



ATTORNEY GENERAL OF TEXAS  
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August 11, 2010

Mr. Hans P. Graff  
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OR2010-12195

Dear Mr. Graff:

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# 390074.

The Houston Independent School District (the "district") received two requests for information pertaining to the selection process of job order contracts. You state the submitted information may implicate the proprietary interests of third parties.<sup>1</sup> Accordingly, you have notified Fort Bend Mechanical, Ltd. ("FBM"); Jamail & Smith Construction ("Jamail"); RHJ-JOC, Inc. ("RHJ"); Kellogg Brown and Root Services, Inc. ("KBR"); The Trevino Group ("Trevino"); 4 City Construction & Development ("4 City"); Weatherproofing Technologies, Inc. ("WTI"); Dura Pier Facilities Services, Ltd. ("Dura Pier"); Glennlock Construction Group, L.L.C. ("Glennlock"); General Works Construction Services ("General Works"); GRG Commercial ("GRG"); Hallmark Capital Group, L.L.C. ("HCG"); and Horizon Group International ("Horizon") of this request for information and

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<sup>1</sup>We note that the district raises sections 552.101, 552.104, and 552.110 of the Government Code as exceptions to disclosure. However, you have not provided this office with arguments applying those exceptions to the submitted information. *See* Gov't Code §§ 552.301, .302. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. Furthermore, we note that section 552.110 is designed to protect the interests of third parties, not the interest of a governmental body.

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 reviewed the submitted information and considered comments submitted by General Works, KBR, Dura Pier, HCG, and Horizon. We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note a portion of the submitted information appears to be the subject of a previous request, as a result of which this office issued Open Records Letter No. 2010-11784 (2010). In Open Records Letter No. 2010-11784, we determined the district must withhold the portions of KBR's information we marked under section 552.110 of the Government Code and the information we marked under section 552.136, but must release the remainder of the information at issue in accordance with copyright law. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude the district must rely on Open Records Letter No. 2010-11784 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information was not previously requested or ruled upon by this office, we will address the arguments against disclosure of the information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice 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, we have not received any correspondence from FBM, Jamail, RHJ, Trevino, 4 City, WTI, Glennlock, or GRG. Thus, these private parties have not demonstrated that they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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). Accordingly, the district may not withhold the submitted information on the basis of any proprietary interest these companies may have in the information.

HCG argues a portion of its information should be withheld under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by

judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. The Federal Financial Modernization Act, also known as the Gramm-Leach-Bliley Act (the “GLB Act”), became law in November 1999. *See* 15 U.S.C. § 6801 *et seq.* The purpose of the GLB Act was to promote competition in the financial services industry. *See* H.R. Conf. Rep. No. 106-434, at 245 (1999), reprinted in 1999 U.S.C.C.A.N. 245, 245. Reflecting Congressional concern regarding the dissemination of consumers’ personal financial information, the Act provides certain privacy protections “to protect the security and confidentiality of [consumers’] nonpublic personal information.” 15 U.S.C. § 6801. The statute defines nonpublic personal information (“NPI”) as “personally identifiable financial information [“PIFI”] - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution.” *Id.* § 6809(4)(A). Federal Regulations define “PIFI” as “any information: (i) [a] consumer provides to [a regulated financial institution] to obtain a financial product or service ...; (ii) [a]bout a consumer resulting from any transaction involving a financial product or service between [a regulated financial institution] and a consumer; or (iii) [a regulated financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer.” 16 C.F.R. § 313.3(o)(1).

Additional protection is provided to consumers by limitations placed on the reuse of PIFI obtained from a financial institution by a nonaffiliated third party. Section 6802(c) provides as follows:

... a nonaffiliated third party that receives from a financial institution [NPI] under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6802(c). HCG states the financial information should be confidential. However, HCG does not inform this office, nor does the information on its face reflect, that the information at issue is NPI or PIFI as defined by the federal regulations. *See Individual Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) (“It is the context in which information is disclosed-rather than the intrinsic nature of the information itself-that determines whether information falls within the GLB Act.”). Thus, we are unable to conclude that the GLB Act is applicable to this information.

Horizon argues a portion of its information should be withheld under section 552.101 of the Government Code, which also encompasses section 901.457 of the Occupations Code. Chapter 901 of the Occupations Code, the Public Accountancy Act, addresses the licensing and regulation of accountants. Section 901.457(a) pertains to the accountant-client privilege and provides the following:

A license holder or a partner, member, officer, shareholder, or employee of a license holder may not voluntarily disclose information communicated to the license holder or a partner, member, shareholder, or employee of the license holder by a client in connection with services provided to the client by the license holder or a partner, member, shareholder, or employee of the license holder, except with the permission of the client or the client's representative.

