



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2008

Ms. Renee Byas
General Counsel
Houston Community College
3100 Main
Houston, Texas 77002

OR2008-17124

Dear Ms. Byas:

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# 329134.

The Houston Community College (the "college") received a request for copies of the awarded bids for temporary personnel agency services. Although you take no position as to the disclosure of the submitted information, you state the information may implicate the proprietary interests of third parties. You also state, and have submitted documentation showing, the college has notified these third parties of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor.¹ 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 the applicability of exception to disclose under Act in certain circumstances). Representatives from Riverway and TEK have submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.

¹We understand the following third parties were notified: Apple One Employment Services ("Apple One"), Compass Point Consultants ("Compass Point"), Diverse Staff ("Diverse"), Kelly Services ("Kelly"), Riverway Personnel ("Riverway"), Spherion ("Spherion"), TEK Systems ("TEK"), The Spearhead Group ("Spearhead"), and Topp Knotch Personnel, Inc. ("Topp Knotch").

Initially, we must address Riverway's assertion that the request for information was an improper request. Section 552.301(c) of the Government Code provides that "a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission." Gov't Code § 552.301(c). Riverway argues that because the e-mail request was not sent to the college's officer for public information, or a person designated by that officer, the August 29, 2008 e-mail request was not a proper written request, and therefore did not require the college to respond. *See generally id.* § 552.301 (governmental body's duty to request a ruling from the attorney general arises only after it receives a written request). We note, however, that although the college was not required to respond, the college did treat the request for information as a proper written request and subsequently requested a decision from our office under the Act. Accordingly, we will rule on the submitted information.

Next, we note the college did not comply with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). The submitted documentation shows the college received the request for information on August 29, 2008. You inform us the college was closed for Hurricane Ike on September 12, 2008, and official business operations resumed on September 23, 2008. Thus, the college's ten-business-day deadline in requesting a decision from this office was September 24, 2008. However, you did not ask this office for a decision until September 25, 2008. Consequently, we find the college failed to comply with the procedural requirements of section 552.301.

When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See Gov't Code* § 552.302; *Hancock*, 797 S.W.2d at 381. Generally, a compelling reason exists when some other source of law makes the information confidential or third party interests are at stake. *See Open Records Decision No. 630 at 3* (1994). Accordingly, we will determine whether any of the submitted information is confidential by law or must be withheld to protect third party interests.

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 it should be withheld from disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, Apple One, Compass Point, Diverse, Kelly, Spherion, Spearhead, and Topp Knotch have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of these companies, and the college may not withhold any portion of the submitted information

on that basis. *See* 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).

We note, however, the submitted information includes tax returns of Compass Point and Topp Knotch. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 6103 of title 26 of the United States Code makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). We have marked the corporate and partnership tax return information the college must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Both Riverway and TEK assert some of their information is excepted under section 552.101. However, neither Riverway nor TEK has directed our attention to any law, nor are we aware of any law, that makes the remaining information confidential. *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). Therefore, the college may not withhold any of the submitted information under section 552.101 of the Government Code.

As a provider of personnel services under chapter 2501 of the Occupations Code, Riverway contends some of its information constitutes a trade secret pursuant to section 2501.252, which provides that "a service file is a trade secret for purposes of [section 31.05] of the Penal Code." Occ. Code § 2501.252. Section 2501.001 defines a "service file" as "a job order, resume, application, workpaper, or other record containing information relating to" an applicant, employer, employment position, or the operation of a personnel service. *Id.* § 2501.001(10). We understand Riverway to argue some of its information is a service file and thus is a trade secret pursuant to sections 2501.252 of the Occupations Code and 31.05 of the Penal Code.² Section 2501.252 only makes a service file a trade secret for purposes of section 31.05 of the Penal Code, not for purposes of the Act. Section 31.05 provides "a person commits an offense if, without the owner's effective consent, he knowingly: (1) steals a trade secret; (2) makes a copy of an article representing a trade secret; or (3) communicates or transmits a trade secret." Penal Code § 31.05(b). Section 31.05 does not expressly make information confidential. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of the statute); *see also* Open

²Section 31.05(a)(4) of the Penal Code provides a trade secret is "the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes." Penal Code § 31.05(a)(4).

