



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 8, 2011

Mr. James Downes  
Assistant County Attorney  
Harris County Hospital District  
2525 Holly Hall, Suite 190  
Houston, Texas 77054

OR2011-09688

Dear Mr. Downes:

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# 423117 (CA File No. 11HSP0297).

The Harris County Purchasing Agent (the "county") received two requests from the same requestor for (1) the winning bidder's name and reasons why the requestor's company did not win the bid pertaining to Request for Proposals ("RFP") No. 10/0232 regarding reinsurance for Community Health Choice, Inc. and (2) the winning bidder's proposal submitted in response to the same RFP. You indicate the county has provided some of the requested information to the requestor. Although you state the county takes no position with respect to the public availability of the submitted bid proposal, you state its release may implicate Dubraski & Associates Insurance Services, LLC's ("Dubraski") proprietary interests. Accordingly, you state, and provide documentation showing, the county notified Dubraski of the company's 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) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from Dubraski. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the county failed to request a ruling or submit the requested information within the statutory time periods prescribed by sections 552.301(b) and 552.301(e) of the

Government Code. *See* Gov't Code § 552.301(b) (stating governmental body must request ruling and state exceptions to disclosure that apply within ten business days after receiving request), (e) (stating governmental body required to submit within fifteen business days of receiving request (1) written comments stating why exceptions apply, (2) copy of written request for information, (3) sufficient evidence showing date governmental body received written request, and (4) copy of specific information requested or representative samples). 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 the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because the third-party interests at issue here can provide a compelling reason to overcome the presumption of openness, we will consider whether the submitted proposal is excepted under the Act.

Next, Dubraski argues the submitted bid proposal is not responsive to the request for information pertaining to the winning bidder's identity or the reasons why the requestor's company did not win the bid and, thus, should not be released or be considered for release under the Act. We note, however, subsequent to the county submitting the request for the winning bidder's identity and reasons why the requestor's company did not win, the county submitted the second written request for information from the requestor specifically seeking the winning bidder's bid proposal. We find the submitted bid proposal is responsive to the second request for information. Accordingly, we will consider Dubraski's arguments against disclosure for the submitted bid proposal.

Dubraski claims some of its information is 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 Open Records Decision No. 552 at 5* (1990). 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.<sup>1</sup> *Open Records Decision No. 402* (1983).

Section 552.110(b) 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. Gov't Code § 552.110(b); *Open Records Decision No. 661 at 5-6* (1999).

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<sup>1</sup>The 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).

Dubraski claims specified portions of its submitted bid proposal constitute trade secrets under section 552.110(a). Upon review, we find Dubraski has established its customer information constitutes trade secrets. Therefore, the county must withhold this information, which we have marked, under section 552.110(a) of the Government Code. We find, however, Dubraski has not demonstrated how the remaining information it seeks to withhold, which includes general project information, personnel and company qualifications, pricing information, and general proposed methods for the project at issue, meets the definition of a trade secret. *See* Restatement of Torts § 757 cmt. b (1939) (trade secret “is not simply information as to single or ephemeral events in the conduct of the business”); Open Records Decision 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 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the county may not withhold any of Dubraski’s remaining information at issue under section 552.110(a) of the Government Code.

Dubraski also claims its remaining information at issue constitutes commercial information that, if released, would cause the company substantial competitive harm. Upon review, however, we find Dubraski has made only general conclusory assertions that release of the information, including its pricing information, would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *See generally* Open Records Decision Nos. 661, 509 at 5, 319 at 3. Furthermore, we note Dubraski was the winning bidder in this instance and the pricing information of a winning bidder 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). Therefore, the county may not withhold any of Dubraski’s remaining information at issue under section 552.110(b) of the Government Code.

We note some of the remaining information 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. Accordingly, the remaining information must be released in accordance with copyright law.

In summary, the county must withhold the customer information we have marked under section 552.110(a) of the Government Code. The county must release the remaining information, but any information protected by copyright must 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](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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 423117

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Jack M. Cleaveland, Jr.  
For Dubraski & Associates Insurance Services, L.L.C.  
Thompson, Coe, Cousins & Irons, L.L.P.  
700 North Pearl Street, 25<sup>th</sup> Floor  
Dallas, Texas 75201  
(w/o enclosures)