



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2008

Mr. James Downes
Assistant County Attorney
Harris County Attorney's Office
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2008-01288

Dear Mr. Downes:

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# 300603.

The Harris County Purchasing Agent (the "county") received a request for proposals submitted in response to an RFO for a search firm for Community Health Choice. The county takes no position on whether the submitted information is excepted from disclosure, but you state that release of the submitted information may implicate the proprietary interests of interested third parties Korn/Ferry International ("Korn"), Tyler & Company ("Tyler"), and Witt/Kieffer, Ford, Hadelman, and Lloyd Corp. ("Witt"). You notified the third parties of this request for information and of each company's right to submit arguments to this office as to why the company's information should not be released. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have received correspondence from Korn and Tyler. We have considered all of the submitted arguments and have reviewed the submitted information.¹

¹We note that Korn seeks to withhold its Best and Final Offer, Attachment A of its proposal; however, the county did not submit this information for our review. This ruling does not address information beyond what the county has submitted to us for review. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Initially, we address the county's obligations under section 552.301 of the Government Code. This section prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

The county did not request this decision within the ten-business-day period prescribed by section 552.301(b). The submitted information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982), 150 (1977). A third party's interest can provide a compelling reason to overcome the presumption of openness. Open Records Decision No. 150 (1977). Because third-party interests are at stake in this instance, we will address the submitted arguments.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Witt. Thus, there has been no demonstration that any of the information that relates to Witt is proprietary for the purposes of the Act. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990).

Korn and Tyler claim that certain information pertaining to each of these companies is commercial or financial information excepted under section 552.110(b) of the Government Code. 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 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find that Korn and Tyler have demonstrated that release of portions of their information would cause the companies substantial competitive harm. Accordingly, we have marked the client lists in both proposals and Korn's pricing information that must be withheld under section 552.110(b). However, Korn and Tyler have made only conclusory

allegations and provided no specific factual or evidentiary showing to support their allegations that release of the remaining information at issue would cause either company substantial competitive injury. *See* Open Records Decision No. 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). Furthermore, we note that the pricing information of a winning bidder, such as Tyler in this instance, 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 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). Thus, Korn and Tyler have not demonstrated that substantial competitive injury would likely result from the release of the remaining information. Therefore, the county must only withhold the information we have marked under section 552.110 of the Government Code.

Korn claims its remaining information is excepted from disclosure under section 552.101 of the Government Code based on the right to privacy. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (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 types 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. Upon review, we find that Korn has failed to explain how any portion of the submitted information constitutes highly intimate or embarrassing information the release of which would be highly objectionable to a reasonable person. Thus, we conclude that no portion of the submitted information is protected by common law privacy, and it may not be withheld under section 552.101 on this basis.

Korn also asserts that its remaining information is excepted from disclosure under section 552.113 of the Government Code. Section 552.113 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is:

...

- (2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

Gov't Code § 552.113(a)(2). In Open Records Decision No. 627 (1994), this office concluded that section 552.113(a)(2) protects from public disclosure only commercially valuable geological and geophysical information regarding the exploration or development of natural resources. Open Records Decision No. 627 at 3-4 (1994) (overruling rationale of Open Records Decision No. 504 (1988)). Although Korn raises section 552.113, it does not explain how any of the information at issue relates to commercially valuable geological and geophysical information regarding the exploration or development of natural resources. Therefore, no portion of the submitted information may be withheld pursuant to section 552.113 of the Government Code.

Next, we address Korn's argument that the information at issue is excepted from disclosure by 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). Korn has failed to explain how the submitted information relates to economic development negotiations involving it and the county. *See* Gov't Code § 552.131. Accordingly, we conclude that the county may not withhold any portion of the submitted information pursuant to section 552.131(a) of the Government Code. Furthermore, we note that section 552.131(b) is designed to protect the interest of governmental bodies, not third

parties. As the county does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the submitted information is excepted under section 552.131(b) of the Government Code.

Finally, we note that some of the submitted information bears notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to 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 county must withhold the information we have marked under section 552.110 of the Government Code. The remaining submitted information must be released to the requestor, but any information protected by copyright must be released in accordance 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 300603

Enc. Submitted documents

c: Ms. Deanna L. Banks
Furst Group
555 South Perryville Road
Rockford, Illinois 61107
(w/o enclosures)

Mr. R. Nelson Mann
Mr. J. Larry Tyler
Tyler & Company
375 Northbridge Road, Suite 400
Atlanta, Georgia 30350-3299
(w/o enclosures)

Mr. William Altman
Korn/Ferry International
1100 Louisiana, Suite 2850
Houston, Texas 77002
(w/o enclosures)

Mr. Stephen J. Katz
Witt/Kieffer, Ford, Hadelman,
and Lloyd Corporation
2 Lincoln Centre
5420 LBJ Freeway, Suite 460
Dallas, Texas 75240
(w/o enclosures)