



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2011

Mr. W. Montgomery Meitler
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Texas Education Agency
1701 North Congress Avenue
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OR2011-14444

Dear Mr. Meitler:

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# 431952 (TEA PIR# 15823).

The Texas Education Agency (the "agency") received a request for all information pertaining to the top five bids for request for proposal number 701-11-038. You state the agency will release some of the requested information. You state that, although the agency takes no position with respect to the remaining requested information, it may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the agency notified the third parties of the request for information and of their right to submit arguments stating why their information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 applicability of exception in certain circumstances). We have reviewed the submitted information and the comments submitted by AMS, CEDU and HCDE.

¹The third parties notified pursuant to section 552.305 are: AMS Pictures ("AMS"), ConnectEDU, Inc. ("CEDU"), Harris County Department of Education ("HCDE"), iGlobal Educational Services LLC ("iGlobal"), and The Office of Sponsored Projects at the University of Texas at Austin ("OSP").

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from iGlobal or OSP explaining why its information should not be released to the requestor. Thus, we have no basis to conclude that the release of any of the information at issue would implicate iGlobal's or OSP's interests. *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. Accordingly, we conclude that the agency may not withhold any of the information on the basis of any interest iGlobal or OSP may have in the information. We will consider the arguments submitted by AMS, CEDU and HCDE for their respective information.

AMS raises section 552.101 of the Government Code. 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. However, AMS has not directed our attention to any law, nor are we aware of any law, under which any of this information is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality).

AMS also raises section 552.104 of the Government Code. This section excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which 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 a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the agency does not seek to withhold any information pursuant to this exception, no portion of AMS's information may be withheld on this basis.

AMS, CEDU and HCDE each claim that some of their information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information, the disclosure of which 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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). A "trade secret" has been defined as the following:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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 *See* 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 2. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

²There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (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* ORD 232.

Section 552.110(b), which 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.*; ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

AMS, CEDU and HCDE each claim portions of their information constitute trade secrets. Upon review, we find that HCDE has established a *prima facie* case that portions of its information constitute trade secrets. Accordingly, the agency must withhold HCDE’s information we have marked under section 552.110(a). However, HCDE has failed to demonstrate any of its remaining information meets the definition of a trade secret. AMS and CEDU have failed to demonstrate that any of their information meets the definition of a trade secret. Additionally, none of these parties demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the agency may not withhold any of AMS’s or CEDU’s information, or HCDE’s remaining information on this basis.

AMS, CEDU and HCDE each contend some of their information is commercial or financial information, release of which would cause competitive harm. Upon review, we conclude HCDE and AMS have established that release of some of their information would cause them substantial competitive injury. Accordingly, the agency must withhold the information we have marked under section 552.110(b). However, we find that AMS, CEDU, and HCDE have not made the specific factual or evidentiary showings required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Additionally, we note the pricing information of a winning bidder of a government contract, such as CEDU, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see also* ORD 319 at 3. *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). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. We therefore conclude the agency may not withhold any of AMS’s, CEDU’s or HCDE’s remaining information under section 552.110(b) of the Government Code.

HCDE raises section 552.117 of the Government Code. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former

officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). As HCDE acknowledges, however, section 552.117 only applies to records that the governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer). In this instance, the information at issue is not contained in records that the agency holds in its capacity as an employer. Thus, none of the remaining information may be withheld under section 552.117 of the Government Code.

HCDE also asserts that portions of the submitted responsive information are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Subsection 552.137(c)(2) states that subsection 552.137(a) does not apply to an e-mail address “provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent[.]” *Id.* § 552.137(c)(1), (2). Upon review, we find the e-mail addresses at issue are among the types specifically excluded by section 552.137(c) of the Government Code. Therefore, the agency may not withhold any of the e-mail addresses at issue under section 552.137 of the Government Code.

AMS notes that its proposal 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.

In summary, the agency must withhold the information we have marked under section 552.110 of the Government Code. The agency must release the remaining information; however, 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,



Cynthia G. Tynan
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Open Records Division

CGT/em

Ref: ID# 431952

Enc. Submitted documents

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