



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2012

Mr. Frank J. Garza
General Counsel for Brooks Development Authority
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OR2012-08781

Dear Mr. Garza:

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# 455851.

The Brooks Development Authority (the "authority"), which you represent, received a request for the proposals submitted by Air Stream Services ("Air Stream"), Gillette Air Conditioning Co., Inc. ("Gillette"), and J&J Maintenance, Inc. ("J&J") in response to a specified request for proposals. You state some information will be released. You claim portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code. Although the authority takes no position regarding whether the remaining submitted information is excepted from disclosure, you state its release may implicate the proprietary interests of Air Stream, Gillette, and J&J. Accordingly, you provide documentation showing you have notified these third parties of the request and their right to submit arguments to this office. *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 comments from J&J. We have considered the submitted arguments and reviewed the submitted information.

We first note 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 ruling, we have not received comments from Air Stream or Gillette. Thus, we have no basis to conclude either of these third parties has 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 authority may not withhold any of the information at issue on the basis of any proprietary interest Air Stream or Gillette may have in the information.

J&J and the authority each raise section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body’s interest in competitive bidding situation). Therefore, we will consider only the authority’s interests under section 552.104 of the Government Code. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, this office has determined in some circumstances section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5.

You argue release of the information at issue will impair the authority’s ability to receive proposals from qualified contractors in response to future requests for proposals. However, you acknowledge a winning bidder has been selected for the request for proposals at issue and a contract has been executed. Thus, the submitted information relates to a contract that has already been executed. We find you have not demonstrated the submitted information pertains to the solicitation of bids for the same or similar goods or services on a recurring basis. Accordingly, we conclude the authority may not withhold the submitted information under section 552.104 of the Government Code.

J&J raises section 552.101 of the Government Code for portions of its information. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information other statutes make confidential. J&J asserts some of its information is protected by the Privacy Act of 1974, section 552a of title 5 of the United States Code (“Federal Privacy Act”). We note that the Federal Privacy Act applies only to a federal agency. *See* 5 U.S.C. 552(f), 552a (a). State and local government agencies are not covered by the Federal Privacy Act. *See Davidson v. Georgia*, 622 F. 2d 895, 897 (5th Cir. 1980); *see also* Attorney General Opinion MW-95 (1979). Because the authority is not a federal agency, it is not bound by the Federal Privacy Act’s confidentiality provisions as

would be a federal agency. *See* 5 U.S.C. §§ 552a(a)(1), 552(f) (defining “agency” for purposes of Privacy Act). Therefore, none of the information at issue can be considered confidential by law pursuant to section 552.101 of the Government Code in conjunction with the Federal Privacy Act.

Finally, J&J raises 552.110 for its information.¹ Section 552.110 protects the proprietary interests of private parties by excepting from disclosure (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. *See id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 defines a “trade secret” to be

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 a single or ephemeral event 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) (citation omitted); *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.² This office will accept a claim that information subject to the Act is excepted as a trade secret under section 552.110(a) if a *prima facie* case for the exception

¹Although J&J also raises section 552.113 of the Government Code, J&J has not presented arguments explaining how this exception applies to its information. Thus, this ruling does not address section 552.113.

²The 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 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

is made, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable 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. 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. *See* ORD 661 at 5-6 (business must show by specific factual evidence that release of particular information at issue would cause substantial competitive injury).

In J&J’s section 552.110 argument, J&J states it believes that release of bidders’ information would prevent qualified contractors from responding to requests for proposals in the future. Thus, we understand J&J to raise the test announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), concerning the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal entity. 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. Although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, the Third Court of Appeals overturned that standard in holding *National Parks* was not a judicial decision for purposes of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information at issue would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing Seventy-sixth Legislature’s enactment of Gov’t Code § 552.110(b)). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only J&J’s interests in its information.

Upon review, we find J&J has established that release of its pricing information would cause the company substantial competitive injury. Therefore, the authority must withhold the information we have marked in J&J’s proposal under section 552.110(b). However, we find J&J has not established by a factual or evidentiary showing that release of the remaining information at issue would cause the company substantial competitive injury for purposes of section 552.110(b). *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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

(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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). In addition, we find J&J has failed to establish any of the remaining information at issue meets the definition of a trade secret, nor has J&J demonstrated the necessary factors to establish a trade secret claim for the remaining information. *See* ORD 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). Therefore, the authority may not withhold any of J&J's remaining information under subsection 552.110(a) or (b).

We note a portion of Gillette's information is protected by section 552.136 of the Government Code.³ Section 552.136 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." Gov't Code § 552.136(b); *see also* § 552.136(a) (defining "access device number"). This office has determined an insurance policy number is an access device for purposes of section 552.136. Thus, the authority must withhold the information we have marked in Gillette's proposal under section 552.136.

We note portions of the submitted information are protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, 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 copyright law and the risk of a copyright infringement suit.

In summary, the authority must withhold the information we marked in J&J's proposal under section 552.110(b) of the Government Code and in Gillette's proposal under section 552.136 of the Government Code. The remaining information must be released to the requestor, 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

³The 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).

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 455851

Enc. Submitted documents

- c: Requestor
(w/o enclosures)

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- c: Mr. Wayne Riddle
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