



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2011-06726

Dear Ms. Alexander:

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# 417456.

The Texas Department of Transportation (the "department") received a request for Protect Environmental Services, Inc.'s ("Protect") bid package for a specified solicitation number. Although the department takes no position on whether the submitted information is excepted from disclosure, you state that release of this information may implicate the proprietary interests of Protect. Accordingly, you inform us, and provide documentation showing, that you notified Protect of the request and of its right to submit arguments to this office as to why its 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 Protect. We have considered the submitted arguments and reviewed the submitted information.

Protect raises section 552.101 of the Government Code for its submitted information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which

protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. See Open Records Decision Nos. 600 (1992), 545 (1990). We note, however, common-law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. 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 *U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *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 find Protect has failed to demonstrate how any portion of the submitted information constitutes an individual's highly intimate or embarrassing information. Therefore, none of the information at issue may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Protect generally asserts that its information is excepted from disclosure 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(a). This section, however, is a discretionary exception that only protects the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, *pet. denied*); Open Records Decision No. 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). As the department does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the submitted information. Therefore, the department may not withhold any of the submitted information pursuant to section 552.104.

Protect generally asserts that portions of its submitted information are excepted from disclosure under section 552.110(b) of the Government Code. 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.* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial and financial information, party must show by specific factual evidence, not

conclusory or generalized allegations, that release of the requested information would cause that party substantial competitive harm).

Having considered Protect's arguments, we have marked the customers in Protect's proposal that the department must withhold under section 552.110(b) of the Government Code. However, Protect has made the remaining listed customers publicly available on its website, and does not explain how information that has been published on a website could cause the company substantial competitive injury. Further, we find that Protect has made only conclusory allegations that the release of any of its remaining information would result in substantial damage to the company's competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, 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). Furthermore, we note that the contract at issue was awarded to Protect. 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). Accordingly, none of Protect's remaining information may be withheld under section 552.110(b).

Protect raises section 552.113 of the Government Code, which protects certain geological, geophysical, and other information regarding the exploration or development of natural resources. *See* Gov't Code § 552.113; *see generally* Open Records Decision No. 627 (1994). Because Protect has not demonstrated this exception is applicable to any of its information, the department may not withhold any of the remaining information under section 552.113 of the Government Code.

Protect asserts that its information is excepted under section 552.131 of the Government Code, which relates to economic development information and provides, in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Id. § 552.131. Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). We note Protect does not argue any of the information constitutes a trade secret for these purposes. Furthermore, we have already disposed of Protect’s claims under section 552.110(b). Therefore, the department may not withhold any of the remaining information under section 552.131(a) of the Government Code.

We note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the department does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the remaining information is excepted under section 552.131(b) of the Government Code.

We note that a portion of the remaining information is subject to section 552.136 of the Government Code.¹ 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.” *Id.* § 552.136. Accordingly, we find that the department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.²

In summary, the department must withhold the information we have marked under section 552.110(b) of the Government Code and the insurance policy numbers we have

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

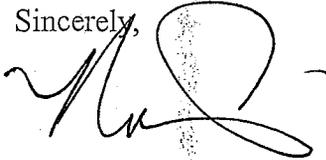
²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

marked under section 552.136 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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 417456

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Mr. Richard Cameron
CEO - President
Protect Environmental Services, Inc.
6504 Midway Road, Suite 200
Haltom City, Texas 76117
(w/o enclosures)