



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2009

Ms. Neera Chatterjee
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-06329A

Dear Ms. Chatterjee:

This office issued Open Records Letter No. 2009-06329 (2009) on May 11, 2009. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 11, 2009. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 349904.

The University of Texas System (the "university") received a request for information related to a request for proposals for office products and services. The requestor subsequently clarified the request to include "bid responses from each responding company [except the requestor's,] the complete response package including the pricing submitted in the online auction and the line item level pricing" of the winning bidder. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You claim that portions of the submitted information are excepted from disclosure under section 552.137 of the Government Code. You also state that the remaining information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you have notified the interested third parties of the request for information and their right to submit arguments to

this office as to why the requested information should not be released.¹ *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from TBS, Lone Star, OfficeMax, and Staples, Inc.² We have considered the claimed exceptions and reviewed the submitted information.

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 letter, we have not received comments from any of the remaining third parties. Thus, we have no basis for concluding that any portion of the submitted information constitutes the proprietary information of any of those companies, and none of their information may be withheld on that basis. *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).

Staples contends that the requestor, as a competitor, should not be allowed to request its pricing information under the Act. However, this office has determined the Act does not permit the consideration by a governmental body or this office of a requestor's intended use of information when responding to open records requests. *See* Gov't Code §§ 552.222(a) (stating governmental body may not inquire into purpose for which information will be used), 552.223 (requiring uniform treatment of all open records requests); *see* Open Records Decision Nos. 508 (1988) at 2 (motives of a person seeking information under the Act are irrelevant), 51 (1974). Therefore, the university may only withhold the information at issue if it is excepted from disclosure under the Act or made confidential by law.

Staples raises section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note, however, that section 552.104 only protects the interests of a governmental body and is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). In this instance, the university has not argued that the release of any portion of the

¹The third parties that received notice pursuant to section 552.305 are the following: ELP Enterprises, Inc.; 1 Stop Print and O/S, Inc.; Advantage Supply; Corporate Express Office Products, Inc.; Williams Office Products, Inc.; Today's Business Solutions ("TBS"); Tejas Office Products, Inc.; Summus Industries, Inc.; Stargel Office Solutions; Staples Contract and Commercial, Inc.; Lone Star Supplies ("Lone Star"); and OfficeMax, Inc. ("OfficeMax").

²Staples, Inc. provides comments on behalf of its subsidiaries, Staples Contract and Commercial, Inc., and Corporate Express Office Products, Inc. (collectively, "Staples").

submitted information would harm its interests in a particular competitive situation under section 552.104. Because the university has not submitted any arguments under section 552.104, we conclude that the university may not withhold any portion of the information pertaining to Staples under section 552.104 of the Government Code.

Lone Star and OfficeMax each claim that portions of the submitted information are excepted from disclosure under section 552.110(a) of the Government Code, while TBS and Staples assert both sections 552.110(a) and 552.110(b).³ Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 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.), *cert. denied*, 358 U.S. 898 (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

³TBS states that it has no objection to the release of its "core-item pricing."

secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that 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).

Section 552.110(b) of the Government Code 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.*; see also *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

TBS implies that the release of its 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 Association 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

⁴The 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).

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.

Having considered the arguments of Lone Star, OfficeMax, TBS, and Staples, we find that these companies have failed to establish that any of the information at issue meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We note that pricing information pertaining to a particular proposal or 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3 (1982). Therefore, we determine that no portion of the submitted information is excepted from disclosure under section 552.110(a) of the Government Code.

Staples and TBS also claim that some of their information is excepted from disclosure under section 552.110(b). Upon review, we find that Staples has established that its pricing information constitutes commercial and financial information, the release of which would cause the company substantial competitive harm. Therefore, the university must withhold the information we have marked under section 552.110(b). We note, however, that the pricing information of a winning bidder, such as TBS, 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, the pricing information of TBS may not be withheld on that basis. Further, TBS and Staples have failed to provide specific factual evidence demonstrating that release of any of the remaining submitted information would result in substantial competitive harm to these companies. None of the remaining information is excepted from disclosure under section 552.110(b). *See* ORD 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).

