



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 12, 2009

Ms. Ashley R. Allen  
Staff Attorney  
Administrative Law Section  
General Land Office  
P. O. Box 12873  
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OR2009-03312

Dear Ms. Allen:

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# 337037.

The Texas General Land Office (the "GLO") received nine requests from different requestors for information pertaining to Request for Proposal 91165-SG for Hurricane Ike debris removal.<sup>1</sup> You state you have released some of the requested information. Although you take no position as to the disclosure of the remaining requested information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and have provided documentation showing, that the GLO notified: Crowder Gulf; The DRC Group ("DRC"); Bamaco, Inc. ("Bamaco"); Angel Brothers Ent., Ltd. ("Angel Brothers"); Storm Reconstruction Services, Inc. ("Storm"); J & J Maintenance, Inc. ("J & J"); RLB Contracting; Rhoades Land Leveling and Excavation ("Rhoades"); Phillips & Jordan; Jesco Construction Corporation ("Jesco"); JB Coxwell Contracting ("JB Coxwell"); Ceres Environmental Services ("Ceres"); Cahaba Disaster Recovery ("Cahaba"); and Byrd Brothers, Inc. ("Byrd Brothers"). We have received correspondence from Angel

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<sup>1</sup>We note that one of the requestors clarified his original request. *See* Gov't Code § 552.222(b). We also note that to the extent the requestors' companies' information is at issue, they have a right of access to their own companies' information.

Brothers, DRC, J & J, and Rhoades.<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.<sup>3</sup>

Initially, we understand DRC to contend that some of its submitted information, the Narrative and Technical Proposals, is not responsive to the requests for information. We note that 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 (1990) (construing statutory predecessor). After reviewing the requests for information, we find that the GLO has made a good-faith effort to relate the requests for information to the responsive information that the GLO maintains. We, therefore, address the claimed exceptions with respect to this information.

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, this office has received no correspondence from Crowder Gulf, Bamaco, Storm, RLB Contracting, Phillips & Jordan, Jesco, JB Coxwell, Cahaba, or Byrd Brothers. In addition, although Rhoades and DRC notified this office that they object to the release of some of their information, we have received no arguments in support of Rhoades' or DRC's objections to disclosure. *See id.* § 552.301(e)(1)(A) (providing that written comments must be submitted stating reasons why exceptions to disclosure apply). Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret) 542 at 3 (1990). Accordingly, the GLO may not withhold any of these companies' information on the basis of any proprietary interest that these companies may have in their information.

J & J claims that its information is subject to section 552.101 of the Government Code and that matters related to its information are required to be kept confidential. 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. However, J&J has not directed our attention to any law, nor are we aware of any law, that makes the submitted

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<sup>2</sup>In correspondence to this office, Rhoades states it does not object to release of bid tabulations, and DRC states it has no objection to release of bids, bid tabulations, or evaluation documents.

<sup>3</sup>To the extent any additional responsive information existed on the date the GLO received this request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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). Additionally, we note that information is not confidential under the Act simply because the party that submitted the information anticipates or requests that it be kept confidential. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 Gov’t Code § 552.110). Therefore, unless the submitted information relating to J & J falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary. Therefore, the GLO may not withhold any of J & J’s information under section 552.101 of the Government Code.

J & J and Angel Brothers claim that portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov’t Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. See *id.* § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this 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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552. 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). 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).

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. *Id.* § 552.110(b); *see also* ORD 661 at 5-6.

J & J claims that portions of its information are excepted from public disclosure under section 552.110(a) as trade secrets. Upon review, we find that J & J has not demonstrated that any of the information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Accordingly, the GLO may not withhold any of J & J's information under section 552.110(a) of the Government Code.

Next, we find that J & J and Angel Brothers have demonstrated that release of portions of their information would cause those companies substantial competitive harm. Accordingly, we have marked the information that must be withheld under section 552.110(b). However, we conclude that J & J has made only conclusory allegations and has provided no specific factual or evidentiary showing to support its allegations that release of its remaining information at issue would cause its company substantial competitive injury. *See* Gov't Code § 552.110; *see also, e.g.*, ORD 661 at 5-6, 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, experience, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We also note that some of the remaining information J & J seeks to withhold has been made publicly available by J & J on its website. Thus, no portion of the remaining information pertaining to this company may be withheld under section 552.110(b).

We note that sections 552.130 and 552.136 of the Government Code are applicable to some of the submitted information.<sup>4</sup> Section 552.130 of the Government Code excepts from disclosure information that "relates to. . . a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(2). We note that section 552.130 does not encompass motor vehicle record information of other states. To the extent the representative sample of information we have marked consists of motor vehicle record information issued by an agency of the State of Texas, the GLO must withhold it under section 552.130 of the Government Code. *See* Transp. Code § 501.002(14)(B) (motor vehicle means a trailer or semitrailer, other than manufactured housing, that has a gross vehicle weight that exceeds 4,000 pounds). The GLO may not withhold any information that does not pertain to motor vehicle record information issued by an agency of the State of Texas under section 552.130.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). We have marked information that the GLO must withhold under section 552.136.

Finally, we note that some of the remaining 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 materials that are subject to copyright

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<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

protection 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 GLO must withhold the marked information under section 552.110 of the Government Code. To the extent the representative sample of information we have marked consists of motor vehicle record information issued by an agency of the State of Texas, the GLO must withhold it under section under section 552.130 of the Government Code. The GLO must also withhold the information we have marked under 552.136 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.<sup>5</sup>

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Paige Savoie  
Assistant Attorney General  
Open Records Division

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<sup>5</sup> We note that the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Ref: ID# 337037

Enc. Submitted documents

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