



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2011

Ms. Anne M. Constantine
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OR2011-06194

Dear Ms. Constantine:

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# 416449.

The Dallas/Fort Worth International Airport Board (the "board") received two requests from the same requestor for a specified contract and related bids submitted to the board. You state you have released portions of the contract and related bids. We understand you to claim some of the submitted information is excepted from disclosure under sections 552.136 and 552.137 of the Government Code. In addition, you state the information at issue may implicate the proprietary interests of Trane U.S. Inc. ("Trane"), Meridian Management Corporation ("Meridian"), and ERMC. Accordingly, you state you notified these third parties of the request for information 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 Trane, Meridian, and ERMC. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have only submitted the requested bids. Thus, to the extent information related to the requested contract existed and was maintained by the board on the

date the board 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).

ERMC asserts the request for the submitted bids was improper because "it does not appear the [b]oard received a written request for copies of the bids." *See* Gov't Code § 552.301(c). We note, however, the board requested a decision from this office, submitted the bids as responsive, and raised exceptions to disclosure of some of the requested information.¹ We rely on the board's representations the submitted bids are responsive to the request. Accordingly, we will address the submitted arguments against disclosure of the submitted information.

ERMC and Trane claim some of their information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. In this instance, ERMC does not present any arguments against disclosure under that section nor has the company directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In addition, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990). Accordingly, none of ERMC's information may be withheld under section 552.101 of the Government Code.

Trane claims some of its information is excepted under common-law privacy, which is encompassed by section 552.101 of the Government Code. The common-law right of privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in

¹It appears the board received clarification of the information requested. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Rosen v. Matthews Constr. Co., 777 S.W.2d 434 (Tex. App—Houston [14th Dist.] 1989), rev'd on other grounds, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Upon review, we conclude no portion of Trane's information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the board may not withhold any portion of Trane's information under section 552.101 of the Government Code in conjunction with common-law privacy.

ERMC also claims its information is excepted under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the board does not argue section 552.104 is applicable in this instance, we conclude none of ERMC's information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

ERMC, Meridian, and Trane raise section 552.110 of the Government Code for portions of their submitted 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* Open Records Decision No. 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 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 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. *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* Open Records Decision No. 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).

ERMC states some of its submitted information consists of trade secrets under section 552.110(a) of the Government Code. Upon review, however, we determine ERMC has failed to demonstrate any portion of its submitted information meets the definition of a trade secret, nor has the company demonstrated the necessary factors to establish a trade

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).

secret claim for its information. Accordingly, the board may not withhold any of ERMC's information at issue under section 552.110(a) of the Government Code.

ERMC, Meridian, and Trane contend some of their submitted information is excepted under section 552.110(b) of the Government Code. Upon review, we conclude ERMC and Meridian have established release of their respective pricing information would cause the companies substantial competitive injury; therefore, the board must withhold this information, which we have marked, under section 552.110(b). We note Trane was the 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* 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). Upon review, we find ERMC, Meridian, and Trane have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of ERMC's or Meridian's remaining information or any of Trane's submitted information would cause the companies substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications, and experience). We, therefore, conclude the board may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136 of the Government Code 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(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). You have not demonstrated how the taxpayer identification number you have marked constitutes an access device number for the purposes of section 552.136. Accordingly, the board may not withhold the taxpayer identification number you have marked under section 552.136 of the Government Code.

You assert portions of ERMC's and Trane's bids, and ERMC asserts portions of its bid, consist of personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). However, we note section 552.137(c)(3) states section 552.137(a) does not apply to an e-mail address "contained in a response to a request for bids or proposals, [or] contained in a response to

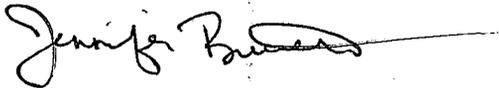
similar invitations soliciting offers” *Id.* § 552.137(c)(3). Accordingly, the board may not withhold any of the e-mail addresses under section 552.137 of the Government Code.

In summary, the board must withhold the information we have marked in ERMC’s and Meridian’s information under section 552.110(b) of the Government Code. The remaining information must be released.

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,



Jennifer Burnett
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Open Records Division

JB/tf

Ref: ID# 416449

Enc. Submitted documents

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