



January 15, 2015

Ms. Elaine Nicholson
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2015-00884

Dear Ms. Nicholson:

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# 550209.

The City of Austin (the "city") received a request for information related to a specified request for proposals. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Adjacent Technologies, Inc. ("Adjacent"); Clean Power Research ("Clean Power"); CLEAResult Consulting, Inc.; Direct Technology; EnergySavvy; ICF Resources, LLC; and Nexant, Inc. Accordingly, you state, and provide documentation showing, you notified these interested third parties of the request for information and of their right 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 exception in the Act in certain circumstances). We have received comments from Adjacent, CleanPower, and EnergySavvy. We have considered the submitted arguments and reviewed the submitted information.¹

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to

¹We note the city did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). Nevertheless, because the interests of third parties can provide a compelling reason to overcome the presumption of openness, we will consider the submitted arguments for the submitted information. *See id.* §§ 552.007, .302, .352.

that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have only received comments from Adjacent, CleanPower, and EnergySavvy. Thus, we have no basis to conclude any of the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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 city may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Clean Power raises the federal Trade Secrets Act, section 1905 of title 18 of the United States Code, in conjunction with section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. The Trade Secrets Act provides, in pertinent part:

[w]hoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (2008). By its terms, this statute pertains only to employees and agents of the federal government. State employees who are assigned to federal government agencies in some circumstances may be deemed federal employees for certain purposes. 5 U.S.C. § 3374 (2001). However, in this case there is no indication of such an assignment pertinent to the submitted information. The federal courts have held that no basis exists to justify transforming officers and employees of state agencies into federal officers and employees for

purposes of the Trade Secrets Act. *St. Michael's Convalescent Hosp. v. State of Cal.*, 643 F.2d 1369 (9th Cir. 1981). We conclude that the Trade Secrets Act does not prohibit the city from disclosing the information at issue. Therefore, the information at issue is not excepted from public disclosure under section 552.101 of the Government Code in conjunction with the Trade Secrets Act.

Clean Power also asserts a portion of its information is protected by the Procurement Integrity Act, chapter 21 of title 41 of the United States Code. Section 2102(a) of title 41 of the United States Code provides, in relevant part:

(1) In general.—Except as provided by law, a person described in paragraph (3) shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

...

(3) Application.—Paragraph (1) applies to a person that—

(A)(i) is a present or former official of the Federal Government; or

(ii) is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement; and

(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

41 U.S.C. § 2102(a)(1), (3). We note section 2102 applies only to information related to a “Federal agency procurement contract.” *See id.* § 2102(a)(1). Furthermore, this section applies only to “a present or former official of the Federal Government” or a person that “is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement.” *See id.* § 2102(a)(3)(A)(i), (ii). Because the city is not a federal agency, the city is not acting on behalf of the federal government, and the submitted information does not relate to a federal agency procurement, the Procurement Integrity Act does not apply to the submitted information. *See id.* § 2101(3), (4) (defining “Federal agency” and “Federal agency procurement” for purposes of Procurement Integrity Act). Therefore, none of the information at issue can be considered confidential by law pursuant to section 552.101 of the Government Code in conjunction with the Procurement Integrity Act.

Adjacent, CleanPower, and EnergySavvy 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

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).

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).

Adjacent, CleanPower, and EnergySavvy claim portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Adjacent and Clean Power have established a *prima facie* case that their customer information constitutes trade secret information. Therefore, the customer information at issue must generally be withheld under section 552.110(a) of the Government Code. However, to the extent any of the customer information Adjacent and Clean Power seek to withhold has been published on the companies’ websites, such information is not confidential under section 552.110(a). We also conclude Adjacent, CleanPower, and EnergySavvy have failed to establish a *prima facie* case that any portion of their remaining information at issue meets the definition of a trade secret. We further find Adjacent, CleanPower, and EnergySavvy have not demonstrated the necessary factors to establish a trade secret claim for their remaining information at issue. *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). Therefore, none of Adjacent’s, CleanPower’s, or EnergySavvy’s remaining information at issue may be withheld under section 552.110(a).

Adjacent, CleanPower, and EnergySavvy contend some of their information is commercial or financial information, the release of which would cause substantial competitive harm to the companies. We note Adjacent has published some of the information it seeks to withhold on its website, making this information publicly available. Because Adjacent has published this information, it has failed to demonstrate how the release of this information would cause it substantial competitive injury. Upon review, we find Adjacent, CleanPower, and EnergySavvy have demonstrated some of their information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the city must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Adjacent, CleanPower, and EnergySavvy have not established any of the remaining information at issue constitutes commercial or financial information the disclosure of which would cause the companies

substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the city may not withhold any of the remaining information at issue on this basis.

Section 552.136(b) 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 concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, to the extent Adjacent's and Clean Power's customer information is not publicly available on the companies' websites, the city must withhold Adjacent's and Clean Power's submitted customer information under section 552.110(a) of the Government Code. The city must withhold the information we have marked under section 552.110(b) of the Government Code. The city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The city must release the remaining information.

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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

³The 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).

Ref: ID# 550209

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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