



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701

OR2009-09079

Dear Ms. Alexander:

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# 348134.

The Texas Department of Transportation (the "department") received a request for all information related to the award of TxDOT IFB B442009018807000, including the bidders' proposals, pricing, and decisions that led to the award of the IFB. You state you have released a portion of the requested information. Although you take no position with respect to the public availability of the remaining requested information, you state its release may implicate the proprietary interests of Colonial Press International ("Colonial"), Fry Communications Inc. ("Fry"), The Lane Press Inc. ("Lane"), Publishers Press Inc. ("Publishers"), Quad Graphics ("Quad"), Quebecor World Dallas ("Quebecor"), RR Donnelley ("Donnelley"), Royle Printing ("Royle"), and Brown Printing ("Brown"). You state you have notified the third parties of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *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 arguments from Fry, Quebecor, Royle, and Brown. We have considered these arguments and reviewed the submitted information.

We note 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter Colonial, Lane, Publishers, Quad, and Donnelley have not submitted any comments to this office explaining how release of the submitted information would affect their proprietary interests. Therefore, these companies have not provided us with any basis to conclude they have a protected proprietary interest in any of the submitted information. *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, it actually faces competition and substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the department may not withhold the information related to Colonial, Lane, Publishers, Quad, or Donnelley on the basis of any proprietary interest these parties may have in the information.

Quebecor seeks to withhold pricing and customer information from the requestor that the department did not submit to us for review.¹ Also, Brown seeks to withhold its pricing information that the department did not submit for our review. Accordingly, this decision does not address such information. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested, or representative sample, if voluminous amount of information was requested).

Fry and Quebecor claim their information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure information that, if released, would give an advantage to a competitor or bidder. *Id.* § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed

¹Quebecor objects to release of its pricing information even though Quebecor is the winning bidder. 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 Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *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). We further note pricing information 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision Nos. 319 at 3 (1982) (information relating to pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 306 at 3 (1982).

to protect interests of a governmental body in a competitive situation, and not interests of private parties submitted information to the government), 522 (1989) (discretionary exceptions in general). Because the department did not assert section 552.104, the department may not withhold Fry's or Quebecor's information pursuant to section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

Royle, Brown, and Quebecor assert portions of their submitted information are excepted under section 552.110(b) of the Government Code. 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 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing the information at issue and the arguments of the interested third parties, we conclude Royle and Brown have demonstrated release of their customer information would result in substantial competitive harm to them for purposes of section 552.110(b). We have marked the information that must be withheld on this basis. However, we find the companies have made only conclusory allegations that release of their remaining information would result in substantial competitive harm and have not provided a specific factual or evidentiary showing to support this allegation. *See* Open Records Decision No. 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 was entirely too speculative).

Fry, Brown, and Quebecor assert portions of their submitted information are excepted under section 552.110(a) of the Government Code. Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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 . . . [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.

Restatements of Torts § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776.

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;
- (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). This office must accept a claim that information subject to the Act is exempted 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. However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990).

We find Fry has made a *prima facie* showing that its customer information, which we have marked, is protected trade secret information; therefore, the department must withhold the marked information under section 552.110(a). However, we find Fry, Brown, and Quebecor have not shown the remaining information at issue meets the definition of a trade secret or

demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Thus, the department may not withhold the remaining information under section 552.110(a).

We note the remaining submitted information contains insurance policy numbers that are excepted from disclosure under section 552.136 of the Government Code.² 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.” Gov’t Code § 552.136(b). Accordingly, the department must withhold these access device numbers, which we have marked, under section 552.136 of the Government Code.

Finally, we note some of the materials at issue may 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 department must withhold the proprietary information we have marked under section 552.110 of the Government Code and the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released; however, in releasing the information that is copyrighted, the department must comply with applicable 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

²The 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).

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 348134

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Joseph P. Dirik
Fulbirth & Jaworski, L.L.P.
Counsel for Quebecor
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784
(w/o enclosures)

Stephen E. Yoch
Felhaber, Larson, Fenlon & Vogt
Counsel for Brown Printing
444 Cedar Street, Suite 2100
St. Paul, Minnesota 55101-2136
(w/o enclosures)

Scott Pierquet
Director of Finance
Royale Printing
745 South Bird Street
Sun Prairie, Wisconsin 53590
(w/o enclosures)

Robert A. Swift
Kohn, Swift & Graf, P.C.
Counsel for Fry Communications
One South Broad Street, Suite 2100
Philadelphia, Pennsylvania 19107-3304
(w/o enclosures)

Chris Seruga
Colonial Press International
3690 Northwest 50th Street
Miami, Florida 33142-3934
(w/o enclosures)

Charles G. Shelley Jr.
The Lane Press Inc.
P.O. Box 130
Burlington, Vermont 05402-0130
(w/o enclosures)

Byran S. Bullock
Publishers Press Inc.
100 Frank E Simon Avenue
Sheperdsville, Kentucky 40165-6013
(w/o enclosures)

Tina Stacy
Quad/ Graphics
16650 Westgrove Drive, Suite 175
Addison, Texas 75001-5669
(w/o enclosures)

Richard Johnson
Vice President
RR Donnelley
1512 North Church Road, Suite B
Liberty, Missouri 64068-7162
(w/o enclosures)