



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2010

Mr. James E. Tourtelott
Office of General Counsel
Texas Higher Education Coordinating Board
P.O. Box 12788
Austin, Texas 78711

OR2010-11870

Dear Mr. Tourtelott:

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# 392265.

The Texas Higher Education Coordinating Board (the "board") received a request for a specified proposal from Milkshake Media, L.P. ("Milkshake") and a copy of the contract between Milkshake and the board. You state you will release the requested contract to the requestor. Although you take no position with respect to the public availability of the remaining requested information, you state release of this information may implicate the proprietary interests of Milkshake. Accordingly, you inform us, and provide documentation showing, pursuant to section 552.305 of the Government Code, the board has notified Milkshake of the request and of its right to submit arguments to this office explaining why its information should not be released. *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 Milkshake objecting to the release of portions of its information. We have considered the submitted arguments and reviewed the submitted information.

Milkshake asserts its information is confidential because the documents were marked as such when they were submitted to the board. 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.

Milkshake argues that its employees’ dates of birth should be excepted from disclosure. Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See* 540 S.W.2d 668. To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. We note dates of birth are not highly intimate or embarrassing information. *See Tex. Comptroller of Public Accounts v. Attorney Gen. of Tex.*, 244 S.W.3d 629 (Tex. App.— 2008, pet. granted) (“We hold that date-of-birth information is not confidential[.]”); *see also* Attorney General Opinion MW-283 (1980) (public employee’s date of birth not protected under privacy); ORD 455 at 7 (birth dates not protected by privacy). Thus, Milkshake has failed to demonstrate the applicability of common-law privacy to the information at issue. Consequently, the board may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 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.¹ 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, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *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).

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).

Milkshake contends portions of its proposal, including its customer information, consists of trade secrets excepted from disclosure under section 552.110(a). Upon review, we find Milkshake has established a *prima facie* case that some of its customer information constitutes trade secrets. Accordingly, the board must withhold the information we have marked in Milkshake's proposal under section 552.110(a). We note, however, that Milkshake has made some of the customer information it seeks to withhold publicly available on its website. Because Milkshake has published this information, it has failed to demonstrate that this information is a trade secret, and none of it may be withheld under section 552.110(a). Additionally, we find Milkshake has failed to demonstrate how any of its remaining information meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We note pricing information pertaining to a particular proposal or 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD Nos. 319 at 3, 306 at 3 (1982). Therefore, Milkshake has failed to establish that any portion of its remaining information constitutes a protected trade secret under section 552.110(a) of the Government Code, and none of its remaining information may be withheld on that basis.

Milkshake claims portions of its remaining information, including its financial information, are excepted from disclosure under section 552.110(b). Milkshake explains it is a privately-held company and that its financial information is not otherwise publicly available. Milkshake argues release of its financial information would allow its competitors to gain an unfair competitive advantage over Milkshake by structuring their pricing to underbid Milkshake in future competitive bidding. Upon review, we find Milkshake has established that release of portions of its remaining information, which we have marked, would cause the company substantial competitive harm. Therefore, the board must withhold the information we have marked under section 552.110(b) of the Government Code. However, although Milkshake specifically argues against disclosure of some of its pricing information, we note Milkshake was the winning bidder in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted 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, 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). Furthermore, we find Milkshake has failed to demonstrate release of any of the remaining information at issue would result in substantial competitive harm to its interests. *See* ORD 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, none of Milkshake's remaining information may be withheld under section 552.110(b) of the Government Code.

Milkshake argues that certain e-mail addresses in its proposal are confidential. Section 552.137 of the Government Code provides in relevant part the following:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . .[.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses Milkshake seeks to withhold were provided to the board by Milkshake in response to a request for proposals. *See id.* § 552.137(c)(3). Thus, the board may not withhold any of the e-mail addresses at issue under section 552.137 of the Government Code.

Milkshake argues the submitted social security number should be excepted from disclosure. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.² *Id.* § 552.147(a). Accordingly, the board may withhold the social security number in Milkshake's proposal under section 552.147 of the Government Code.

²We note 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.

In summary, the board must withhold the information we have marked in Milkshake's proposal under section 552.110(b) of the Government Code. The board may withhold the social security number in Milkshake's proposal under section 552.147 of the Government Code. The remaining information must be released to the requestor.

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/tp

Ref: ID# 392265

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Peter Kennedy
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(w/o enclosures)