Records Decision No. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure). We therefore determine the college may not withhold any of Riverway's information as a trade secret under the Penal Code.

Next, Riverway claims its information is, and TEK claims portions of its information are, excepted from disclosure under section 552.110 of the Government Code, which protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets and (2) 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." 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.1958); *see also* ORD 552 at 2. 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. 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; 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 Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office has held 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. ORD 552 at 5-6. 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).

Having considered Riverway and TEK's arguments, we conclude both Riverway and TEK have established a *prima facie* case that their client information constitutes a trade secret. Therefore, the college must withhold this information, which we have marked, pursuant to section 552.110(a) of the Government Code. However, we find Riverway and TEK have failed to demonstrate how any of their remaining information constitutes a trade secret. *See* ORD 552 at 5-6.

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). 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Riverway implies the release of its voluntarily provided information could discourage private parties from providing proprietary information needed by government officials, and would thus harm future procurement efforts by the state. This argument relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act ("FOIA") to third-party information held by a federal agency, as announced in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also* *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). The *National*

Parks test states that commercial and financial information is confidential if disclosure is likely to impair the government's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain proposals from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will only consider each third party's own interests in the information at issue.

Upon review, we find Riverway and TEK have made only conclusory allegations that release of their remaining information would result in substantial damage to each company's competitive position. Thus, these companies have not demonstrated substantial competitive injury would likely result from the release of any of their remaining information. See *id.* (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). Furthermore, we note Riverway and TEK were both awarded bids by the college. 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 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). Therefore, we determine Riverway and TEK's pricing information may not be withheld under section 552.110(b) of the Government Code. Accordingly, the college may not withhold any of Riverway or TEK's remaining information under section 552.110(b) of the Government Code.

Next, 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.”³ Gov't Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

by paper instrument, and includes an account number. *Id.* § 552.136(a). This office has determined insurance policy numbers are access device numbers for the purposes of section 552.136. Thus, the college must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, we note, and you acknowledge, some of the remaining information is 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 college must withhold (1) the federal tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, (2) Riverway's and TEK's client information we have marked under section 552.110(a) of the Government Code, and (3) the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining submitted information must be released, but any copyrighted information 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). If the governmental body does not file suit over 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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/eeg

Ref: ID# 329134

Enc. Submitted documents

c: Requestor
(w/o enclosures)

TEK Systems
10333 Richmond Avenue
Houston, Texas 77042
(w/o enclosures)

Ms. Margo Costello
Riverway Personal
5213 Spruce Street, Suite 100
Bellaire, Texas 77401
(w/o enclosures)

Kelly Services
999 West Big Beaver
Troy, Michigan 48084
(w/o enclosures)

Spherion
12941 North Freeway, Suite 218
Houston, Texas 77060
(w/o enclosures)

Diverse Staff
3730 Kirby Drive, Suite 1010
Houston, Texas 77098
(w/o enclosures)

Apple One Employment Services
Government Services Division
990 Knox Street
Torrance, California 90502
(w/o enclosures)

Topp Knotch Personnel, Inc.
2 Canal Street, Suite 2610
New Orleans, Louisiana 70130
(w/o enclosures)

The Spearhead Group
4615 Southwest Freeway, Suite 470
Houston, Texas 77027
(w/o enclosures)

Compass Point Consultations
5850 San Felipe, Suite 500
Houston, Texas 77057
(w/o enclosures)

Ms. Linda P. Wills
Wison, Elser, Moskowitz,
Edelman & Dicker LLP
5847 San Felipe, Suite 2300
Houston, Texas 77057
(w/o enclosures)