



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 4, 2019

Ms. Mary Beth Rudel
Deputy Director
Ark-Tex Council of Governments
4808 Elizabeth Street
Texarkana, Texas 75503

OR2019-31032

Dear Ms. Rudel:

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# 793818.

The Ark-Tex Council of Governments (the "council") received two requests from different requestors for proposals submitted to a specified request for proposals ("RFP"). The first requestor additionally requested score sheets and any other documents pertaining to the specified RFP. 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 DoubleMap, Inc. ("DoubleMap"); Ecolane USA, Inc. ("Ecolane"); Enghouse Transportation, LLC ("Enghouse"); Routematch Software, Inc. ("Routematch"); Shah Software, Inc. ("Shah"); and StrataGen. Accordingly, you state, and provide documentation showing, you notified these interested 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 DoubleMap, Enghouse, Routematch, Shah, and StrataGen. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the council has only submitted the requested proposals submitted to the specified RFP. To the extent information responsive to the remainder of the first request existed on the date the council received the request, we assume you have released it to the first requestor. See Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information to the first requestor, you must do so at this time. See Gov't Code §§ 552.301(a), .302.

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 Ecolane. Thus, we have no basis to conclude Ecolane 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 council may not withhold any of the submitted information on the basis of any proprietary interest Ecolane may have in the information.

Section 552.104(a) of the Government Code exempts 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. Routematch and Shah state they have competitors. In addition, Routematch and Shah state the release of the information at issue would provide an advantage to their competitors. Shah further seeks to withhold its pricing information. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). See generally Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d 831, at 831, 842. After review of the

information at issue and consideration of the arguments, we find Routematch and Shah have established the release of the information at issue, which we have indicated, would give advantage to a competitor or bidder. Thus, we conclude the council may withhold the information we have indicated 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 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

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

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).

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 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).

Enghouse, DoubleMap, and StrataGen claim portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Enghouse and StrataGen 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 Enghouse or StrataGen seek to withhold has been published on their website, such information is not confidential under section 552.110(a). We also conclude Enghouse, DoubleMap, and StrataGen have failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Enghouse, DoubleMap, and StrataGen have 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 Enghouse’s, DoubleMap’s, or StrataGen’s remaining information at issue may be withheld under section 552.110(a).

Enghouse, DoubleMap, and StrataGen argue some of the remaining information consists of commercial or financial information, the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. To the extent any of the customer identities Enghouse or StrataGen seek to withhold have been published on their website, we find Enghouse and StrataGen failed to establish release of such information would cause the companies substantial competitive harm. Upon review, we find Enghouse, DoubleMap, and StrataGen have demonstrated their pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the council must withhold Enghouse’s, DoubleMap’s, and StrataGen’s pricing information under section 552.110(b) of the

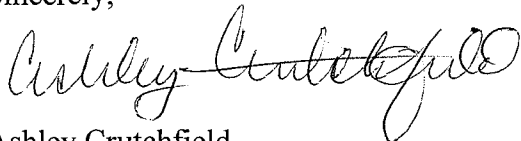
Government Code. However, we find Enghouse, DoubleMap, and StrataGen have not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the council may not withhold any of the remaining information at issue on this basis.

In summary, the council may withhold the information we have indicated under section 552.104(a) of the Government Code. To the extent Enghouse's and StrataGen's customer information is not publicly available on their website, the council must withhold Enghouse's and StrataGen's customer information under section 552.110(a) of the Government Code. The council must withhold Enghouse's, DoubleMap's, and StrataGen's pricing information under section 552.110(b) of the Government Code. The council 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 <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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/gw

Ref: ID# 793818

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

c: Third Parties
(w/o enclosures)