



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2012

Ms. Cindy J. Crosby
For Austin Community College
Bickerstaff Heath Delgado Acosta, L.L.P.
Building One, Suite 300
3711 South MoPac Expressway
Austin, Texas 78746

OR2012-02843

Dear Ms. Crosby:

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# 446423.

Austin Community College ("ACC"), which you represent, received two requests from different requestors for the following information related to RFP# 952-11023RW: (1) the portions of certain responses related to prices, the description of goods and services offered, and the executive summaries; and (2) a list of vendors who submitted proposals, each vendor's original and best and final offer, copies of certain proposals and related documents, and copies of the evaluation/comments for each proposal. You state you will release some information to the second requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Aetna Behavioral Health, LLC ("Aetna"); Alliance Work Partners; Deer Oaks EAP Services ("Deer Oaks"); Health Management Systems of America; and MHN Services d/b/a MNH Services, Inc. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their 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) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received arguments from Aetna and you have submitted comments you received from Deer Oaks. We have considered the submitted arguments and reviewed the submitted information.

We note 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) of the Government Code 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, we have only received arguments from Aetna and Deer Oaks. Thus, we have no basis for concluding any portion of the submitted information constitutes the proprietary information of any of the remaining third parties. *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, ACC may not withhold any of the submitted information based on the proprietary interests of any of the remaining third parties.

We note portions of the information Aetna seeks to withhold were not submitted by ACC for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by ACC. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Aetna and Deer Oaks claim section 552.110 of the Government Code for portions of their submitted information. 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. *See 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. 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 [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).

There are six factors to be assessed in determining 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. This office must accept a claim that information subject to the Act is exempted 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).

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.*; ORD 661.

Aetna and Deer Oaks argue some of their information constitutes trade secrets. Upon review, we agree some of Deer Oaks' customer information constitutes trade secret information under section 552.110(a); therefore, ACC must withhold this information, which we have marked, under section 552.110(a). However, we note Deer Oaks has made some of its client information publicly available on its website. Because Deer Oaks has published this information, it has failed to demonstrate how this information constitutes trade secret information for purposes of section 552.110(a). In addition, we find Aetna and Deer Oaks have failed to demonstrate any of the remaining information for which the companies assert section 552.110(a) meets the definition of a trade secret, nor have Aetna or Deer Oaks demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, ACC may not withhold any of the remaining information at issue on the basis of section 552.110(a) of the Government Code.

Aetna also contends, in part, portions of its remaining information are excepted under section 552.110(b) based on the holding 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 future. *Id.* at 770. 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 Aetna's interests in its own information.

Aetna and Deer Oaks contend some of their information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we conclude Aetna has established the release of its pricing information, which we have marked, would cause the company substantial competitive injury; therefore ACC must withhold the information we have marked under section 552.110(b). However, we find Aetna and Deer Oaks have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the companies substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience). Furthermore, we note Deer Oaks was the winning bidder with respect to the contract at issue, and the pricing information of a winning bidder is generally not excepted 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 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We, therefore, conclude ACC may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information appears to 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, ACC must withhold the information we have marked under section 552.110 of the Government Code. ACC must release the remaining information, but any information that is 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,

A handwritten signature in black ink, appearing to read "Jennifer Burnett", with a long horizontal flourish extending to the right.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 446423

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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