



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2012

Ms. Neera Chatterjee
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2012-00699

Dear Ms. Chatterjee:

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# 442399 (OGC # 140286).

The University of Texas System (the "system") received a request for proposals and bid tabulations pertaining to five specified projects. Although you take no position on whether the requested information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Austin Commercial, L.P.; Manhattan Construction Company ("Manhattan"); Hensel Phelps Construction Company ("Hensel Phelps"); J.T. Vaughn Construction, L.L.C.; Linbeck Group, L.L.C ("Linbeck"); Balfour Beatty Construction; and Tellepsen Builders, L.P. ("Tellepsen"). Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Manhattan, Hensel Phelps, Linbeck, and Tellepsen. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this

decision, we have only received correspondence from Manhattan, Hensel Phelps, Linbeck, and Tellepsen. Thus, the remaining third parties have not demonstrated they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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, the system may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information. We will, however, consider the submitted arguments against disclosure.

Linbeck and Manhattan raise section 552.104 of the Government Code. 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), 522 (1989) (discretionary exceptions in general). In this instance, the system does not raise section 552.104 as an exception to disclosure. Therefore, the system may not withhold any of the information at issue pursuant to section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

Hensel Phelps, Linbeck, Tellepsen, and Manhattan each claim section 552.110 for portions of the submitted information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides that 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular 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." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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).

After reviewing the submitted arguments and the information at issue, we conclude Linbeck and Manhattan have demonstrated that portions of their respective information constitute trade secrets for purposes of section 552.110(a). Accordingly, the system must withhold the information we have marked under section 552.110(a). We note, however, Hensel Phelps, Linbeck, and Manhattan have each made some of their respective customer information publicly available on their websites. Because these companies have published this

¹The following are the six factors the Restatement gives 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).

information, they have failed to demonstrate this information is a trade secret, and none of it may be withheld under section 552.110(a). Additionally, we find Hensel Phelps, Linbeck, and Manhattan have failed to establish any of the remaining information at issue meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for the remaining information. Thus, the system may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

Hensel Phelps, Linbeck, Telepsen, and Manhattan assert portions of the remaining information are excepted from disclosure under section 552.110(b). After reviewing the submitted arguments and the information at issue, we conclude Hensel Phelps has established that release of portions of the remaining information would cause it substantial competitive harm. Accordingly, the system must withhold the information we have marked in the remaining information under section 552.110(b). We note, as previously stated, Hensel Phelps, Linbeck, and Manhattan have made some of their client information publicly available on their respective websites. Because Hensel Phelps, Linbeck, and Manhattan have published this information, they have failed to demonstrate how release of this information would cause them substantial competitive injury. Further, we find Hensel Phelps, Telepsen, Linbeck, and Manhattan have failed to provide specific factual evidence demonstrating release of any of the remaining information would result in substantial competitive harm to the companies. *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). Furthermore, we note the pricing information of a winning bidder, such as Telepsen, is generally not excepted from disclosure 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). Accordingly, the system may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

Finally, we note some of the materials at issue are 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 system must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released, but any copyrighted information 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/ag

Ref: ID# 442399

Enc. Submitted documents

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