



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 5, 2003

Ms. Dona G. Hamilton
University of Houston
311 East Cullen Building
Houston, Texas 77204-2028

OR2003-5447

Dear Ms. Hamilton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185315.

The University of Houston (the "university") received two requests for information relating to proposals submitted by contractors responding to the university's Job Order Contract for Construction, Minor Repairs, Renovations and Remodeling, which was solicited in 2002. You state that the university does not take a position on whether the information at issue should be released. However, you state that release of the requested information may implicate the proprietary interests of the companies that submitted proposals to the university. Thus, you state, and provide documentation showing, that you notified third parties 3D/International ("3D/I"), Alpha Building Corporation ("Alpha"), Basic Industries, Inc. ("Basic"), Centennial Contractors Enterprises, Inc. ("Centennial"), DT Construction, Inc. ("DT"), Elba Design & Construction, Inc. ("Elba"), Horizon Group International ("Horizon"), Jamail General Contractor ("Jamail"), MCC Construction Corporation ("MCC"), Purcell Construction, Inc. ("Purcell"), Southerland Construction Co. ("Southerland"), The Trevino Group ("Trevino"), and Vaughn Construction ("Vaughn") of the request and of their right 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) (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 in certain circumstances). We have reviewed the submitted information.

We note that 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, 3D/I, Basic, DT, Jamail, Purcell, Southerland, and Vaughn have not submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, 3D/I, Basic, DT, Jamail, Purcell, Southerland, and Vaughn have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 551.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Alpha, Centennial, Elba, Horizon, MCC and Trevino have submitted comments to this office contending that portions of the submitted information are excepted from disclosure. First, Elba, Horizon, and Trevino argue that their proposals should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104, however, is a discretionary exception intended to protect only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the university does not raise section 552.104, this section does not apply to the requested information. *See* Open Records Decision No. 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Therefore, the university may not withhold the proposals of Elba, Horizon, and Trevino pursuant to section 552.104.

Next, Elba raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that other law makes confidential. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). However, Elba has not directed our attention to any law, nor are we aware of any law, under which any of the information that Elba seeks to have withheld is confidential for purposes of section 552.101. Thus, we find Elba has not demonstrated that section 552.101 applies to any portion of the submitted information.

We also note Horizon's claim that part of its proposal is excepted from disclosure under section 552.102 of the Government Code, which excepts from disclosure "information in a

personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). We note, however, that the information in the proposal that Horizon seeks to withhold under section 552.102 is not “information in a personnel file.” We determine that section 552.102 does not apply to any portion of the submitted information.

Trevino claims that portions of its proposal are excepted from disclosure under section 552.128 of the Government Code. Section 552.128 provides as follows:

- (a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section.
- (b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:
 - (1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:
 - (A) for purposes related to verifying an applicant’s status as a historically underutilized or disadvantaged business; or
 - (B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or
 - (2) with the express written permission of the applicant or the applicant’s agent.
- (c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

We note that the information at issue in this case was not provided to the university in connection with an application for certification as a historically underutilized or disadvantaged business under a certification program. Rather, the information Trevino seeks

to withhold under section 552.128 was submitted by Trevino to the university in connection with a specific proposed contractual relationship. We therefore determine that under these circumstances, the information submitted by Trevino is not excepted from disclosure pursuant to section 552.128 of the Government Code. Consequently, the university may not withhold any portion of the proposal submitted by Trevino under section 552.128.

Next, Alpha, Centennial, Elba, Horizon, MCC, and Trevino all contend that information in their proposals is excepted from disclosure 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See Gov't Code § 552.110(a)*. A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Public Information Act (the "Act") is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). 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. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review, we determine that Alpha, Centennial, and Horizon have made a specific factual showing that release of portions of their proposals would result in substantial competitive injury to the companies. Accordingly, we have marked the information in the proposals of Alpha, Centennial, and Horizon that the university must withhold pursuant to section 552.110(b) of the Government Code. With respect to the remaining information in the proposals, however, we find that Alpha, Centennial, and Horizon have not established that the information is excepted as trade secrets pursuant to 552.110(a). We further determine that Alpha, Centennial, and Horizon have not established by specific factual evidence that the remainder of the information in their proposals is excepted under section 552.110(b). Accordingly, the university may not withhold the remaining submitted information pertaining to Alpha, Centennial, and Horizon pursuant to section 552.110 of the Government Code.

With respect to information in the proposals of Elba, MCC, and Trevino, we find that the companies have not established that any portions of their respective proposals are excepted from disclosure as trade secrets pursuant to section 552.110(a). Furthermore, Elba, MCC, and Trevino have not demonstrated based on specific factual evidence that release any portion of their proposals would result in substantial competitive injury to the companies. Thus, we are unable to determine that section 552.110 applies to the proposals of Elba, MCC, and Trevino. *See* Open Records Decision Nos. 661 (1999), 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *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 are not ordinarily excepted from disclosure under statutory predecessor). Accordingly, the university may not withhold any portion of the proposals submitted by Elba, MCC, and Trevino pursuant to section 552.110 of the Government Code.

We note that the proposals of Alpha, Basic, and Horizon contain e-mail addresses. Section 552.137 of the Government Code provides that “[a]n 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 [the Act].” We note that section 552.137 does not apply to the general e-mail address or website address of a business. We have marked the types of e-mail addresses that the university must withhold, provided the relevant individuals have not affirmatively consented to the release of the e-mail addresses. *See* Gov’t Code § 552.137(b).

Finally, we note that some of the submitted information is 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 protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, 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. *See* Open Records Decision No. 550 (1990).

In summary, we have marked the portions of the proposals submitted by Alpha, Centennial, and Horizon that the university must withhold pursuant to section 552.110(b) of the Government Code. We have marked the type of e-mail addresses that must be withheld under section 552.137 of the Government Code. The remainder of the submitted information must be released in compliance with copyright law.

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 Dep't of Pub. 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,



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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 185315

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