



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 13, 2010

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
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OR2010-00662

Dear Ms. Chatterjee:

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# 367110 (OGC # 121861).

The University of Texas System (the "system") received a request for information relating to 14 specified projects. You take no position on the public availability of the requested information. You believe, however, that this request for information may implicate the interests of third parties. You inform us that the interested parties were notified of this request for information and of 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); 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). We received arguments from attorneys

¹The third parties who were notified are Abel Design Group, Ltd.; Alamo Architects; Bennett Design Group; BOKA Powell, LLC; The Bommarito Group ("Bommarito"); Booziotis & Company Architects; Corgan Associates, Inc.; DLR Group; F & S Partners, Inc.; Gensler & Associates, Inc. ("Gensler"); Gideon Toal, Inc.; Graeber, Simmons & Cowan, Inc.; HKS; Hampton Design; Hellmuth, Obata + Kassabaum, LP; Interprise/Southwest Interior and Space Design, Inc. ("Interprise"); Lauckgroup-I, Inc; Marmon Mok, Inc. ("Marmon Mok"); Megamorphosis Architecture & Interior Design, LLC; Merriman Associates/Architects, Inc. ("Merriman"); Montgomery Roth Architecture & Interior Design, LLC; Noack Little Architects, Inc.; O'Connell Robertson; Omniplan, Inc. ("Omniplan"); PPDS; PSP; Ed Parker, Inc.; Parsons - 3D/I; Parsons Architecture; Perkins & Will; RDH & Associates, Inc.; RAD Consultants; Rees Associates, Inc. ("Rees"); STG Architects; STG Design, Inc.; Staffelbach, Inc.; Sterling Barnett Little, Inc.; Studio 8 Architects; and WHR Architects.

for or representatives of Bommarito, Gensler, Interprise, Marmon Mok, Merriman, Omniplan, and Rees. We have considered all of the submitted arguments and reviewed the submitted information.²

We first note that a small portion of the submitted information does not appear to be related to any of the projects listed by the requestor. Thus, that information is not responsive to this request for information. This decision does not address the public availability of any information that is not responsive to this request, and the system need not release any such information in response to this request.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, only Bommarito, Gensler, Interprise, Marmon Mok, Merriman, Omniplan, and Rees have submitted arguments to this office. Therefore, because none of the other third parties has demonstrated that any of the information at issue is proprietary for the purposes of the Act, the system may not withhold any of the submitted information on the basis of any proprietary interest that any of those parties may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Turning to the arguments that we received from the third parties, we begin with Bommarito's and Merriman's claims under section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 protects information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Although Bommarito contends that some of its information is protected by copyright, we note that copyright law does not make information confidential for the purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). Likewise, Merriman has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the system may not withhold any of the submitted information under section 552.101 of the Government Code.

Gensler and Rees claim 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(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private third parties. *See* Open Records Decision

²We note that the submitted information does not appear to include some of the information for which the third parties claim exceptions. This decision is applicable only to the information that the system submitted to this office in requesting this decision. *See* Gov't Code § 552.301(e)(1)(D) (governmental body that requests attorney general's decision must submit specific information at issue).

No. 592 at 8 (1991) (discussing statutory predecessor). Thus, because the system does not claim section 552.104 of the Government Code, none of the submitted information may be withheld under that exception.

All seven parties that submitted arguments claim section 552.110 of the Government Code. This exception protects the proprietary interests of third 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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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.³

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];
- (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.

See ORD 552 at 5. We cannot conclude, however, 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 ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Bommarito states that its pricing was submitted as confidential information, and Rees states that its information was marked as being confidential. We note that information is not confidential under the Act simply because the party that submitted the information anticipated or requested 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 by 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 did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless information falls within the scope of an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Bommarito, Gensler, Interprise, Marmon Mok, Omniplan, and Rees claim section 552.110(a) and/or section 552.110(b) for pricing and other parts of their proposals. Merriman also raises section 552.110 but has submitted no arguments in support of its assertion of this exception. With specific regard to the parties’ claims for their prices, we note that pricing information pertaining to a particular contract is generally not a trade secret under section 552.110(a) 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); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Likewise, 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

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

made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

Having considered the parties' arguments and reviewed the information at issue, we have marked pricing information relating to Bommarito, Gensler, Interprise, Marmon Mok, Omniplan, and Rees that the system must withhold under section 552.110(b). We conclude that none of the parties has demonstrated that any of the remaining information at issue constitutes a trade secret under section 552.110(a). We also conclude that none of the parties has made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause substantial competitive harm. We therefore conclude that the system may not withhold any of the remaining information under section 552.110. *See* Gov't Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 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), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Merriman also raises section 552.113 of the Government Code, which protects certain geological, geophysical, and other information regarding the exploration or development of natural resources. *See* Gov't Code § 552.113; *see generally* Open Records Decision No. 627 (1994). Because Merriman has not demonstrated that this exception is applicable to any of the remaining information at issue, the system may not withhold any information under section 552.113 of the Government Code.

Merriman and Rees raise section 552.131 of the Government Code, which 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(a)-(b). 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.* Thus, the protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); ORD 552, 661. Therefore, because we have already disposed of Merriman's and Rees's claims under section 552.110, the system may not withhold any of the remaining information under section 552.131(a) of the Government Code.

Section 552.131(b) protects information relating to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See* Gov't Code § 552.131(b). This aspect of section 552.131 protects the interests of governmental bodies, not those of third parties. Therefore, because the system does not claim this exception, none of the remaining information may be withheld under section 552.131(b) of the Government Code.

We note that section 552.136 of the Government Code is applicable to some of the remaining information.⁴ Section 552.136(b) 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, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked insurance policy numbers that the system must withhold under section 552.136.⁵

We also note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

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).

⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the system must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code.⁶ The rest of the submitted information must be released, but any information that is protected by copyright 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, toll free, at (888) 672-6787.

Sincerely,



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

JWM/cc

Ref: ID# 367110

Enc: Submitted information

c: Requestor
(w/o enclosures)

⁶We note that the remaining information includes social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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