You have marked certain e-mail addresses that the university seeks to withhold under section 552.137 of the Government Code. Section 552.137 provides in relevant part the following:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . . [.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses at issue were provided to the university in response to a request for bids or proposals. *See id.* § 552.137(c)(3). Thus, the e-mail addresses at issue are not excepted under section 552.137. *See id.* § 552.137(c).

We note that some of the remaining information is excepted from public disclosure under section 552.101 of the Government Code.⁵ Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 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).

This office has generally found that personal financial information not relating to a financial transaction between an individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We note that common-law privacy protects the interests of individuals, not those of corporations and other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Furthermore, although this

⁵The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

office generally classifies percentages of ownership of a business as personal financial information, we do not so hold where an individual owns a one hundred percent interest in a business. Such information simply reflects that an individual owns his own business. Upon review, we find that the ownership percentage information we have marked is confidential pursuant to the owner's common-law right to privacy. The university must withhold this information under section 552.101 in conjunction with common-law privacy. However, the information that reflects one hundred percent ownership is not protected by common-law privacy and may not be withheld on that basis under section 552.101.

In summary, the university must withhold the information we have marked under section 552.110 of the Government Code. The university must also withhold the ownership percentage information we have marked under section 552.101 in conjunction with common-law privacy. The remaining submitted information must be released to the requestor.

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,

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 349904

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ref: ID# 349904

Ms. Martha Ceballos
ELP Enterprises, Inc.
9346 Rosstown Way
Houston, Texas 77080
(w/o enclosures)

Mr. F. Kaka
1 Stop Print and O/S, Inc.
1000 East Campbell Road, Suite 108
Richardson, Texas 75081
(w/o enclosures)

Mr. Kevin Kilpatrick
CFO
Advantage Supply
P.O. Box 471103
Fort Worth, Texas 76147
(w/o enclosures)

Mr. Wayne Smith
Regional V.P. of Strategic Accounts
Corporate Express Office Products, Inc.
1 Environmental Way
Broomfield, Colorado 80021
(w/o enclosures)

Mr. Doug Parsley
Williams Office Products, Inc.
2330 Merrell Road
Dallas, Texas 75229
(w/o enclosures)

Mr. Stephen Fraga
President
Tejas Office Products, Inc.
1225 West 20th Street
Houston, Texas 77008-3315
(w/o enclosures)

Mr. Rodney Craig
President
Summus Industries, Inc.
14090 Southwest Fwy, Ste 300
Sugar Land, Texas 77478
(w/o enclosures)

Mr. Jack Stargel
President
Stargel Office Solutions
4700 Blalock
Houston, Texas 77041
(w/o enclosures)

Ms. Rita Davis
President
Lone Star Supplies
P.O. Box 151616
Austin, Texas 78715-1616
(w/o enclosures)

Mr. Joseph Doody
President
Staples Contract and Commercial, Inc.
P.O. Box 9271
Framingham, MA 01701-09271
(w/o enclosures)

Ms. Karen E. Kohl
Associate General Counsel
OfficeMax, Inc.
263 Shuman Boulevard
Naperville, Illinois 60563
(w/o enclosures)

Mr. Robert H. Kelley
Counsel
Staples Contract and Commercial, Inc.
P.O. Box 9271
Framingham, MA 01701-09271
(w/o enclosures)

Mr. Scott O'Farrell
Office Max, Inc.
6355 Clara Road
Houston, Texas 77041
(w/o enclosures)

Mr. Francisco Ramirez
Francisco Ramirez & Associates, P.C.
Three Riverway, Suite 555
Houston, Texas 77056
(w/o enclosures)

Mr. Robert Jiminez
President
Today's Business Solutions
1920 North Memorial Way, Suite 100
Houston, Texas 77007
(w/o enclosures)