



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 22, 2017

Ms. Barbara Martinez  
Public Information/Records Management Officer  
San Antonio Water System  
P.O. Box 2449  
San Antonio, Texas 78298-2449

OR2017-13953

Dear Ms. Martinez:

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# 662706 (SWAS Open Request No. 5829).

The San Antonio Water System (the "system") received a request for all proposals pertaining to a specified request for proposals. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of third parties might be implicated. Accordingly, you state, and provide documentation showing, you notified H.W. Lochner, Inc.; The Norfleet Group, LLC; Pinnacle Consulting Management Group, Inc.; THC, Inc.; Ardaga & Associates; Burns & McDonnell Engineering Company, Inc.; Clark Land Resources, Inc. ("CLR"); Hardwick Law Firm, LLC; HDR Engineering, Inc.; and Spitzer & Associates, Inc. ("Spitzer") of the request and of their right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from CLR and Spitzer. We have reviewed the submitted information and the submitted arguments.

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) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public

disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Spitzer and CLR explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; 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 system may not withhold the submitted information on the basis of any proprietary interest the remaining 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). 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. CLR asserts it has competitors. CLR argues release of its information would provide its competitors with information they could use to out-compete CLR in future bidding situations. After review of the information at issue and consideration of the arguments, we find CLR has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold CLR’s proposal under section 552.104(a) of the Government Code.<sup>1</sup>

Spitzer seeks to withhold some of its information under section 552.110 of the Government Code. Section 552.110 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(a)-(b). 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

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<sup>1</sup>As our ruling is dispositive, we need not address CLR’s remaining arguments against disclosure of this information.

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 776 (Tex. 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.<sup>2</sup> 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. 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.*; *see also* ORD 661 at 5.

Spitzer asserts portions of its proposal are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find Spitzer has established some 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 Spitzer. Therefore, the system must withhold the information we have indicated and Spitzer’s customer information, to the extent the customer information is not publicly available on Spitzer’s website, under section 552.110(b) of the Government Code. However, we find Spitzer has not made the specific factual or evidentiary showing required

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<sup>2</sup>The 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).

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 system may not withhold the remaining information at issue under section 552.110(b) of the Government Code.

Spitzer asserts portions of its remaining information at issue constitute trade secrets. Upon review, we find, to the extent Spitzer'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 Spitzer has failed to demonstrate the remaining information at issue meets the definition of a trade secret, nor has Spitzer demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the system may not withhold the remaining information at issue on the basis of section 552.110(a) of the Government Code.

Section 552.136 of the Government Code states "[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."<sup>3</sup> Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device for purposes of this exception. Thus, the system must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

In summary, the system may withhold CLR's proposal under section 552.104(a) of the Government Code. The system must withhold the information we have indicated and Spitzer's customer information, to the extent the customer information is not publicly available on Spitzer's website, under section 552.110(b) of the Government Code. The system must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The system 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/>

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<sup>3</sup>The 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).

[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, appearing to read 'SMP', written in a cursive style.

Sidney M. Pounds  
Assistant Attorney General  
Open Records Division

SMP/nmd

Ref: ID# 662706

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

10 Third Parties  
(w/o enclosures)