



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2011

Ms. Barbara Smith Armstrong
Assistant County Attorney
General Counsel to the Harris County Purchasing Agent
1019 Congress, 15th Floor
Houston, Texas 77002

OR2011-10897

Dear Ms. Armstrong:

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# 425452 (C.A. File Nos. 11PIA0177 and 11PIA0178).

The Harris County Purchasing Agent (the "county") received two requests from different requestors for the bid proposals of the winning bidder and any other bidders, excluding the requestors' companies, scoring documents, scoring methodology and selection criteria documents, and any other documents related to the selection of the winning bidder pertaining to RFP No. 11/0078.¹ Although you state the county takes no position with respect to the public availability of the submitted bid proposals, you state their release may implicate the proprietary interests of The Litaker Group, LLC ("Litaker") and McDonald Consulting Group, Inc. ("McDonald"). Accordingly, you state, and provide documentation showing, the county notified Litaker and McDonald of each 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 Litaker, and the county has provided comments submitted by McDonald to the county. We have considered the submitted arguments and reviewed the submitted information.

¹We note the county received clarification from one of the requestors regarding that requestor's request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

Initially, we note you have submitted only the requestors' companies' bid proposals. To the extent information responsive to the remainder of the requests existed on the date the county received the requests, 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).

Although McDonald generally claims "all components" of its bid proposal are considered confidential, McDonald has not specified any law under which its entire proposal may be found confidential. Therefore, the county may not withhold McDonald's bid proposal in its entirety. We note, however, McDonald's proposal contains insurance policy numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device 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.

(b) Notwithstanding 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.²

Gov't Code § 552.136. We conclude the insurance policy numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the county must withhold the marked insurance policy numbers in McDonald's proposal under section 552.136 of the Government Code.³ The county must release McDonald's remaining information.

Litaker claims some of its information is excepted from disclosure under section 552.110(a) of the Government Code, which protects trade secrets obtained from a person that are

²The 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).

³We note this office 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.

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 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 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.⁴ *Open Records Decision No. 402* (1983).

⁴The 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).

Litaker claims specified portions of its submitted bid proposal constitute trade secrets under section 552.110(a). Litaker argues the information it seeks to withhold constitutes “technical and non-technical processes and algorithms [Litaker] will use . . . continuously throughout the course of its business” and will apply the processes and algorithms in future projects. Upon review, we find Litaker has established its methodology for organizing, conducting, and reporting on large workshops in section 2.2.1, and the detailed components/activities of its project plan in section 2.2.2.8, constitute trade secrets. Furthermore, we find Litaker has demonstrated the applicability of the trade secret factors. Therefore, the county must withhold the portions of Litaker’s proposal we have marked under section 552.110(a) of the Government Code. We find, however, Litaker has not demonstrated how the remaining information it seeks to withhold, which includes previous workshop experience, time line and project plan information specific to the project at issue, and a sample reimbursement voucher, 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 No. 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). Consequently, the county may not withhold any of Litaker’s remaining information at issue under section 552.110(a) of the Government Code.

Litaker claims all of its remaining information is 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, Litaker’s remaining information must be released in accordance with copyright law.

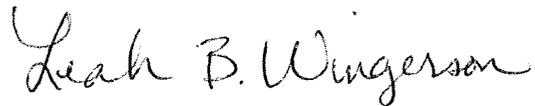
In summary, the county must withhold the marked insurance policy numbers in McDonald’s proposal under section 552.136 of the Government Code. The county must withhold the portions of Litaker’s proposal we have marked under section 552.110(a) of the Government Code. The county must release the remaining information, but any of Litaker’s 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, 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,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 425452

Enc. Submitted documents

c: Requestors
(w/o enclosures)