



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2006

Ms. Renee Smith Byas
Vice Chancellor and General Counsel
North Harris Montgomery Community College District
5000 Research Forest Drive
The Woodlands, Texas 77381-4356

OR2006-03583

Dear Ms. Smith Byas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 245931.

The North Harris Montgomery Community College District (the "district") received a request for a copy of the winning bidder's entire submission regarding RFP# 05-081. You state that, with the exception of pricing information, the requested information has been released to the requestor. Although you take no position with respect to the pricing information, you claim that this information may be proprietary information subject to exception under the Act. Pursuant to section 552.305(d) of the Government Code, the district notified the interested third parties, Provider Select, LLP ("Provider Select") and U.S. Foodservice, Inc. ("USF"), of the district's receipt of the request and of their right to submit arguments to us as to why any portion of the submitted 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 the Act in certain circumstances). We have considered arguments received from Provider Select and USF, and have reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we note that although Provider Select raises section 552.101 of the Government Code to protect its pricing information, it has provided no arguments in support of withholding the information under this provision. Provider Select also raises section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the district does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

We next address the arguments of Provider Select and USF under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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

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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if

¹The following are the six factors that the Restatement gives 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 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).

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).

Although Provider Select and USF both argue that the submitted pricing information is a protected trade secret, we note that 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 (1939); see *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, upon review of the information at issue and the arguments presented, we conclude neither Provider Select nor USF has established a *prima facie* case that the pricing information at issue is a trade secret in this instance. See Open Records Decision No. 402 (1983).

We further find Provider Select and USF have not established that the submitted pricing information is excepted from disclosure under section 552.110(b). See Open Records Decision Nos. 661 at 5-6 (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 and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). In addition, the pricing information of a winning bidder is generally not excepted under section 552.110(b). See Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). 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). 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 balance of public interest in disclosure with competitive injury to company). Thus, the pricing information at issue may not be withheld pursuant to section 552.110 of the Government Code. The submitted pricing information 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, 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).

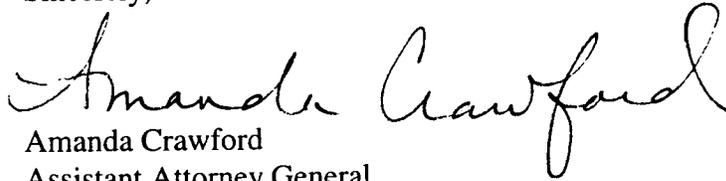
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink that reads "Amanda Crawford". The signature is written in a cursive, flowing style.

Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/krl

Ref: ID# 245931

Enc. Submitted documents

c: Mr. Mike Needham
Assistant General Manager
Ben E. Keith Foods
P. O. Box 34810-78265
San Antonio, Texas 78218
(w/o enclosures)

Mr. Douglas Cassidy
Director, Health Systems
9933 Woods Drive
Skokie, Illinois 60077
(w/o enclosures)

Mr. Joe DaCosta
US Foodservice, Inc.
111 Alliant Drive
Houston, TX 77032
(w/o enclosures)