Occ. Code § 901.457. Horizon argues that a portion of its financial information is protected by the accountant-client privilege. We note, however, that section 901.457 only governs the circumstances under which licensed accountants may disclose information communicated to them by their clients in connection with the accountants' services. *Id.* Section 901.457 does not address the public disclosure of information held by the client or the client's representative. Here, Horizon is the client with regards to the accountant-client communications at issue. Section 901.457 does not prohibit Horizon from publicly disclosing the communications at issue. Consequently, section 901.457 does not make the communications provided to the district by Horizon confidential. We therefore conclude that the district may not withhold this information under section 552.101 of the Government Code on the basis of section 901.457 of the Occupations Code. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

Dura Pier asserts that some of its information is excepted under section 552.101 of the Government Code. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (statutory confidentiality). However, Dura Pier has not directed our attention to, and we are not aware of, any law under which any of its information is considered to be confidential for the purposes of section 552.101. Therefore, we conclude that the district may not withhold Dura Pier's information under section 552.101 on this basis.

Horizon and KBR argue a portion of their information is confidential under common-law privacy. KBR raises section 552.101 and section 552.102(a) of the Government Code. 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). Section 552.102 only applies to information in a personnel file of an employee of a

governmental body. The information KBR seeks to withhold is not contained in the personnel file of a governmental employee. Thus, we determine that section 552.102 does not apply to any of KBR's information, and it may not be withheld on that basis.

However, section 552.102(a) utilizes the same test as the test for common-law privacy under section 552.101 of the Government Code, which can protect private individuals. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy 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 Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. We note that names, addresses, telephone numbers, educational history and work background of individuals are not highly intimate or embarrassing. *See* Open Records Decision No. 455 at 7 (1987) (names and addresses are not protected by privacy). Upon review, we find KBR's and Horizon's proposals do not contain information that is highly intimate or embarrassing and of no legitimate public interest. Therefore, the district may not withhold any of KBR's or Horizon's information under section 552.101 of the Government Code in conjunction with common-law privacy.

General Works, KBR, Horizon, HCG, and Dura Pier raise section 552.110 of the Government Code. 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* 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.<sup>2</sup> 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 note that pricing information 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); see also *Huffines*, 314 S.W.2d at 776.

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 ORD 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find that General Works, KBR, Horizon, HCG, and Dura Pier have established a *prima facie* case that a portion of their information constitutes a trade secret. Thus, the district must withhold the information we marked under section 552.110(a). Horizon seeks to withhold portions of its information under section 552.110(a). However, we find Horizon has failed to demonstrate the information it seeks to withhold, including personnel information, project management ability, and pricing, meets the definition of a trade secret. See RESTATEMENT OF TORTS § 757 cmt. b (1939) (trade secret “is not simply information as to a single or ephemeral event in the conduct of the business”); Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily

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<sup>2</sup>The 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).

excepted from disclosure under statutory predecessor to section 552.110). In addition, we find General Works, KBR, Horizon, HCG, and Dura Pier have failed to establish how any of their remaining information constitutes a trade secret under section 552.110(a). See RESTATEMENT OF TORTS § 757 cmt. b. Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Next, General Works, KBR, Horizon, HCG, and Dura Pier assert that their information is excepted from disclosure under section 552.110(b). Horizon also contends, in part, that portions of its information are excepted under section 552.110(b) because release of the information at issue would harm the district's ability and the ability of other governmental entities to obtain qualified candidates in response to future searches. In advancing this argument, Horizon appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Horizon's interest in its information.

Upon review, we find HCG has established release of its pricing information would result in substantial competitive harm to the company. Therefore, the district must withhold the information we marked under section 552.110(b). However, we find General Works, KBR, Horizon, HCG, and Dura Pier have made conclusory or generalized allegations or failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to their interests. See ORDs 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). Furthermore, we note that KBR was a 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). Accordingly, we determine that no portion of the remaining information at issue is excepted from disclosure under section 552.110(b) of the Government Code.

We note the remaining information contains insurance policy numbers and bank account 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.”<sup>3</sup> 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 must withhold the information we have marked pursuant to section 552.136 of the Government Code.<sup>4</sup>

Finally, we note that some of the remaining information at issue 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. 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, to the extent the information is identical to the information ruled upon in Open Records Letter No. 2010-11784, the district must continue to treat the previously ruled upon information in accordance with that ruling. In regard to the information not previously ruled upon, the district must withhold the information we marked under section 552.110 and section 552.136. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.<sup>5</sup>

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<sup>3</sup>The 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).

<sup>4</sup>We 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, bank account numbers, and credit card numbers under section 552.136, without the necessity of requesting an attorney general decision.

<sup>5</sup>We note that the remaining information contains a social security number. 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. Gov’t Code § 552.147(b).

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](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,



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CS/em

Ref: ID# 390074

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