



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2011

Mr. Frank J. Garza
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San Antonio, Texas 78229-5815

OR2011-01781

Dear Mr. Garza:

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# 408100.

The Brownsville Public Utility Board (the "board"), which you represent, received a request for responses submitted by Contec Systems Industrial Corporation ("Contec"); Environmental Systems Corporation ("ESC"); GE Energy Management Services, Inc. ("GE"); and Teledyne Monitor Labs ("Teledyne") in response to a request for proposal entitled PO-40-10 CEMS Replacement Project. We understand you to claim portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Further, you state the submitted documents may contain proprietary information of third parties subject to exception under the Act. Accordingly, the board notified Contec, ESC, GE, and Teledyne 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); *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 received comments from Babcock & Wilcox Power Generation Group, Inc. ("B&W"), GE's successor in interest. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-14926 (2010). In the prior ruling, this office determined the board may withhold the submitted information under section 552.104 of the Government Code. You inform us the facts and circumstances have changed since the issuance of our previous ruling. In the previous request for a ruling, the board asserted, at the time the board received the request, a contract had not yet been awarded and executed. In response to the present request, you inform us the contract has been executed. Therefore, as relevant facts have changed since the issuance of Open Records Letter Ruling No. 2010-14926, we conclude the board may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (describing the four criteria for a "previous determination"). Thus, we will address the submitted arguments against disclosure of portions of the submitted information.

Next, we note 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Contec, ESC, or Teledyne. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the board may not withhold any of these companies' information on the basis of any proprietary interest these companies may have in their information.

Next, we address your argument that the release of the pricing information and customer lists within the submitted proposals will have a chilling effect on the board's ability to obtain qualified contractors to respond to the board's future requests for proposals. In advancing this argument, you appear 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. However, section 552.110(b) of the Government Code has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of section 552.110(b) by Seventy-sixth

Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Although we understand you to argue the pricing information and customer lists within the submitted proposals are excepted under section 552.110, we note this exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address your arguments under section 552.110. However, we will address B&W's interests in its information.

B&W 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* ORD 552 at 5-6. 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).

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

B&W argues its pricing information, customer list, and implementation strategies constitute trade secret information which is confidential under section 552.110(a) of the Government Code. Upon review, we find that B&W has established a *prima facie* case its customer information and some of its implementation strategies, which we have marked, constitute trade secrets. Therefore, the board must withhold the information we have marked pursuant to section 552.110(a).² However, B&W has failed to demonstrate any of the remaining information at issue meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. We note pricing information pertaining to a particular proposal 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, 306 at 3. Thus, the board may not withhold any of the remaining information at issue under section 552.110(a).

B&W claims its cover letter, pricing information, implementation strategies, detailed project timeline, and terms and conditions of sale are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find B&W has established the pricing information we have marked constitute commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the

¹The following are the six factors that the Restatement gives 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; (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).

²As our ruling for this information is dispositive, we need not address B&W’s remaining argument against release of portions of this information.

board must withhold the information we have marked under section 552.110(b). However, we find B&W has made only conclusory allegations the release of the remaining information it seeks to withhold would result in substantial damage to its competitive position. Thus, B&W failed to demonstrate substantial competitive injury would result from the release of any of its remaining information at issue. *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). Consequently, the board may not withhold any of the remaining information under section 552.110(b).

B&W asserts its proposal contains insurance policy numbers that are confidential under section 552.136 of the Government Code. Section 552.136 provides “[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). An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. We note the submitted certificate of insurance is marked as a sample document. Thus, we are unable to determine whether the insurance policy numbers within the sample certificate of insurance are real policy numbers. Accordingly, we find if the information we marked constitutes real insurance policy numbers, the board must withhold the marked information under section 552.136. If the marked information constitutes sample insurance policy numbers that are not used to obtain money, goods, services, or another thing of value, the board may not withhold the marked information under section 552.136.

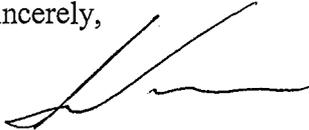
We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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 board must withhold the information we have marked under section 552.110 of the Government Code. The board must withhold the insurance policy numbers we have marked, if they are real insurance policy numbers, under section 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 408100

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