



February 28, 2002

Ms. Carol Longoria  
Public Information Coordinator  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2002-0975

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159133.

The University of Texas at San Antonio (the "university") received a request for certain technical proposals that relate to RFP No. 743-1040. You inform this office that with one exception, the responsive proposals have been released to the requestor. The university takes no position as to whether the one remaining proposal is excepted from disclosure. The university believes, however, that the request for this proposal implicates the proprietary interests of the private party that submitted the proposal in question, Centennial Contractors Enterprises, Inc. ("Centennial"). You notified Centennial of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> You also submitted what the university deems to be the information at issue. Centennial submitted arguments in which it raises sections 552.101, 552.102, 552.104, and 552.110 of the Government Code. We have considered Centennial's arguments and have reviewed the submitted information.<sup>2</sup>

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<sup>1</sup> See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under chapter 552 of Government Code in certain circumstances).

<sup>2</sup>Centennial submits arguments with respect to the following specific portions of its proposal: (1) a letter to Mr. Bernard Leiter dated August 7, 2001; (2) Table of Contents; (3) Executive Summary, pages i-ii; (4) Section A, pages 1-20, including Sections A.1, Job Order Process, and A.2, Established Subcontractor Management Procedures; (5) Section B, pages 21-22; (6) Section C, pages 23-28; (7) Section D, pages 29-42; (8) Section E, pages 43-46; (9) Section F, pages 47-56; (10) Sections G and H, pages 57-63; (11) Section I, pages 65-66; (12) Section J, pages 67-68; (13) Section K, pages 69-115; (14) Section L, pages 117-121 and 123-128; and (15) Attachments A and B. We note, however, that the information submitted by the university is limited to a document titled "Pricing/Delivery Proposal" that appears to be a cover page; the referenced letter

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Centennial states that it would not have submitted its proposal to the university had Centennial not anticipated that the information would be kept confidential. We note, however, that information that is subject to chapter 552 of the Government Code is not confidential simply because the party that submits the information anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Furthermore, Centennial has not directed our attention to any law, nor are we aware of any law, under which any of the information in question is considered to be confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

Centennial also raises section 552.102(a) of the Government Code. This exception protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Section 552.102(a) is applicable only to the personnel records of employees of governmental bodies. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref’d n.r.e.); Open Records Decision Nos. 444 at 3-4 (1986), 423 at 2 (1984). In this instance, the information in question relates to a private entity and its employees. Therefore, section 552.102 is not applicable to any of this information.

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Section 552.104 protects the interests of governmental bodies, not those of private parties such as Centennial that submit information to governmental bodies. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). As the university does not raise section 552.104, none of the information at issue may be withheld from disclosure under this exception.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) commercial or financial

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to Mr. Leiter; documents titled Section 6, Execution of Offer (page 153 of 160), Section 7, Pricing and Delivery Schedule (pages 155 and 157 of 160), and Job Order Contracting Services Addenda #1 (three pages), #2 (two pages), and #3 (one page); a Bid Bond, Power of Attorney, and letter to the university from HEH&L dated August 7, 2001; documents titled Unit Price Development Information and Detailed Coefficient Breakdown (four pages); a letter to Mr. Paul Goodman of the university from Centennial dated August 27, 2001; documents relating to Centennial’s personnel (10 pages); and a number of other documents that describe Centennial’s services in large bold-face type. This decision addresses only the information that the university submitted to this office. *See* Gov’t Code §§ 552.006, .301(e)(1)(D).

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. See Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "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 a single or ephemeral event 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) (emphasis added); see also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), cert. denied, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>3</sup> See Open Records Decision No. 552 at 5 (1990).

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<sup>3</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 (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) of the Government Code 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, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Centennial argues that specified portions of its proposal are excepted from disclosure under both components of section 552.110. We also understand Centennial to contend that the entire proposal is protected by section 552.110. Having considered these arguments and reviewed the information that the university submitted, we conclude that Centennial has shown that the university must withhold some of this information under section 552.110(b). We have marked that information accordingly. Centennial has not demonstrated that any of the remaining information must be withheld from disclosure under section 552.110. *See also* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing not ordinarily excepted from disclosure under statutory predecessor).

We note, however, that the remaining information contains a private individual’s e-mail address. This e-mail address may be confidential under section 552.137, which the Seventy-seventh Legislature added to chapter 552 of the Government Code. Section 552.137 provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov’t Code § 552.137. The university must withhold the e-mail address that we have marked under section 552.137 unless the individual who submitted this e-mail address has affirmatively consented to its disclosure.

In summary, the university must withhold some of the submitted information under section 552.110 of the Government Code. The university must also withhold the e-mail address under section 552.137, unless the individual who submitted it has affirmatively consented to its disclosure. The rest of the submitted information is not excepted from disclosure and must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 159133

Enc: Marked documents

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