



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 12, 2016

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2016-22909

Dear Mr. Ramirez:

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# 630025.

The Lower Colorado River Authority (the "authority") received two requests from different requestors for specified information pertaining 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 Frost Insurance Agency, Inc. ("Frost"); Gallagher Benefit Services, Inc. ("Gallagher"); Holmes Murphy & Associates; IPS Advisors, LLP; Mercer; NFP Corporate Benefits ("NFP"); Vantage Benefits Administrators, Inc.; Wells Fargo Insurance Services USA, Inc.; Willis Towers Watson ("Willis"); and Wortham Insurance. Accordingly, you state, and provide documentation showing, you notified these third parties of the requests 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 Frost, Gallagher, NFP, and Willis. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Frost objects to disclosure of information the authority has not submitted to this office for review. This ruling does not address information that was not submitted by

the authority and is limited to the information the authority has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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 that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from any of the remaining interested third parties. Thus, we have no basis to conclude any of the remaining interested third parties has 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 authority may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining interested third parties may have in the information.

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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, 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. Frost, Gallagher, and Willis each state it has competitors. In addition, Gallagher states the release of its information at issue would allow competitors access to information that would improve their own business models and put Gallagher at a competitive disadvantage. Willis states the release of its information at issue would cause substantial competitive harm by providing a window into how Willis conducts its bidding processes and business. Frost states the release of its information at issue would give its competitors an unfair competitive advantage and enable them to reverse engineer the information to determine other information pertaining to Frost's business guidelines. After review of the information at issue and consideration of the arguments, we find Frost, Gallagher, and Willis have established the release of the information at issue, which we have marked, would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold the information we have marked under section 552.104(a) of the Government Code.¹

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

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

the person from whom the information was obtained. *See* Gov't Code § 552.110(a)–(b). 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

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).

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 No. 661 at 5 (1990).

Gallagher, NFP, and Willis claim portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Gallagher, NFP, and Willis 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 Gallagher, NFP, and Willis seek to withhold has been published on their websites, such information is not confidential under section 552.110(a). We also conclude Gallagher 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 Gallagher has not demonstrated the necessary factors to establish a trade secret claim for its remaining 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). Therefore, none of Gallagher’s remaining information may be withheld under section 552.110(a).

Gallagher argues some of its remaining information consists of commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. To the extent any of the customer identities Gallagher, NFP, and Willis seek to withhold have been published on their websites, we find Gallagher, NFP, and Willis have failed to establish release of such information would cause the companies substantial competitive harm. Additionally, we find Gallagher has not established any of the remaining information at issue constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. Accordingly, none of the remaining information at issue may be withheld under section 552.110(b) of the Government Code.

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

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).

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 authority must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information appears to 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 authority may withhold the information we have marked under section 552.104(a) of the Government Code. To the extent Gallagher’s, NFP’s, and Willis’ customer information is not publicly available on each company’s website, the authority must withhold Gallagher’s, NFP’s, and Willis’ submitted customer information under section 552.110(a) of the Government Code. The authority must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The authority must release the remaining information; however, any information subject to 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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 630025

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

8 Third Parties
(w/o enclosures)