



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2010

Ms. Destinee Waiters
Assistant General Counsel
Houston Community College
3100 Main Street
Houston, Texas 77002

OR2010-17183

Dear Ms. Waiters:

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# 399749.

Houston Community College (the "college") received a request for (1) proposals or other records submitted in response to Request for Proposals for Facility Maintenance Services (the "RFP"), Project No. 10-15; (2) all documents relating to the evaluation of the proposals; (3) all documents relating to requests for clarification or negotiations conducted in connection with the RFP; (4) all written determinations made by the Procurement Operations Office in connection with the RFP; and (5) all documents referring or relating to communications by a respondent to the RFP and the Procurement Operations Office in connection with the RFP. The college takes no position on whether the submitted information is excepted from disclosure, but states release of this information may implicate the proprietary interests of TDIndustries, Inc. ("TDIndustries") and Kellogg, Brown, and Root, L.L.C. ("KBR"). Accordingly, you inform us, and provide documentation showing, that you notified TDIndustries and KBR of the request 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) (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 received comments from TDIndustries and KBR. We have considered the submitted comments and reviewed the submitted information.

Initially, we note that you have only submitted the bid proposals submitted in response to the RFP for our review. Thus, to the extent any information responsive to the other categories of information requested existed and was maintained by the college on the date the college received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that KBR seeks to withhold from public disclosure certain information that the college did not submit. This ruling does not address information that was not submitted by the college and is limited to the information submitted as responsive by the college. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requested decision from Attorney General must submit copy of specific information requested). Therefore, we do not address KBR's argument against disclosure of this information.

KBR argues its information should be withheld from disclosure because the information was labeled "confidential" when it was submitted to the college. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to 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 Gov't Code § 552.110). Consequently, unless KBR's information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

TDIndustries argues section 552.104 of the Government Code excepts its proposal from public disclosure. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the college does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

KBR claims all of its proposal is and TDIndustries claims portions of its proposal are excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types

of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (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.” 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 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 a single or ephemeral event 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 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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.¹ Open Records Decision No. 402 (1983).

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 others 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;

Section 552.110(b) of the Government Code 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 requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; see also *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); 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).

KBR claims all of its proposal is and TDIndustries claims portions of its proposal are confidential under section 552.110(a) of the Government Code. Upon review, we find that KBR has established a *prima facie* case that some of its customer information, which we have marked, constitutes trade secrets. Therefore, the college must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note that KBR has published the identities of many of its customers and TDIndustries has published the identities of all of its customers on their respective websites. Thus, KBR and TDIndustries have failed to demonstrate that the information published on their respective websites constitutes trade secrets. Further, KBR and TDIndustries have failed to demonstrate that any of the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. We note that information pertaining to a particular 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.” RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

KBR claims all of its remaining information is and TDIndustries claims portions of its proposal are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find that KBR and TDIndustries have established that the pricing information we have marked in the submitted information constitutes commercial or financial information, the release of which would cause the companies substantial competitive harm. Therefore, the college must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find KBR and

(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).

TDIndustries have made only conclusory allegations that the release of the remaining submitted information they seek to withhold would result in substantial damage to their competitive positions. Thus, KBR and TDIndustries have not demonstrated that substantial competitive injury would result from the release of any of their remaining information. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

We note some of the remaining information is confidential under section 552.136 of the Government Code.² Section 552.136 of the Government Code states, “[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.” Gov’t Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. The college must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.³

We note some of the remaining information may 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 (1977) 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 college must withhold the information we have marked under section 552.110 of the Government Code and the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.

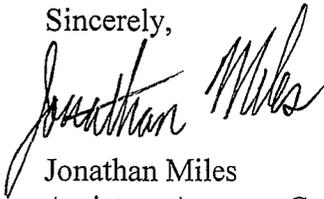
²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note this office 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 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/eeg

Ref: ID# 399749

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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