



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2009

Ms. Ashley R. Allen
Staff Attorney
Administrative Law Section
General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2009-03436

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# 337311.

The Texas General Land Office (the "GLO") received five requests for information pertaining to a specified Request for Proposals ("RFP"). You state that you have released some of the requested information. Although you take no position with regard to the public availability of the remaining requested information, you state that it may implicate the proprietary interests of CDM; Solid Resources Inc.; Beck Disaster Recovery ("Beck"); Healthy Resources Enterprise, Inc. ("HRE"); Metric Engineering; SRS; Cravens Partners, Ltd ("Cravens"); Neel-Shaffer; and RIO Technical Services ("RIO"). You state, and provide documentation showing, that you 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 requestors. *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 disclosure under the Act in certain circumstances). We have received comments from RIO, Cravens, HRE, and Neel-Shaffer. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that, as of the date of this letter, this office has received no comments from CDM, Solid Resources, Inc., Beck, Metric Engineering, or SRS explaining how the release of their information would affect their proprietary interests. Thus, we have no basis to conclude that the release of the submitted information would implicate the proprietary interests of CDM, Solid Resources, Inc., Beck, Metric Engineering, or SRS. *See e.g.*, Open Records Decisions Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of the requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret). Accordingly, the GLO may not withhold any of the submitted information based on the proprietary interests of entities that have not briefed this office.

Next, RIO asserts that its proposal contained language that restricted the proposal to GLO review only. Further, we note that certain other proposals are marked as proprietary and confidential by the submitting companies. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests 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 through an 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). Consequently, unless the submitted bid proposals come within an exception to disclosure, they must be released, notwithstanding any expectation or agreement to the contrary.

RIO, Cravens, HRE, and Neel-Shaffer assert portions of their proposals are subject to section 552.110 of the Government Code. This section 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. Gov’t Code § 552.110. Section 552.110(a) protects trade secrets 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. *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). Information pertaining to a specific contract with a governmental body 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *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* Open Records Decision No. 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

RIO and Neel-Shaffer argue that their proposals contain trade secret information that should be excepted under section 552.110(a). Upon review, we agree that portions of Neel-Shaffer's proposal contains information that constitutes a trade secret under section 552.110(a).

¹The Restatement of Torts lists the following six factors 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 other 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).

Therefore, the GLO must withhold the information we have marked in Neel-Shaffer's proposal under section 552.110(a) as a trade secret. However, RIO and Neel-Shaffer have not demonstrated how the remaining information in their proposals meets the definition of a trade secret. *See* ORD 552 at 5 (party must establish *prima facie* case that information is trade secret). Accordingly, the GLO may not withhold any of the remaining information in their proposals under section 552.110(a).

RIO, Cravens, HRE, and Neel-Shaffer claim that portions of their proposals are subject to section 552.110(b). Upon review, we find RIO, Cravens, and Neel-Shaffer have demonstrated that release of some of their submitted information would cause them specific competitive harm; therefore, the GLO must withhold the information we have marked under section 552.110(b) of the Government Code. However, upon review of RIO, Cravens, HRE, and Neel-Shaffer's remaining arguments, we find each company has provided conclusory arguments that release of their remaining information would result in substantial competitive harm to their companies. *See* Open Records Decision Nos. 661 (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 (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). We note the pricing information of a winning bidder, such as Neel-Shaffer 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). Accordingly, the GLO may not withhold any portion of the remaining information under section 552.110(b).

RIO further raises section 552.131 of the Government Code for its remaining information at issue. 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 id.* § 552.110(a)-(b). Because RIO did not demonstrate that its information at issue qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor has it made the specific factual or evidentiary showing required under section 552.110(b) that the release of the information at issue would result in substantial competitive harm, we conclude that none of the information at issue may be withheld pursuant to section 552.131(a). Furthermore, we note that section 552.131(b) is designed to protect the interest of governmental bodies, not third parties. As the GLO does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of RIO's information is excepted under section 552.131(b) of the Government Code.

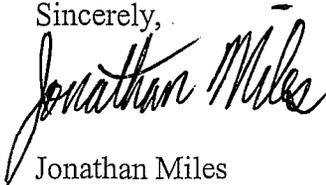
We note that portions of the submitted information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, 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 information we have marked in Neel-Shaffer's proposal under section 552.110(a) as a trade secret and the information we have marked in RIO, Cravens, and Neel-Shaffer's proposals under section 552.110(b). The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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, 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 337311

Enc. Submitted documents

c: Requestor
(w/o enclosures)