



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2010

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2010-11247

Dear Ms. McGowan:

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# 388009.

The Dallas Independent School District (the "district") received a request for statements of qualifications submitted in response to RFQ 01-10. You claim the requested information is excepted from disclosure under section 552.110 of the Government Code. You also state the submitted information may implicate the interests of third parties. Accordingly, you state, and submit documentation showing, that you notified the following third parties: Apex Roofing Technology ("Apex"); Conley Group, Inc. ("Conley"); Crenshaw Consulting Group, LP ("Crenshaw"); DryTec Moisture Protection Technology Consultants, Inc. ("DryTec"); Roof Asset Management USA ("RAM"); Roof Technical Services, Inc. ("Rooftech"); and Terracon Consultants, Inc. ("Terracon") of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exception you claim and reviewed the submitted information. We have also considered comments received from Apex, DryTec, Rooftech, and Terracon.

Initially, we note that 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be

withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Conley, Crenshaw, or RAM. Thus, we have no basis to conclude that any portion of the submitted information constitutes the proprietary information of Conley, Crenshaw, or RAM. 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. Accordingly, the district may not withhold any of the submitted information based on any proprietary interests Conley, Crenshaw, or RAM may have in it.

DryTec raises section 552.101 of the Government Code for portions of its submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101; see Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). However, DryTec has not directed our attention to, nor are we aware of, any law under which any of its information is considered to be confidential for the purposes of section 552.101. Therefore, the district may not withhold any of DryTec's information under section 552.101 of the Government Code.

Next, Apex raises section 552.102 of the Government Code for a portion of its information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In this instance, the information at issue is related to a private entity, Apex. Therefore, the district may not withhold any portion of Apex's information under section 552.102(a) of the Government Code.

DryTec asserts some of its information is excepted from disclosure pursuant to section 552.104 of the Government Code, which 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 district, not the proprietary interests of private parties such as DryTec. See Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the district does not raise section 552.104 as an exception to disclosure. Therefore, the district may not withhold any of DryTec's information under section 552.104 of the Government Code.

Although the district argues the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the district's arguments under section 552.110. We will, however, address the section 552.110 of the Government Code of Apex, DryTec, Rooftech, and Terracon. Section 552.110(a) protects trade secrets obtained

from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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* 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 secret factors. 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).

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,

¹The 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.

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).

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Apex, Rooftech, and Terracon argue that portions of their information constitute protected trade secrets. Upon review, we find that Apex, Rooftech, and Terracon have established *prima facie* cases that portions of their respective customer information, which we have marked, constitute trade secrets. Accordingly, the district must withhold the information we have marked pursuant to section 552.110(a). However, we note that Rooftech has made some of the customer information they seek to withhold publicly available on the company's website. Because Rooftech has published this information, Rooftech has failed to demonstrate that release of this information would cause substantial competitive injury. *See* ORD 402. In addition, Apex, Rooftech, and Terracon have failed to demonstrate that any portion of their remaining information at issue constitutes a trade secret. Thus, no portion of their remaining information may be withheld under section 552.110(a) of the Government Code.

Next, Apex, DryTec, Rooftech, and Terracon assert that portions of their remaining information are excepted from disclosure under section 552.110(b). DryTec asserts its former and current customer information constitute commercial information, the release of which would cause DryTec substantial competitive injury. Upon review, we find DryTec has established that release of its customer information would cause the company substantial competitive injury; therefore, the district must withhold this information, which we have marked, under section 552.110(b). However, we find that Apex, DryTec, Rooftech, and Terracon have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *See* Open Records Decision No. 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). Therefore, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note the remaining information contains insurance policy numbers. Section 552.136(b) of the Government Code states 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."² Gov't Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, the district

²The Office of the Attorney General will raise a mandatory exception, such as section 552.136, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code.³

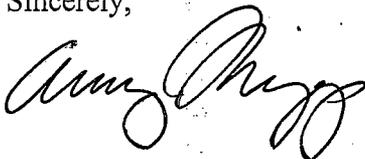
We note some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, the district must withhold the information we marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released, but any information 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/tp

³We note that 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 insurance policy numbers under section 552.136, without the necessity of requesting an attorney general decision.

Ref: ID# 388009

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Wilson Gin
Apex Roofing Technology
9603 White Rock Trail, Suite 326
Dallas, Texas 75268
(w/o enclosures)

Mr. Edward R. Grant Jr.
Roof Asset Management USA
13550 Falling Water Drive, Suite 205
Strongsville, Ohio 44136
(w/o enclosures)

Mr. Steven R. Block
Block & Garden, LLP
5949 Sherry Lane, Suite 900
Dallas, Texas 75225
(w/o enclosures)

Mr. Greg Waterscheid
Conley group, Inc
5800 East Campus Circle, Suite 250
Irving, Texas 75063
(w/o enclosures)

Ms. Vicki Crenshaw
Crenshaw Consulting Group, LP
P.O. Box 1590
Glen Rose, Texas 76043
(w/o enclosures)

Mr. Michael J. Yost
Terracon Consultants, Inc
18001 West 106th Street, Suite 300
Olathe, Kansas 66061
(w/o enclosures)

Mr. J. Keith Webb
The Miller Law Firm
3811 Turtle Creek Boulevard, Suite 1950
Dallas, Texas 75219
(w/o enclosures)