



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 26, 2019

Ms. Alexandra Golden  
Assistant District Attorney  
Criminal District Attorney Brazoria County  
111 East Locust, Suite 408A  
Angleton, Texas 77515

OR2019-23853

Dear Ms. Golden:

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# 782548 (Ref. No. 19-0970).

The Brazoria County Purchasing Department (the "department") received a request for all proposals submitted in response to a specified request for proposals and the resulting final contract. 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 Aspire Consulting, LLC; Beacon Application Services Corporation; Cherry Road Technologies Inc.; ERP Analysis, Inc.; GNC Consulting, Inc.; Graviton Consulting Services, Inc.; Momix Solutions, Inc.; Nessium Consulting LLC; Rollcage Technology, Inc. ("Rollcage"); Sierra-Cedar, Inc. ("Sierra"); and Smart ERP Solutions, Inc. Accordingly, you state, and provide documentation showing, you notified the 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 Rollcage and Sierra. We have considered the submitted arguments and reviewed the submitted information.

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* Gov't Code § 552.305(d)(2)(B). As of the date of

this ruling, we have not received comments from the remaining third parties. Thus, we have no basis to conclude 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 department may not withhold any of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by section 521.051 of the Business and Commerce Code. Section 521.051 of the Business and Commerce Code provides,

(a) A person may not obtain, possess, transfer, or use personal identifying information of another person without the other person’s consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person’s name.

Bus. & Comm. Code § 521.051(a) (formerly Bus. & Comm. Code § 48.101(a)). “Personal identifying information” means “information that alone or in conjunction with other information identifies an individual.” *Id.* § 521.002(a)(1)(A). Rollcage asserts the some of the submitted information meets the definition of “personal identifying information” under section 521.002(a)(1) of the Business and Commerce Code. *See id.* § 521.002(a)(1). We note section 521.051(a) of the Business and Commerce Code does not prohibit the transfer of personal identifying information of another person unless the transfer is made with the intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person’s name without that person’s consent. *See id.* § 521.051(a). In this instance, the department’s release of the information at issue would be for the purpose of complying with the Act, and not “with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value[.]” *See id.* Therefore, section 521.051(a) of the Business and Commerce Code does not prohibit the department from transferring the information at issue. Accordingly, the department may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 521.051 of the Business and Commerce 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. Rollcage states it has competitors. In addition, Rollcage states release of some of its information would provide an unfair advantage to its competitors.

After review of the information at issue and consideration of the arguments, we find Rollcage has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we marked under section 552.104(a) of the Government Code.<sup>1</sup>

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 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 ORD 552. 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.<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

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<sup>1</sup> As our ruling is dispositive, we need not address Rollcage's remaining argument against disclosure of this information.

<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).

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 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).

Rollcage and Sierra claim portions of the remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Rollcage and Sierra 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 Rollcage or Sierra seeks to withhold has been published on that company’s website, such information is not confidential under section 552.110(a). In that event, we will address the arguments under section 552.110(b) for the customer information that is publicly available on that company’s website. We also conclude Rollcage and Sierra have failed to establish a *prima facie* case that any portion of their remaining information meets the definition of a trade secret. We further find Rollcage and Sierra have not demonstrated the necessary factors to establish a trade secret claim for their 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 Rollcage’s or Sierra’s remaining information may be withheld under section 552.110(a) of the Government Code.

Rollcage and Sierra argue some of their remaining information consists of commercial or financial information the release of which would cause their respective companies substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Rollcage has demonstrated some of its information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold this information, which we marked, under section 552.110(b) of the Government Code. However, to the extent any of the customer information Rollcage or Sierra seeks to withhold is available on that company’s website and not excepted from disclosure under section 552.110(a), the department may not withhold such information under section 552.110(b). Additionally, we find Rollcage and Sierra have not established any of the remaining information at issue

constitutes commercial or financial information the disclosure of which would cause their respective company's substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the department may not withhold any of the remaining information at issue on this basis.

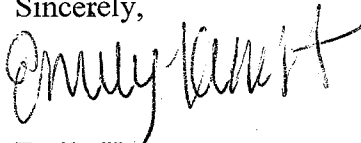
We note some of the remaining materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection 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.

In summary the department may withhold the information we marked under section 552.104 of the Government Code. To the extent Rollcage's and Sierra's customer information is not publicly available on the companies' websites, the department must withhold Rollcage's and Sierra's submitted customer information under section 552.110(a) of the Government Code. The department must withhold the information we marked under section 552.110(b) of the Government Code. The department must release the remaining information; however, any information protected by 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Emily Kunst  
Assistant Attorney General  
Open Records Division

EK/be

Ref: ID# 782548

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

11 Third Parties  
(w/o enclosures)