



ATTORNEY GENERAL OF TEXAS
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January 30, 2012

Ms. L. Renee Lowe
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OR2012-01469

Dear Ms. Lowe:

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# 443686 (CA File No. 11HSP1137).

The Harris County Hospital District (the "district") received a request for all proposals submitted in response to Job No. 11/0065. You state you have redacted insurance policy numbers from the responsive proposals under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You represent that some of the interested third parties had no objection to release of their information, and the district has released their requested information to the requestor. Although the district takes no position with respect to the public availability of the submitted information, you state its release may implicate the proprietary interests of the remaining third parties. Accordingly, you state, and provide documentation showing, the district notified the companies of their right to submit

¹Open Records Decision No. 684 is 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. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Thus, the statutory amendments to section 552.136 of the Government Code superseded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to section 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

arguments to this office as to why the submitted information should not be released.² 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 correspondence on behalf of A&L, Anslow-Bryant, Centennial, Dura Pier, Paschen, Horizon, KBR, LMC, P2MG, Primetime, and WTI. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that a portion of the submitted information, which we have marked, is non-responsive because it was created after the date the district received the request. Our ruling does not address this non-responsive information, and the district need not release this information in response to the request.

We understand A&L, Centennial, and WTI argue their submitted information is confidential because it was marked as "confidential" when submitted to the district. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Centennial and Dura Pier assert that some of their information is excepted 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. However, Centennial and Dura Pier have not directed our attention to, and we are not aware of, any law under which any of its information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). In addition, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2

²The remaining companies notified pursuant to section 552.305 are the following: A&L Services, Inc. ("A&L"); Anslow-Bryant Construction Ltd. ("Anslow-Bryant"); Centennial Contractors Enterprises, Inc. ("Centennial"); Dura Pier Facilities Services, Ltd. ("Dura Pier"); F.H. Paschen, S.N. Nielsen & Associates LLC ("Paschen"); Horizon Group International ("Horizon"); Kellogg, Brown & Root, Inc. ("KBR"); LMC Corporation ("LMC"); P2MG; Primetime Resources ("Primetime"); and Weatherproofing Technologies, Inc. ("WTI").

(2000), 575 at 2 (1990). Therefore, we conclude that the district may not withhold Centennial or Dura Pier's information under section 552.101 on this basis.

Section 552.101 of the Government Code also encompasses section 901.457 of the Occupations Code. Chapter 901 of the Occupations Code, the Public Accountancy Act, addresses the licensing and regulation of accountants. Section 901.457(a) pertains to the accountant-client privilege and provides the following:

A license holder or a partner, member, officer, shareholder, or employee of a license holder may not voluntarily disclose information communicated to the license holder or a partner, member, shareholder, or employee of the license holder by a client in connection with services provided to the client by the license holder or a partner, member, shareholder, or employee of the license holder, except with the permission of the client or the client's representative.

Occ. Code § 901.457(a). Horizon argues that a portion of its financial information is protected by the accountant-client privilege. We note, however, that section 901.457 only governs the circumstances under which licensed accountants may disclose information communicated to them by their clients in connection with the accountants' services. *Id.* Section 901.457 does not address the public disclosure of information held by the client or the client's representative. Here, Horizon is the client with regards to the accountant-client communications at issue. Section 901.457 does not prohibit Horizon from publicly disclosing the communications at issue. Consequently, section 901.457 does not make the communications provided to the district by Horizon confidential. We therefore conclude that the district may not withhold this information under section 552.101 of the Government Code on the basis of section 901.457 of the Occupations Code. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

Centennial also claims portions of its submitted information are excepted under section 552.102(a) of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, section 552.102(a) applies only to information in a personnel file of a government employee. *See id.* Furthermore, Centennial has not submitted any explanation of how this exception applies to its bid proposal. Therefore, Centennial has failed to demonstrate how section 552.102(a) applies to its bid proposal, and no portion of Centennial's information may be withheld on this basis.

Centennial, Dura Pier, LMC, and WTI claim their information is excepted under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 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 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 district does not argue that section 552.104 is applicable in this instance, we conclude that none of these companies' information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Anslow-Bryant, Centennial, Dura Pier, Paschen, Horizon, KBR, LMC, P2MG, Primetime, and WTI assert portions of their information are 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. *See* 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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a

³The 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;

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 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).

Section 552.110(b) 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.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find that Paschen, KBR, LMC, P2MG, Primetime, and WTI have established a *prima facie* case that some of their information, which we have marked, constitutes trade secrets. Therefore, the district must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that Paschen, KBR, P2MG, and WTI have made the remaining customer information they seek to withhold publicly available on their websites. Because Paschen, KBR, P2MG, and WTI have published this information, they have failed to demonstrate this information is a trade secret. We also find Centennial, Dura Pier, Paschen, Horizon, KBR, LMC, P2MG, Primetime, and WTI have failed to demonstrate how any portion of the remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision Nos. 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), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). We further 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; *see Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306

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- (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).

at 3. Therefore, the district may not withhold any of the remaining information pursuant to section 552.110(a) of the Government Code.

Anslow-Bryant, Centennial, Dura Pier, Paschen, Horizon, KBR, LMC, P2MG, Primetime, and WTI claim some of the remaining information constitutes commercial information that, if released, would cause the companies substantial competitive harm. In advancing their arguments, Dura Pier and Horizon rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Dura Pier's and Horizon's interests in their information.

Upon review, we find Anslow-Bryant, Paschen, LMC, P2MG, and WTI have established that release of their pricing information would cause the companies substantial competitive injury. Accordingly, the district must withhold these companies' pricing information, which we have marked, under section 552.110(b) of the Government Code. However, we find Anslow-Bryant, Centennial, Dura Pier, Paschen, Horizon, KBR, LMC, P2MG, Primetime, and WTI have not demonstrated how release of their remaining information at issue would cause them substantial competitive injury. 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. Furthermore, because Centennial has published the customer information it seeks to withhold on its website, the company has failed to demonstrate how release of this information would cause it substantial competitive harm. We also note the pricing information of a winning bidder, such as Centennial, 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). Consequently, the district

may not withhold any of the remaining information under section 552.110(b) of the Government Code.

LMC and WTI claim their remaining information is confidential under section 552.128 of the Government Code. Section 552.128 is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). However, LMC and WTI do not indicate they submitted their proposals in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, LMC and WTI submitted their proposals to the district in connection with a specific proposed contractual relationship with the district. We therefore conclude the district may not withhold any portion of LMC’s or WTI’s information under section 552.128 of the Government Code.

Finally, we note that a portion of the remaining information 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 district must release the remaining responsive information to the requestor, but only 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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/ag

Ref: ID# 443686

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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