



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2011

Mr. Humberto Aguilera
For San Antonio Independent School District
Escamilla, Poneck & Cruz, L.L.P.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2011-11667

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# 427149.

The San Antonio Independent School District (the "district"), which you represent, received a request for "Contractor's Qualification Statements[.]" Although you take no position as to the public availability of the submitted information, you state its release may implicate the proprietary interests of A.D. Willis Company, Inc. ("A.D. Willis"); Alamo Roofing & Metal Co., Inc. ("Alamo"); Benco Commercial Roofing ("Benco"); CS Advantage USAA, Inc. ("CS Advantage"); Cram Roofing Company ("Cram"); Empire Roofing Companies, Inc. ("Empire"); Port Enterprises, Ltd. ("Port"); Rain King, Inc. ("Rain King"); Superior Roofing & Construction Company ("Superior Roofing"); and Topside Contracting ("Topside"). Thus, pursuant to section 552.305 of the Government Code, you notified those companies of the request and of their right to submit arguments to this office as to why their information should not be released. Gov't Code § 552.305(d); *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 to disclosure under in certain circumstances). We have received comments from A.D. Willis, Alamo, Benco, Cram, CS Advantage, and Port. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Benco, Cram, and CS Advantage seek to withhold detailed customer lists that were not submitted by the district. Further, Benco, Cram, and Port seek to withhold

financial statements that were also not submitted by the district. This ruling does not address information that was not submitted by the district and is limited to the submitted information.¹ *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Empire, Rain King, Superior Roofing, or Topside explaining why any portion of their submitted information should not be released. Therefore, we have no basis to conclude Empire, Rain King, Superior Roofing, or Topside have protected proprietary interests in their submitted information. *See id.* § 552.110; 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. Consequently, the district may not withhold any of these companies' information on the basis of any proprietary interest they may have in the information.

We understand Cram to assert some of its information is protected by the doctrine of common-law privacy, which is encompassed by section 552.101 of the Government Code, an exception to disclosure that excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Common-law privacy 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. We note common-law privacy protects the privacy interests of individuals, but 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). We further note names, addresses, telephone numbers, educational history, and work background of individuals are not highly intimate or embarrassing. *See* Open Records Decision No. 455 at 7 (1987) (names and addresses not protected by privacy). Upon review, we find none of the information at issue is highly intimate or embarrassing information pertaining to an individual that is of no legitimate public interest. Consequently, the district may not

¹ Accordingly, this ruling is dispositive of Port's argument as Port only seeks to withhold its financial statements from public disclosure.

withhold any of the information at issue under section 552.101 in conjunction with common-law privacy.

A.D. Willis raises section 552.102 of the Government Code and we understand it to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102 and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at *10. Upon review, find none of the information at issue is excepted under section 552.102(a) and none of it may not be withheld on that basis.

We understand CS Advantage to assert its information is excepted from disclosure by the litigation exception, section 552.103 of Government Code. CS Advantage states the information at issue is related to pending litigation between CS Advantage and the requestor and that the requestor is utilizing the Act to circumvent the discovery process. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties, we do not address CS Advantage's argument. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate rights of third party), 522 (1989) (discretionary exceptions in general). The litigation exception only applies when the governmental body is a party to the pending or reasonably anticipated litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Accordingly, the district may not withhold any of CS Advantage's information under section 552.103.

A.D. Willis raises 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 governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (discretionary exceptions in general). As the district does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to any of the information at issue. *See* ORD 592 (governmental body may waive section 552.104). Accordingly, none of the submitted information may be withheld under section 552.104.

Benco, Cram, and CS Advantage raise section 552.110(a) of the Government Code for some of their information. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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. Section 757 provides 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 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). Upon review, we find Cram has established a *prima facie* case the information in section 4.1 of its Contractor's Qualification Statement, which identifies the company's references, is confidential under section 552.110(a). We have

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 other 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).

marked this information and the district must withhold it under section 552.110(a). However, we find Benco and CS Advantage have failed to establish any of their information at issue meets the definition of a trade secret. Further, we find Cram has failed to show any of its remaining information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* ORD 552 at 5-6; *see also* RESTATEMENT OF TORTS § 757 cmt. b (information is generally not trade secret if it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business”). Thus, the district may not withhold any of the remaining information under section 552.110(a).

Alamo, Benco, Cram, and CS Advantage raise section 552.110(b) of the Government Code for some of their information. Section 552.110(b) excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). Upon review of the information at issue and the submitted arguments, we find Alamo has established release of the information in section 4.1 of its Contractor’s Qualification Statement, which identifies the company’s references, would cause it substantial competitive harm. Thus, the district must withhold this information, which we have marked, under section 552.110(b). However, we find Alamo has made only conclusory allegations that the release of any of its remaining information and Benco, Cram, and CS Advantage have made only conclusory allegations that release of their information at issue would result in substantial harm to the companies’ competitive positions. *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 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the district may not withhold any of the remaining information at issue under section 552.110(b).

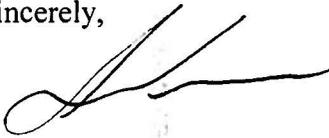
We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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.

In summary, the district must withhold the information we have marked under section 552.110 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 427149

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Mike Johnson
A.D. Willis Company, Inc.
4266 Felter Lane
Austin, Texas 78744

Mr. Theodore M. Bailey
Attorney for Alamo Roofing & Metal Co., Inc.
Bailey & Bailey, P.C.
230 Pereida Street
San Antonio, Texas 78210-1145

Mr. Alan Martin
Benco Commercial Roofing
10101 Hicks Field Road
Fort Worth, Texas 76179

Mr. William L. Pope
Attorney for CS Advantage U.S.A.A., Inc.
Adams & Graham, L.L.P.
134 East Van Buren Avenue, Suite 301
Harlingen, Texas 78551

Mr. Mark Eichelbaum
Cram Roofing Company
P.O. Box 690265
San Antonio, Texas 78269

Mr. George Carroll
Empire Roofing Companies, Inc.
14309 Toepperwein, Suite 204
San Antonio, Texas 78233

Ms. Ann Y. Riddel
Attorney for Port Enterprises, Ltd.
P.O. Box 1912
Austin, Texas 78767-1912

Mr. Alan Cain
Rain King, Inc.
2006 Delmar
Victoria, Texas 77901

Mr. Terry Powell
Superior Roofing & Construction Company
16103 University Oak
San Antonio, Texas 78249

Mr. Claude Elliot
Topside Contracting
703 Cupples
San Antonio, Texas 78237