



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2011

Mr. Humberto Aguilera
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P.O. Box 200
San Antonio, Texas 78291-0200

OR2011-04237

Dear Mr. Aguilera:

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# 412644.

The San Antonio Independent School District (the "district"), which you represent, received two requests for all proposals and related documents for Request for Proposals #10-074(FA), "2010 Bond Capital Improvements Program Administrator Services." You state you have released a portion of the requested information to each of the requestors. Although you raise no exceptions to disclosure of the submitted information, you state release of this information may implicate the proprietary interests of third parties.¹ You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, you notified these third parties of the request and of their right to submit arguments to this office explaining why their 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). We have received arguments from AECOM, Gallagher, Munoz Jacobs, Project Control, and Vanir. We have considered the submitted arguments and reviewed the submitted information.

¹The interested third parties are: AECOM Technical Services, Inc. ("AECOM"); Gallagher Construction Company, L.P., d/b/a Gallagher Construction Services ("Gallagher"); Heery International, Inc.; HR Gray in Association with Vanir Construction Management, Inc. ("Vanir"); Jones Lang La Salle; Kegley, Inc.; Munoz Jacobs; Parsons Commercial Technology Group, Inc.; and Project Control of Texas, Inc. ("Project Control").

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the third party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from the remaining third parties. Thus, because these third parties have not demonstrated that any of the requested information is proprietary for the purposes of the Act, the district may not withhold any of the submitted information on the basis of the proprietary interests of these companies. *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.

Vanir claims that portions of its submitted information are excepted from disclosure under section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note, however, that section 552.104 only protects the interests of a governmental body and is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). In this instance, the district has not argued that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Because the district has not submitted any arguments under section 552.104, we conclude that the district may not withhold any portion of the submitted information under section 552.104 of the Government Code.

AECOM, Gallagher, Munoz Jacobs, Project Control, and Vanir raise section 552.110 of the Government Code for portions of their information. Section 552.110 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 (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.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).

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) (to prevent disclosure of commercial or financial information, party must show by specific

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 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).

factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Gallagher, Munoz Jacobs, and Project Control raise section 552.110(a) for portions of their submitted proposals. Project Control asserts its financial statements constitute trade secrets. Upon review, we find Project Control has failed to demonstrate that its financial statements meet the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Gallagher and Munoz Jacobs generally allege their proposals contain trade secrets protected by section 552.110(a). However, neither Gallagher nor Munoz Jacobs provided arguments explaining how any portion of their information meets the definition of a trade secret, and no part of these companies' proposals may be withheld under section 552.110(a). Thus, none of the information at issue may be withheld under section 552.110(a) of the Government Code.

AECOM, Gallagher, Munoz Jacob, Project Control, and Vanir seek to withhold portions of their submitted information under section 552.110(b). Upon review, we determine that AECOM, Gallagher, Project Control, and Vanir have established that release of some of their submitted information would cause these companies substantial competitive injury. Thus, the district must withhold the information we have marked in their proposals under section 552.110(b) of the Government Code. As to the remaining submitted information, we find that AECOM and Munoz Jacobs have made only conclusory allegations that release of their remaining submitted information would cause either company substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Furthermore, we note the pricing information of a winning bidder, such as Munoz Jacobs, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Thus, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

We note the remaining information contains insurance policy numbers subject to section 552.136 of the Government Code.³ Section 552.136 states that "[n]otwithstanding any other provision of this chapter, 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. This office has determine that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a)

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(defining "access device"). Accordingly, the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

We note some of the submitted information 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, the district must withhold the information we have marked under sections 552.110(b) and 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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

⁴We note Open Records Decision No. 684 (2009) is 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.

Ref: ID# 412644

Enc. Submitted documents

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(w/o enclosures)

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