



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 22, 2017

Ms. Ruth H. Soucy  
Deputy General Counsel for Open Records  
Texas Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2017-05247A

Dear Ms. Soucy:

This office issued Open Records Letter No. 2017-05247 (2017) on March 14, 2017. We have determined the prior ruling should be corrected. *See* Gov't Code §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2017-05247 and serves as the correct ruling. *See generally id.* § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 659213 (Comptroller ID Nos. 12985737415, 13080977418).

The Texas Comptroller of Public Accounts (the "comptroller's office") received requests from different requestors for information pertaining to Requests for Proposals ("RFP") Nos. 218e and 218f. The comptroller's office states it will provide some of the requested information to the requestor. The comptroller's office claims some of the submitted information is excepted from disclosure under section 552.136 of the Government Code. The comptroller's office does not take a position as to whether the remaining submitted information is excepted from disclosure under the Act. However, the comptroller's office states, and provides documentation showing, it notified Account Control Technology, Inc. ("ACT"), Collecto Inc., d/b/a EOS CCA ("EOS"), and Gila L.L.C. d/b/a Municipal Services Bureau ("MSB") of the comptroller's office's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 ACT, EOS, and MSB objecting to the

release of some of the information at issue. We have considered the claimed exceptions and reviewed the submitted information.

The submitted information consists of four proposals for the RFPs at issue, which resulted in two contracts. In response to this office's request for additional information under section 552.303 of the Government Code, the comptroller's office informs us the contracts at issue were for the purchase of services from private vendors that are subject to the posting requirements in section 2261.253 of the Government Code. Gov't Code § 552.303(c) (attorney general may give written notice to governmental body that additional information is necessary to render decision). Section 2261.253(a)(1) of the Government Code reads as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

*Id.* § 2261.253(a)(1). The comptroller's office represents the contracts at issue are (1) valued at more than \$15,000; (2) are between the comptroller's office, a state agency, and private vendors for the purchase of services; and (3) are not expired or completed. *See id.* § 2261.002(2) ("State agency" has meaning assigned by Gov't Code § 2151.002). The comptroller's office also informs us EOS's proposal for RFP No. 218e and ACT's proposal for 218f "are incorporated by reference into the contracts; therefore, we understand the resulting contracts, including the winning responses to the RFPs, to be subject to [s]ection 2261.253." Accordingly, these proposals are required to be posted on the comptroller's office's internet website. Although the comptroller's office, ACT, and EOS seek to withhold portions of these proposals under sections 552.104, 552.110, and 552.136 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Consequently, the comptroller's office may not withhold any portion of EOS's proposal for RFP No. 218e or ACT's proposal for 218f under section 552.104, 552.110, or 525.136 of the Government Code. Therefore, the comptroller's office must release these proposals in their entirety.

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*, 466 S.W.3d 831, 841 (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.* ACT states it has competitors and argues release of the audited financial statements in its proposal for RFP No. 218e would cause it substantial competitive harm. Upon review, we find ACT has established the release of the information at issue would give

advantage to a competitor or bidder. Thus, we conclude the comptroller's office may withhold the audited financial statements in ACT's proposal for RFP No. 218e under section 552.104(a) of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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.<sup>1</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown the information meets the definition of a trade secret and the necessary factors

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<sup>1</sup>The following are the six factors that the Restatement gives 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 others 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).

have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

Upon review, we find MSB has established the release of its customer information would cause it substantial competitive injury. Nevertheless, to the extent MSB has published any of the customer information at issue on its website, this information is not confidential under section 552.110. Accordingly, the comptroller’s office must withhold MSB’s customer information in the submitted documents under section 552.110(b), provided MSB has not published the information on its website. However, we find MSB has failed to establish release of any of the remaining information, including any customer information published on MSB’s website, would cause it substantial competitive injury. *See* Gov’t Code § 552.110(b). We also conclude MSB has not shown any of the remaining information, including any customer information published on MSB’s website, meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See id.* § 552.110(a); ORD 402 at 2-3. Therefore, the comptroller’s office may not withhold any of the remaining information under section 552.110.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding 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). This office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). Thus, the comptroller’s office must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the materials at issue 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.

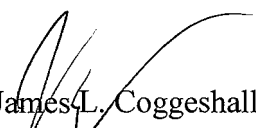
To conclude, the comptroller’s office must release EOS’s proposal for RFP No. 218e and ACT’s proposal for 218f in their entirety pursuant to section 2261.253 of the Government

Code. The comptroller's office may withhold the audited financial statements in ACT's proposal for RFP No. 218e under section 552.104(a) of the Government Code. The comptroller's office must withhold MSB's customer information under section 552.110(b) of the Government Code, provided MSB has not published the information on its website. The comptroller's office must also withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The comptroller's office must release the remaining information, but may only release any copyrighted information 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](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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/bw

Ref: ID# 659213

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

3 Third Parties  
(w/o enclosures)