



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2005

Mr. David Anderson
General Counsel
Office of Legal Services
Texas Education Agency
1701 N. Congress Ave.
Austin, Texas 78701-1494

OR2005-10225

Dear Mr. Anderson:

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# 236401.

The Texas Education Agency (the "agency") received a request for "a copy of the last winning [National Evaluation Systems, Inc., "NES"] proposal . . . for the present educator certification program." You state that some responsive information will be released to the requestor. You indicate that the submitted information may be subject to third party proprietary interests, and thus, pursuant to section 552.305 of the Government Code, you have notified NES of the request and of the company's 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 Act in certain circumstances). We have received correspondence from NES, which claims in the alternative that the requested information is (1) not subject to the Act, (2) not responsive, or (3) excepted from disclosure under sections 552.101, 552.104, 552.110, 552.116, and 552.131 of the Government Code. We have considered the claims asserted by NES, and reviewed the submitted information.

NES also raises sections 552.001 and 552.022 of the Government Code. The preamble of the Act is codified at section 552.001 of the Government Code and it declares the basis for the policy of open government expressed in the Act. *See* Gov't Code § 552.001. Section 552.022 provides a list of eighteen categories of information that are expressly public and may not be withheld unless confidential under other law. *See* Gov't Code § 552.022. Thus, these sections are not exceptions to disclosure under the Act and therefore do not provide a basis for withholding information from disclosure. Further, although NES claims section 552.116, it did not submit to this office written comments stating the reasons

why section 552.116 would allow the information to be withheld. Therefore, we find that NES has waived this exception. *See* Gov't Code §§ 552.301, .302.

We note that NES seeks to withhold the “Key issues” and “Resumes” portions of the Appendix - Volume 1 as well as “ES Audited Financial Statements.” However, the agency did not submit this information to us for review. Accordingly, this ruling does not address information related to NES beyond what the agency submitted to us for review and is limited to the information the agency submitted as responsive to the instant request. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

We next address NES's contention that the requested information is not public information subject to disclosure under the Act. The Act is applicable to “public information.” *See* Gov't Code § 552.021. “Public information” is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). In this instance, the information at issue relates to commercial negotiations involving the agency and a business prospect.¹ We therefore determine the information at issue is public information as defined by section 552.002. Gov't Code § 552.002(a). Thus, the information at issue is subject to the Act and must be released, unless an exception to disclosure is shown to be applicable.

Next, we address NES's contention that the submitted information is not responsive to the request for information. NES informs us that the company was “the sole bidder in the [2004] RFP process, [and] began negotiations [with SBEC] regarding a new contract.” NES asserts that, because the contract was never executed, the proposal was not a “winning proposal” and therefore is not responsive. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision

¹The agency is the successor-in-interest to the State Board for Educator Certification (“SBEC”), the governmental body that issued the 2004 RFP.

Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984). However, a governmental body must make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at 8 (1990) (construing statutory predecessor). The submitted documents are part of the NES proposal that resulted in contract negotiations between NES and SBEC. Based on our review, we find that the agency has made a good-faith effort to relate the request for information to the information that the agency maintains. Accordingly, we will address NES's arguments against disclosure of this information.

NES contends that the requested information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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 is designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the agency does not raise section 552.104, this section is not applicable to the information at issue. *See* Open Records Decision No. 592 (1991) (stating that governmental body may waive Gov't Code § 552.104). Therefore, the agency may not withhold any of the submitted information under section 552.104.

NES also contends that the information at issue is excepted from disclosure under section 552.110 of the Government Code, which protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is the following:

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). 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. *Id.*² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) 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." 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of information at issue, we find that NES has presented a *prima facie* case that portions of the information that it seeks to withhold are protected as trade secrets under section 552.110(a). Moreover, we have received no arguments to rebut this claim as a matter of law. Thus, we have marked the information that the agency must withhold under section 552.110(a). However, NES has not demonstrated that the remaining information meets the definition of a trade secret. We therefore determine that none of the remaining information is excepted from disclosure under section 552.110(a) of the Government Code. We note that pricing information that pertains 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 (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are the following: (1) the extent to which the information is known outside of [the company]; (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 [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).

We also find that NES has not made the showing required by section 552.110(b) that the release of any of its remaining information would be likely to cause the company any substantial competitive harm. We therefore conclude that none of the remaining information is excepted from disclosure under section 552.110(b). *See* Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 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 was entirely too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company).

NES also raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). Because NES has not demonstrated that the remaining information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor made the specific factual or evidentiary showing required under section 552.110(b) that the release of the information would result in substantial competitive harm, we also conclude that the agency may not withhold any of the remaining information pursuant to

section 552.131(a). Furthermore, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Accordingly, none of the remaining information is excepted under section 552.131(b) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses the doctrine of common law privacy. Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, this office has concluded that public disclosure of an individual’s name, home address, and home telephone number is not an invasion of privacy. *See* Open Records Decision Nos. 554 at 3 (1990); *see also* Open Records Decision No. 455 at 7 (1987) (home addresses and telephone numbers do not qualify as “intimate aspects of human affairs”).

Upon review, we find that NES has failed to demonstrate that the names of NES employees comprise highly intimate or embarrassing information.³ Therefore, none of the remaining information is confidential under common law privacy, and the agency may not withhold it under section 552.101 on that ground.

We note that section 552.136 of the Government Code is applicable to some of the remaining information. Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The agency must, therefore, withhold the marked insurance policy number under section 552.136.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to

³We note that NES also asserts that personal information regarding its employees contained in employee resumes in Appendix - Volume I is private. However, the agency did not submit the Appendix - Volume I to this office for review.

furnish copies of records that are copyrighted. 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 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. *See* Open Records Decision No. 550 (1990).

In summary, the agency must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining submitted information must be released to the requestor; however, in releasing information that is protected by copyright, the agency must comply with applicable 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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

CN/jpa

Ref: ID# 236401

Enc. Submitted documents

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