



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 17, 2017

Ms. Susan E. Tennyson
Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2017-05593

Dear Ms. Tennyson:

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# 649315 (DFPS ORR Nos. 090920164BY; 0912201605S; 09142016AYI).

The Texas Department of Family and Protective Services (the "department") received three requests from three different requestors for information, including scoring sheets, pertaining to a specified request for proposals issued by the department. You inform us the department will redact social security numbers pursuant to section 552.147(b) of the Government Code.¹ You state the department has released some information. Although you take no position on the submitted information, you state release of this information may implicate the proprietary interests of Applied Information Sciences, Inc. ("AIS"); CMA Consulting ("CMA"); Cooper

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

Consulting Company (“Cooper”); and Technology Consortium (“TC”).² Accordingly, you state you notified the third parties of the requests for information and of their rights 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 comments from CMA, Cooper, and TC. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the third requestor only seeks scoring sheets. The department is not required to release to the third requestor information that is not responsive to the third request.

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 requested information relating to it should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from AIS explaining why the submitted information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of AIS. *See* 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, 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 interest AIS may have in it.

Cooper asserts it has a non-disclosure agreement regarding some of its information. We note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t

²We note the department 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 interest of a third party can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352. We also note we asked the department to provide additional information pursuant to section 552.303 of the Government Code. *See id.* § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the department pursuant to that request.

Code § 552.110). Cooper has not identified any law that authorizes the department to enter into an agreement to keep any of the information at issue confidential. Therefore, the department may not withhold the information at issue unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Next, we note some of the responsive information consists of information that is subject to the posting requirements in section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, 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[.]

Gov't Code § 2261.253(a)(1). You inform us the proposal submitted by TC is attached to a contract valued at more than \$15,000, and is between the department, which is a state agency, and a private vendor for the purchase of services, and the contract is not expired or completed. *See id.* §§ 2261.002(2) (“State agency” has meaning assigned by Gov’t Code § 2151.002), 2151.002(1) (“State agency” includes a department, commission, board, or other agency in the executive branch of state government created by the state constitution or state statute). Accordingly, TC’s submitted proposal, like the contract at issue, is required to be posted on the department’s internet website. Although TC seeks to withhold portions of the submitted information under section 552.110 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). Further, information that is specifically made public by statute may not be withheld under section 552.101 on the basis of common-law privacy. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common-law principle); *see also CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Therefore, the public’s right of access to the information at issue prevails over common-law privacy, and the department may not withhold this information on that basis. Accordingly, the department may not withhold any portion of TC’s information under section 552.110 of the Government Code or section 552.101 of the Government Code in conjunction with common-law privacy. Consequently, the department must release TC’s information in its entirety pursuant to section 2261.253 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*, 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. Cooper asserts some of its information is excepted from disclosure under section 552.104(a). However, upon review, we find Cooper has not established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude department may not withhold the information at issue under section 552.104(a) of the Government Code.

Section 552.110 of the Government Code protects (1) trade secrets and (2) commercial 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. 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, 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 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 763 (Tex.), *cert. denied*, 358 U.S. 898 (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

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (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).

TORTS § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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).

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.*; ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CMA and Cooper assert portions of their respective information are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find CMA has established the release of the information at issue, including some of its pricing information and its customer information, constitutes commercial or financial information, the release of which would cause substantial competitive injury to CMA. Therefore, the department must withhold the information we have marked and CMA’s customer information, to the extent the customer information is not publicly available on CMA’s website, under section 552.110(b) of the Government Code. However, we find the third parties have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause the respective companies substantial competitive harm. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, we conclude the department may not withhold the remaining information at issue under section 552.110(b) of the Government Code.

CMA and Cooper assert portions of their remaining information constitute trade secrets. Upon review, we find, to the extent CMA’s customer information is publicly available on the company’s website, this information may not be withheld under section 552.110(a) of the Government Code. Furthermore, we find the CMA and Cooper have failed to demonstrate the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the department may not withhold the remaining information at issue on the basis of section 552.110(a) of the Government Code.

We note portions of the remaining responsive information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to

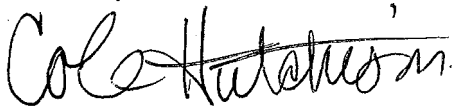
furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies 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, the department must release TC's information pursuant to section 2261.253 of the Government Code. The department must withhold the information we have marked and CMA's customer information, to the extent the customer information is not publicly available on CMA's website, under section 552.110(b) of the Government Code. The department must release the remaining responsive information; however, any information subject to copyright may be released only 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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 649315

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

1 Third Party
(w/o enclosures)