



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2011

Ms. Elisabeth Donley Nelson
For Region 10 Education Service Center
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2011-14402

Dear Ms. Nelson:

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# 432225.

The Region 10 Education Service Center (the "center") received a request for the bid proposals and evaluation documents pertaining to the top five ranked companies that responded to RFP No. 2011-10 Video Production Services. You state the center has provided or will provide some of the requested information to the requestor. Although you indicate the center takes no position with respect to the public availability of the submitted bid proposals, you state their release may implicate the proprietary interests of AMS Pictures Public Interest ("AMS"); Eyecon Video Productions ("Eyecon"); and Jeffrey Markowitz Productions, Inc. ("JMP"). Accordingly, you state, and provide documentation showing, the center notified AMS, Eyecon, and JMP of the request and 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 AMS and JMP. We have considered the submitted arguments and reviewed the submitted information.

Initially, you indicate the center will withhold certain e-mail addresses in the submitted bid proposals, presumably under section 552.137 of the Government Code, pursuant to Open Records Decision No. 684 (2009). This decision acts as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. This decision, however, does not authorize governmental bodies to withhold e-mail addresses that are subject to section 552.137(c) of the Government Code. *See* Open Records Decision No. 684 at 10 (2009). Section 552.137(c)(3) provides an e-mail address “contained in a response to a request for bids or proposals” may not be withheld under section 552.137. *See* Gov’t Code § 552.137(a), (c)(3). In this instance, the e-mail addresses you have indicated are contained in responses to a request for bids or proposals. As such, those e-mail addresses are subject to section 552.137(c)(3). Consequently, the center may not withhold the e-mail addresses in the bid proposals under section 552.137 of the Government Code.

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* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Eyecon explaining why its submitted bid proposal should not be released. Therefore, we have no basis to conclude Eyecon has protected proprietary interests in its 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 center may not withhold any of Eyecon’s submitted information on the basis of any proprietary interest Eyecon may have in the information. As no exceptions have been claimed for Eyecon’s information, the center must release it.

AMS and JMP generally assert their submitted information is confidential 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.” Gov’t Code § 552.101. AMS and JMP, however, have not directed our attention to any law, nor are we aware of any law, that makes AMS’s or JMP’s submitted information confidential. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the center may not withhold AMS’s or JMP’s submitted information under section 552.101 of the Government Code.

AMS also generally asserts its submitted information is excepted from disclosure pursuant to 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 (1989) (discretionary exceptions in general). As the center does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to AMS's information. *See* ORD 592 (governmental body may waive section 552.104).

JMP claims its submitted bid proposal information, and AMS claims some of its submitted bid proposal 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) trade secrets, and (2) certain commercial or financial information. 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 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* 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.¹ Open Records Decision No. 402 (1983).

Section 552.110(b) protects “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(b). This section 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. *Id.*; ORD 661 at 5-6.

AMS and JMP claim their information at issue, including customer and pricing information, constitutes trade secrets under section 552.110(a). Upon review, we find AMS and JMP have established some of their customer information, which we have marked, constitutes trade secrets and must be withheld under section 552.110(a). We note, however, AMS and JMP have both made the remainder of their customer information they seek to withhold publicly available on their websites. Because AMS and JMP published this customer information, we conclude AMS and JMP have failed to demonstrate they consider this information to be trade secret information. Furthermore, we find AMS and JMP have not demonstrated how the remaining information they seek to withhold, including pricing information, meets the definition of a trade secret. We note pricing information pertaining to a particular proposal or contract is generally not a trade secret because 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Consequently, the center may not withhold any of AMS’s or JMP’s remaining information under section 552.110(a) of the Government Code.

¹The 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).

AMS and JMP also claim their remaining information at issue, including pricing information and remaining customer information, constitutes commercial information that, if released, would cause the companies substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find AMS and JMP have established release of their pricing information would cause the companies substantial competitive injury. Therefore, the center must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, because AMS and JMP published their remaining customer information on their websites, the companies have failed to demonstrate how release of this information would cause the companies substantial competitive harm. Furthermore, we find AMS and JMP have not demonstrated how release of their remaining information at issue would cause them substantial competitive injury, and have provided no specific factual or evidentiary showing to support such assertions. *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). Consequently, the center may not withhold any of AMS's or JMP's remaining information under section 552.110(b) of the Government Code.

AMS states 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, the center must release AMS's remaining information in accordance with copyright law.

In summary, the center must withhold AMS's and JMP's information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The center must release the remaining information, but any of AMS'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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 432225

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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