



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2004

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2004-10586

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215180.

The Texas Education Agency (the "agency") received two requests for copies of proposals submitted to the agency in response to two Requests for Proposals concerning Braille textbooks. While the agency takes no position as to whether the requested information is excepted from disclosure, you indicate that release of the information may implicate the proprietary interests of third party vendors. Accordingly you state, and provide documentation showing, that you notified third parties Visual Aid Volunteers, Inc. ("VAV"); Braille Institute of America, Inc. ("BIA"); GH, L.L.C. ("GH"); Braille Jymico; and Clovernook Center for the Blind ("Clovernook") of the request and of their right to submit arguments to this office as to why the information 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 under Public Information Act (the "Act") in certain circumstances). We have reviewed the submitted information, and reviewed comments submitted by third parties.

We first 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, Braille Jymico

and Clovernook have not submitted any comments to this office explaining how release of the requested information would affect the companies' proprietary interests. Braille Jymico and Clovernook have therefore provided us with no basis to conclude that the companies have protected proprietary interests in any of the information at issue. *See* Gov't Code § 552.110(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).

BIA, VAV, and GH have submitted comments regarding the request. BIA references the fact that the Request for Proposals ("RFP") at issue states "[a]fter contract award, proposals are subject to release under the [Act]" and contends that, because the agency received the present requests prior to the award of the contract, the requests are "premature" and invalid. We note that, as information collected, assembled, or maintained by a governmental body in connection with the transaction of official business, the proposals at issue are "public information" and are thus subject to the Act. *See* Gov't Code §§ 552.002 (defining "public information"); .021. Public information in the hands of the agency is subject to required public disclosure under the Act unless the information falls within one of the Act's exceptions to disclosure, and the applicability of the Act's provisions are not dependent on the wording of the RFP. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 (1990) (governmental body cannot, through agreement or contract, alter requirements of Act).

VAV has submitted comments arguing that portions of VAV's proposal information should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104 is a discretionary exception that protects 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 agency does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the information. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the agency may not withhold any of VAV's proposal pursuant to section 552.104.

Next, VAV, BIA and GH raise 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 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).

While GH claims that portions of its proposal are protected as trade secrets, upon review we find that GH has not demonstrated the necessary factors to establish a trade secret claim for any of the information at issue. We therefore determine that the portions of the proposal that GH seeks to withhold are not excepted from disclosure under section 552.110(a). GH, VAV, and BIA also contend that their respective proposals contain commercial and financial information that is excepted from disclosure under section 552.110(b). GH and VAV both specifically seek to withhold pricing information. Upon review, we determine that pricing information in GH’s proposal, as well as pricing information pertaining to the packages in which VAV was not the winning bidder, is excepted from disclosure under section 552.110(b). We have marked the portions of the GH and VAV proposals that the agency must withhold under section 552.110(b). With respect to the remaining pricing information at issue, however, we note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision Nos. 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). We therefore find that the pricing information pertaining to the packages for which VAV was the winning bidder is not excepted from disclosure.

With respect to the remaining information GH, VAV, and BIA seek to withhold under section 552.110(b), we find that the companies have not provided specific factual evidence substantiating their claims that release of the information in the proposals would result in substantial competitive harm. Accordingly, we determine that the remaining information

that GH, VAV, and BIA seek to withhold is not excepted from disclosure under section 552.110(b) and may not be withheld on that basis. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (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 is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

We note, however, that GH's proposal includes tax return information. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The tax return information we have marked in GH's proposal is excepted from disclosure under section 552.101 of the Government Code as information made confidential by federal law.

Finally, we note that VAV's proposal includes social security numbers. A social security number may be excepted from disclosure in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in VAV's proposal are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the agency pursuant to any provision of law enacted on or after October 1, 1990.

In summary, we have marked pricing information in the proposals of GH and VAV that the agency must withhold pursuant to section 552.110(b) of the Government Code. We have marked tax return information in the proposal of GH that the agency must withhold under section 552.101 of the Government Code in conjunction with federal law. Social security

numbers in the proposal of VAV may be excepted under section 552.101 in conjunction with federal law. The remainder of the submitted information must be released to the requestors.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 215180

Enc: Submitted documents

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