



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2012

Mr. Michael R. Salinas
Attorney for Mercedes Independent School District
325 West Second Street
Mercedes, Texas 78570

OR2012-06054

Dear Mr. Salinas:

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# 451889.

The Mercedes Independent School District (the "district"), which you represent, received a request for all information related to a specified request for proposals. Although the district takes no position on whether the requested information is excepted from disclosure, you state release of this information may implicate the proprietary interests of American Contracting USA, Inc. ("American"); CRC Design Consultants ("CRC"); Donald. D. Ferguson, Inc. ("Ferguson"); Enriquez Enterprises ("Enriquez"); Journeyman Construction ("Journeyman"); Peacock General Contractors ("Peacock"); Rigney Construction & Development, LLC ("Rigney"); Rio Valley Construction, Inc. ("Rio Valley"); Roth Construction, Inc. ("Roth"); Texas Descon, LP ("Texas Descon"); and Ziwa Corporation ("Ziwa"). Accordingly, you have notified these third parties of the request 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) (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 Journeyman and Peacock. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from an attorney for the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We note that 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 id.* § 552.305(d)(2)(B). As of the date of

this decision, we have not received correspondence from American, CRC, Ferguson, Enriquez, Rigney, Rio Valley, Roth, Texas Descon, or Ziwa. Thus, these third parties have not demonstrated that 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 district may not withhold the submitted information on the basis of any proprietary interests these third parties may have in the information. However, we will consider Journeyman's and Peacock's submitted arguments against disclosure.

Journeyman and Peacock assert the information in their submitted proposals is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the district, not the proprietary interests of private parties such as Journeyman and Peacock. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the district does not raise section 552.104 as an exception to disclosure. Therefore, the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, Peacock asserts portions of its proposal are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes like section 252.049, which provides as follows:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This statutory provision merely duplicates the protection that section 552.110 of the Government Code provides to trade secret and commercial or financial information. Therefore, we will address Peacock's arguments with respect to section 252.049 of the Local Government Code under section 552.110 of the Government Code.

Both Journeyman and Peacock raise section 552.110 of the Government Code. 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 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 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 5. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that

¹The following are the six factors that 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).

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).

Peacock claims some of the information in its proposal consists of trade secrets. Upon review, we find that Peacock has established a *prima facie* case that the customer information we have marked constitutes a trade secret. Therefore, the district must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, we find Peacock has failed to demonstrate how any portion of the remaining information at issue meets the definition of a trade secret, nor has it 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 (1982) (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). 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 at 3. Therefore, the district may not withhold any of the remaining information at issue pursuant to section 552.110(a) of the Government Code.

Journeyman and Peacock assert some of the information in their submitted proposals consists of commercial or financial information that is excepted from disclosure under section 552.110(b). Upon review, we conclude Journeyman and Peacock have made only conclusory allegations that the release of any of the remaining information at issue would cause these companies substantial competitive injury. *See* Open Records Decision Nos. 661 at 5-6, 509 at 5 (1988) (because costs, 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. Accordingly, the district may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to

financial transaction between individual and governmental body protected under common-law privacy). We note the remaining information contains personal financial information that is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note that portions of the submitted information are subject to section 552.136 of the Government Code.² This section provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential. *See* Gov’t Code § 552.136(b), *see also id.* § 552.136(c) (defining “access device”). This office has determined that insurance policy numbers are subject to section 552.136. Accordingly, the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note some of the information at issue 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(a) of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.³

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.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

³We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 451889

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Journeyman Construction
c/o Mr. Jason C. Spencer
Ford, Nassen & Baldwin, P.C.
111 Congress Avenue, Suite 1010
Austin, Texas 787801
(Third party w/o enclosures)

Peacock General Contractors, Inc.
c/o Ms. Rosalyn R. Tippet
Tippet Law Office
Suite 210-242
106 North Denton Tap Road
Coppell, Texas 75019
Third party w/o enclosures

Ms. Leticia Barcenas
American Contracting USA, Inc.
1606 South Reynolds
Rio Hondo, Texas 78583
(Third party w/o enclosures)

Mr. Carlo R. Cantu
CRC Design Consultants
2016 South 45th Street
McAllen, Texas 78503
(Third party w/o enclosures)

Mr. David Ferguson
Donald. D. Ferguson, Inc.
P.O. Box 3105
Brownsville, Texas 78523
(Third party w/o enclosures)

Mr. Gilbert Enriquez
Enriquez Enterprises
P.O. Box 2999
Edinburg, Texas 78540
(Third party w/o enclosures)

Mr. Jimmy K. Jones
Rio Valley Construction, Inc.
4124 North Taylor Road
McAllen, Texas 78504
(Third party w/o enclosures)

Mr. Steven W. Roth
Roth Construction, Inc.
P.O. Box 149
Mercedes, Texas 78570
(Third party w/o enclosures)

Mr. Michael D. Smith
Texas Descon, L.P.
P.O. Box 3547
McAllen, Texas 78502
(Third party w/o enclosures)

Mr. Leo Aguilar
Ziwa Corporation
1952 South Price Road
Brownsville, Texas 78521
(Third party w/o enclosures)

Mr. John Rigney
Rigney Construction & Development, L.L.C.
7011 North Seminary Road
Edinburg, Texas 78541
(Third party w/o enclosures)