



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2009

Mr. James Downes
Assistant County Attorney
Harris County Attorney's Office
2525 Holly Hall Suite 190
Houston, Texas 77054

OR2009-14159

Dear Mr. Downes:

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# 357553 (CA File No. 09HSP0872).

The Harris County Purchasing Agent (the "county") received a request for "the recent winning bid/proposal/contract" for background checks for the Harris County Hospital District. Although the county takes no position on the public availability of the requested information, you believe that the submitted information may implicate the interests of K-Griff Investigations, Inc. ("K-Griff"). You inform us that K-Griff was notified of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released.¹ We have considered the arguments that we received from an attorney for K-Griff and reviewed the submitted information.

We first note that some of the submitted information is not responsive to the instant request. In this instance, the contract at pages 7 through 17 of the submitted information did not exist when the county received the request. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

information.² Therefore, the submitted contract is not responsive to this request for information. This decision does not address the public availability of the non-responsive information, and the county need not release that information in response to this request.

We next note that the county did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that must be followed in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) provides that a governmental body must request a decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) provides that a governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us that the county received the instant request for information on April 24, 2009; therefore, the county's deadlines under subsections 552.301(b) and 552.301(e) were May 8 and May 15, respectively. The county requested this decision on July 31 and submitted the responsive information on August 7. Thus, the county did not comply with section 552.301, and the responsive information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Accordingly, we will determine whether the county must withhold any of the responsive information to protect K-Griff's interests.

K-Griff claims exceptions to disclosure under sections 552.104 and 552.110 of the Government Code. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the county, not the proprietary interests of private parties such as K-Griff. *See* Open Records Decision No. 592 at 8 (1991)

² *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

(discussing statutory predecessor). Moreover, section 552.104 is a discretionary exception that a governmental body may waive and does not provide a compelling reason for non-disclosure under section 552.302. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (statutory predecessor to Gov't Code § 552.104 subject to waiver). In this instance, the county did not raise section 552.104 as an exception to disclosure. Furthermore, in otherwise failing to comply with section 552.301 of the Government Code, the county waived section 552.104. Therefore, the county may not withhold any of the responsive information under section 552.104 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” 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.” Gov't Code § 552.110(a)-(b).

The Supreme Court of Texas has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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, 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 [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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a third party's claim for exception as valid under section 552.110(a) if the third party establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.³ *See*

³The 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];

Open Records Decision No. 552 at 5 (1990). 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* 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).

K-Griff contends that portions of the responsive information are excepted from disclosure under section 552.110(b). Having considered K-Griff's arguments, we conclude that K-Griff has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the responsive information would cause K-Griff substantial competitive harm. With specific respect to K-Griff's pricing information, we note that K-Griff was awarded a contract by the county. The pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). *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 at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). We therefore conclude that the county may not withhold any of the responsive information under section 552.110 of the Government Code.

We note that the responsive information includes insurance policy numbers. Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled,

(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.

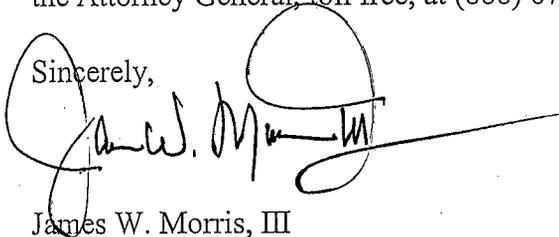
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

or maintained by or for a governmental body is confidential.”⁴ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). The county must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The rest of the responsive information must be released.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 357553

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. John F. Lemos, Jr.
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⁴Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).