



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2009

Mr. Scott A. Kelly
Deputy General Counsel
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OR2009-13454

Dear Mr. Kelly:

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# 356450.

Texas A&M University (the "university") received a request for all contractor submissions and responses regarding Request for Proposals ("RFP") Main 09-0022. Although you take no position with respect to the public availability of the requested information, you state that release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the university has notified the interested third parties of the request and of their right to submit arguments to this office explaining why their information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 applicability of exception in certain circumstances). Pursuant to section 552.305(d), we have received comments from HP, Appro, and Nimble objecting to the release of their information.² We have considered the submitted arguments and reviewed the submitted information.

¹The notified third parties are: Hewlett-Packard Company ("HP"); Appro International, Inc. ("Appro"); Nimble Services, Inc. ("Nimble"); Dell Marketing, L.P.; PetroSys Solutions Inc. d/b/a psitechnology; Ace Computers; and R-Associates, Inc.

²We note that Appro also argues against the disclosure of RFP MAIN 09-0037. However, this proposal is not responsive to this request for information regarding RFP MAIN 09-0022. This decision does not address the public availability of non-responsive 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, only HP, Appro, and Nimble have submitted to this office reasons explaining why its information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *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). Therefore, the university may not withhold any portion of the submitted information on the basis of any proprietary interest that the remaining third parties may have in this information.

HP asserts that its information is confidential because HP's documents were marked as such when they were submitted to the university. Further, we understand Appro to assert that portions of its information are confidential because the information was obtained through a non-disclosure agreement. We note that information is not confidential under the Act simply because the party that submits 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 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 section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

HP claims that some of its information is subject to section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. However, HP has not directed our attention to any law, nor are we aware of any law, that makes any of its information confidential. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, the university may not withhold any of HP's information under section 552.101 of the Government Code.

HP and Nimble both assert that their information is excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104. We note that section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed

to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the university does not raise section 552.104, this section is not applicable to the requested information. *See* ORD 592 (section 552.104 may be waived by governmental body). Therefore, the university may not withhold any of HP's or Nimble's information under section 552.104 of the Government Code.

Appro asserts that its information is confidential under section 552.128 of the Government Code. Section 552.128 is applicable to "[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]" Gov't Code § 552.128(a). However, Appro does not indicate it submitted its proposal to the university in connection with an application for certification under such a program. Moreover, section 552.128(c) states that:

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, the information at issue was submitted by Appro in a proposal to the university in connection with a proposed contractual relationship with the university. Accordingly, the university may not withhold any of Appro's information under section 552.128 of the Government Code.

Next, HP, Appro, and Nimble all assert that portions of their information are excepted from disclosure under section 552.110 of the Government Code. 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. *Id.* § 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. 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.³ 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). We also 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; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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 at 5-6.

Having considered HP's, Appro's, and Nimble's arguments under section 552.110(a), we conclude that HP has established a *prima facie* case that its customer information, which we have marked, constitutes a trade secret. Therefore, the university must withhold the information we have marked in HP's information pursuant to section 552.110(a) of the

³The 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).

Government Code. We note, however, that HP has made some of the customer information it seeks to withhold publicly available on its website. Appro has also made all of the customer information it now seeks to withhold publicly available on its website. Because HP and Appro have published this information, they have failed to demonstrate that this information is a trade secret and none of this information may be withheld under section 552.110(a). Additionally, we find that HP, Appro, and Nimble have failed to demonstrate how any of the remaining information meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. Thus, none of the remaining information may be withheld on that basis.

Upon review of the arguments under section 552.110(b), we find that HP, Appro, and Nimble have established that their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause these companies substantial competitive injury. Furthermore, we find that Nimble has demonstrated that release of the customer information they seek to withhold, which we have marked, would cause the company substantial competitive harm. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find that HP, Appro, and Nimble have made only conclusory allegations that the release of any of their remaining information at issue would result in substantial damage to each company's competitive position. Thus, these companies have not demonstrated that substantial competitive injury would result from the release of any of their remaining information at issue. *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, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of HP's, Appro's, or Nimble's remaining information at issue may be withheld under section 552.110(b).

We note that a portion of Nimble's and Appro's remaining information is excepted from disclosure under section 552.136 of the Government Code.⁴ 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." *Id.* § 552.136(b). Upon review, we find that the bank account number, routing number, and insurance policy numbers in the remaining information are access device numbers under section 552.136. Accordingly, the university must withhold the information we have marked under section 552.136 of the Government Code.

⁴The 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).

Lastly, we note that some of the submitted 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 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). Accordingly, the submitted information must be released to the requestor in accordance with copyright.

In summary, the university must withhold the information we have marked in HP's, Appro's, and Nimble's proposals under sections 552.110(a) and 552.110(b) of the Government Code. The university must also withhold the bank account number, routing number, and insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released to the requestor 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, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 356450

Enc. Submitted documents

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(w/o enclosures)

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