold has been published on the company’s website, any such information is not confidential under section 552.110(a). Further, we conclude Init has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret.

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

Additionally, we find Accenture has not demonstrated the necessary factors to establish a trade secret claim for the portions of its information we have indicated. We further find Init has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110(a)). Therefore, none of Accenture's remaining information or any of Init's portion of the submitted information may be withheld under section 552.110(a).

Accenture contends some of its information is commercial or financial information, the release of which would cause substantial competitive harm to the company. Upon review, we find Accenture has demonstrated some of its information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, DART must withhold this information, which we have indicated, under section 552.110(b) of the Government Code. However, we find Accenture has not established any of the remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, DART may not withhold any of Accenture's remaining information at issue on this basis.

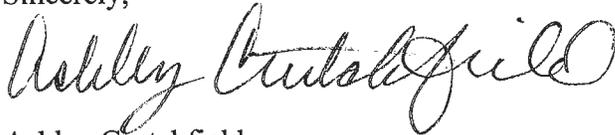
We note some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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, DART must rely on Open Records Letter Nos. 2015-25565 and 2016-00325 as previous determinations and withhold or release the information at issue in accordance with those rulings. Except for customer information that has been published on Accenture's website, DART must withhold the information we indicated in Accenture's information under section 552.110(a) of the Government Code. DART must withhold the information we indicated in Accenture's information under section 552.110(b) of the Government Code. DART 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/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,

A handwritten signature in black ink that reads "Ashley Crutchfield". The signature is written in a cursive style with a large, looped "A" and "C".

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AKC/dls

Ref: ID# 620277

Enc. Submitted documents

c: Requestor
(w/o enclosures)

7 Third Parties
(w/o enclosures)