



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 11, 2011

Mr. Juan J. Cruz
Escamilla, Poneck & Cruz, L.L.P.
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2011-00563

Dear Mr. Cruz:

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# 405606.

Workforce Solutions for South Texas ("Workforce"), which you represent, received an initial request for a copy of the proposals submitted by Neighborhood Centers, Inc. ("NCI") and Teaching & Mentoring Communities ("TMC") in response to RFP-CCS-0110 for Operation and Management of the South Texas Child Care Services System and the proposal rating sheets. Workforce received two subsequent requests for (1) the winning proposal and all scoring documents and (2) all proposals and evaluators' scores. You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code.¹ You also indicate that the requested information may contain NCI, TMC, and ResCare's proprietary information. Accordingly, you state, and provide documentation showing, that Workforce notified these third parties of the request for information and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered

¹Although you also cite to section 552.101 of the Government Code, you have provided no arguments explaining how this exception is applicable to the submitted information. Therefore, we assume you no longer assert this section. *See* Gov't Code §§ 552.301, .302.

the exception you claim and reviewed the submitted information. We have also considered comments submitted by TMC.

Initially, we must address Workforce's procedural obligations. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), a governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See Gov't Code § 552.301(b)*. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You inform us Workforce received the initial request on September 24, 2010. Thus, Workforce was required to request a ruling from this office by October 8, 2010 and submit the information required by section 552.301(e) by October 15, 2010. We note, however, Workforce did not request a ruling from this office until November 3, 2010 and did not submit the information responsive to the initial request until November 9, 2010. Consequently, we find Workforce failed to comply with the procedural requirements of section 552.301 with respect to the first request for information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You assert that the information responsive to the initial request is excepted from disclosure under section 552.104 of the Government Code. This section is a discretionary exception to disclosure that a governmental body may waive. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Accordingly, the information responsive to the initial request, which consists of NCI and TMC's proposals and the proposal rating sheets, may not be withheld under section 552.104. However, we will consider whether the third parties' interests provide a compelling reason to withhold any portion of the submitted information from disclosure. We will also consider Workforce's argument under

section 552.104 for the information that only is responsive to the second and third requests, which consists of ResCare's proposal.

We note that an interested third party is allowed ten business days after the date of its receipt of a 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 that party should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, NCI and ResCare have not submitted comments to this office explaining why any portion of the submitted information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate these third parties' proprietary interests. Accordingly, none of their information at issue may be withheld on that basis. *See id. § 552.110*; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

Section 552.104 of the Government Code protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See Open Records Decision No. 592 (1991)*. Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See Open Records Decision No. 463 (1987)*. Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been awarded. *See Open Records Decision No. 541 (1990)*.

You state the bidding process for the specified request for proposal is not complete and a contract has not been executed. You assert release of ResCare's proposal at this stage in the bidding process would harm Workforce's negotiating interests and compromise the bidding process. Based on your representations, we conclude Workforce may withhold ResCare's proposal under section 552.104 of the Government Code.

TMC claims most of its proposal is excepted under section 552.110 of the Government Code, which 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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.² 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. *See* Open Records Decision No. 402 (1983). We note that 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; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

²The 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).

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 (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).

Upon review of TMC’s arguments under section 552.110(a) and the information at issue, we find that TMC has shown that portions of its information pertaining to its services and operating procedures are protected trade secrets under section 552.110(a). Accordingly, Workforce must withhold the information we have marked under section 552.110(a). However, we conclude that TMC has failed to establish that any of the remaining information at issue is a trade secret protected by section 552.110(a). *See* ORD Nos. 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 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, Workforce may not withhold any of the remaining information at issue under section 552.110(a).

Next, upon review of TMC’s arguments and the information at issue, we find that TMC has established that the pricing and cost information we have marked in its proposal constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, Workforce must withhold the marked information in TMC’s proposal under section 552.110(b) of the Government Code. However, we find TMC has made only conclusory allegations that the release of the remaining information it seeks to withhold would result in substantial damage to its competitive position. Thus, TMC has not demonstrated that substantial competitive injury would result from the release of any of the 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). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

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 (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, Workforce must withhold the information we have marked under section 552.110 of the Government Code. Workforce must release the remaining information, but any information protected by copyright must be released in accordance with copyright law.³

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/tf

Ref: ID# 405606

Enc. Submitted documents

c: Requestors
(w/o enclosures)

³We note the information being released contains partial 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. Gov't Code § 552.147.