ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2008

Ms. Devon V. Bijansky
Assistant General Counsel
Texas Real Estate Commission
P.O. Box 12188
Austin, Texas 78711-2188

OR2008-07237

Dear Ms. Bijansky:

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# 311108.

The Texas Real Estate Commission (the "commission") received three requests for information pertaining to the commission's Request for Proposals for Real Estate and Appraiser Examination Development and Administration Services (the "RFP"). Each of the three requests seeks the proposals submitted in response to the RFP, as well as the commission's evaluation materials used in the evaluation process of the RFP. You state that the commission has released some of the requested information to the requestors, including portions of the requested proposals and the commission's evaluation materials. Although you take no position with respect to the public availability of the submitted proposals, you state that their release may implicate the proprietary interests of several third parties. Accordingly, you have notified Prometric, Applied Measurement Professionals, Inc. ("Applied"), Pearson VUE ("Pearson"), Morris & McDaniel, Inc. ("Morris"), and PSI Services, L.L.C. ("PSI") of the requests and of each company's opportunity to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of an exception to disclosure in certain circumstances). We have received comments from Prometric, Applied, Pearson, and PSI.. We have considered all of the submitted arguments and reviewed the submitted information.

Initially, you inform us that the submitted proposal pertaining to PSI was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-06865 (2008). In that ruling, we determined that the commission must withhold the specific portions of PSI's proposal that we marked under section 552.110 of the Government Code and release the remaining information. With regard to the submitted information pertaining to PSI that is identical to the information previously ruled upon in that open records letter, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the commission must continue to rely on Open Records Letter No. 2008-06865 as a previous determination and withhold or release the information pertaining to PSI in accordance with that prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the remaining information not encompassed by our previous ruling, we will address the submitted arguments against disclosure.

Next, 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Morris has not submitted any arguments to this office explaining why its information should not be released. Therefore, we have no basis to conclude that Morris has a protected proprietary interest in any of the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the commission may not withhold any portion of the submitted information based on the proprietary interests of Morris.

We next address Applied's arguments against disclosure of a portion of its proposal. Applied raises section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other law. Although Applied claims that a portion of its proposal may be excepted from disclosure under section 552.101, it has not directed our attention to any specific law, nor are we aware of any, under which any of the information in question is considered confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Furthermore, we note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540

S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Therefore, the commission may not withhold any portion of Applied's proposal on the basis of section 552.101 of the Government Code.

Next, we understand Pearson to assert that the "Real Estate Client Pass Rates" section of its proposal is confidential under common-law privacy. Section 552.101 of the Government Code encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See* 540 S.W.2d at 685. Although Pearson argues that its client pass rates section includes personal information regarding the number of individuals who have taken and passed certain real estate exams, we note that the information at issue does not identify any individual to whom the potentially private information relates. Therefore, we conclude that there is no privacy interest to protect in this instance, and the commission may not withhold any portion of Pearson's proposal under common-law privacy.

We next address Prometric's and Pearson's arguments to withhold portions of their proposals 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) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *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 must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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) 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." 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. *Id.* § 552.110(b); *see also* 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).

Prometric asserts that the table of contents section of its proposal is excepted from disclosure under section 552110(b). Upon review of its arguments and the documents at issue, we determine that Prometric has not established by specific factual evidence that release of its table of contents would cause the company substantial competitive harm. *See* ORD 661 at 5. Accordingly, the commission may not withhold Prometric's table of contents under section 552.110. Prometric also argues that a section of its proposal titled "Item Writing Guidelines" should be excepted from disclosure under section 552.110(b). However, the commission informs us that it has already released this information. Accordingly, we need not address Prometric's arguments against disclosure of its "Item Writing Guidelines."

Pearson asserts that portions of its proposal are excepted under subsections 552.110(a) and 552.110(b). Upon reviewing its arguments and the information at issue, we determine that Pearson has established a *prima facie* case that its client information, which we have marked, constitutes a trade secret. Therefore, the commission must withhold the client information we have marked under section 552.110(a) of the Government Code. However,

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[1]The 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).

we find that Pearson has not established that any of its remaining information constitutes a trade secret, and thus the commission may not withhold the remaining information under section 552.110(a). Furthermore, we conclude that Pearson has demonstrated that the "Cost Quotation" portion of its proposal, which we have marked, is excepted from disclosure under section 552.110(b). Thus, the commission must withhold this information under section 552.110(b) of the Government Code. However, we determine that Pearson has not established by specific factual evidence that any of its remaining information, which consists of general company information and information particular to the bid at issue, is excepted from disclosure as commercial or financial information, the release of which would cause the company substantial competitive harm. *See* ORD 661 at 5 (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, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the commission may not withhold any of the remaining information under section 552.110(b).

Finally, we note that some of the submitted information appears to be 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 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 commission may continue to rely on Open Records Letter No. 2008-06865 with regard to the submitted proposal pertaining to PSI that is the subject of that prior ruling. The commission must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released to the requestors, but any copyrighted information may only 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).

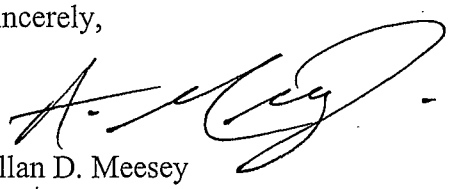
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



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Ref: ID# 311108

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