



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2012

Ms. Neera Chatterjee  
Office of the General Counsel  
The University of Texas System  
201 West Seventh Street  
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OR2012-08782

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# 455777 (OGC #s 142571 and 143027).

The University of Texas System (the "system") received two requests for information pertaining to a specified request for proposals ("RFP").<sup>1</sup> You state the system has released some of the requested information to the requestors. You also state the system will redact information pursuant to section 552.136 of the Government Code.<sup>2</sup> 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 B. E. Smith, Inc. ("B.E. Smith"); Coors & Associates, Inc. dba Coors Executive Resources; CPS HR

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<sup>1</sup>You state the system sought and received clarification of the information requested from one of the requestors. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

<sup>2</sup>On September 1, 2011, the Texas legislature amended section 552.136 of the Government Code 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). Thus, 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).

Consulting; Heidrick & Struggles; InGenesis, Inc. (“InGenesis”); Kaye/Bassman International Corp.; Korn/Ferry International; Opus Partners, Inc.; R. William Funk & Associates; Russell Reynolds Associates, Inc. (“RRA”); and Witt/Kieffer, Ford, Hadelman, Lloyd Corp. Accordingly, you notified these third parties of the requests for information and of their right to submit arguments to this office as to why their 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 comments from B. E. Smith, InGenesis, and RRA. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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* Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, we have only received correspondence from B. E. Smith, InGenesis, and RRA. Thus, we find the remaining interested third parties have not demonstrated that they have a protected proprietary interest in any of their 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 any of the remaining third parties’ information on the basis of any proprietary interests these third parties may have in their information.

Next, we understand B. E. Smith to claim one of the requests is an improper request. Although the request at issue asks for “records in the possession of the City of Hawthorne,” the request is addressed to and was received by the system and specifically asks for information pertaining to a system RFP. We note a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). The submitted information reflects the system has made a good faith effort to do so. Therefore, we will consider the submitted arguments against the disclosure of this information.

B. E. Smith asserts that some of the requested information is excepted from disclosure under section 552.111 of the Government Code. We note, however, the system did not submit this information to our office. This ruling does not address information beyond what the system has submitted to us for review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the responsive information the system has submitted to this office. *See id.*

Next, B. E. Smith asserts its proposal is 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.” *Id.* § 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 B. E. Smith’s arguments with respect to section 252.049 of the Local Government Code under section 552.110 of the Government Code.

B. E. Smith also argues its information is confidential under section 552.101 of the Government Code in conjunction with section 31.05 of the Penal Code. Section 552.101 encompasses section 31.05, which provides in pertinent part:

- (b) A person commits an offense if, without the owner’s effective consent, he knowingly:
  - (1) steals a trade secret;
  - (2) makes a copy of an article representing a trade secret; or
  - (3) communicates or transmits a trade secret.
- (c) An offense under this section is a felony of the third degree.

Penal Code § 31.05(b), (c). We note section 31.05 does not expressly make information confidential. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the system may not

withhold any portion of B. E. Smith's information under section 552.101 on the basis of section 31.05 of the Penal Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 established. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note an individual's name, home address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision Nos. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers not protected under privacy). Additionally, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find RRA has not demonstrated how any portion of its information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, no portion of this information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

B. E. Smith and InGenesis 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." Gov't Code § 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 system 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).

InGenesis and RRA assert portions of their information are excepted from disclosure under section 552.110 of the Government Code, while B. E. Smith seeks to withhold all of its

information under this exception. 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* 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.<sup>3</sup> 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 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

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<sup>3</sup>The 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;
- (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).

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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find that InGenesis and RRA have established a *prima facie* case that some of their customer information, which we have marked, constitutes trade secrets. Therefore, the system must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that InGenesis and RRA have made the remaining customer information they seek to withhold publicly available on their websites. Because these companies have published this information, they have failed to demonstrate this information is a trade secret. We also find B. E. Smith, InGenesis, and RRA 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 at 3. Therefore, the system may not withhold any of the remaining information pursuant to section 552.110(a) of the Government Code.

B. E. Smith, InGenesis, and RRA claim some of the remaining information constitutes commercial information that, if released, would cause the companies substantial competitive harm. In advancing its arguments, InGenesis relies, 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 InGenesis' interests in its information.

Upon review, we find InGenesis has established that release of its pricing information would cause the company substantial competitive injury. Accordingly, the system must withhold InGenesis' pricing information, which we have marked, under section 552.110(b) of the Government Code. However, we find B. E. Smith, InGenesis, and RRA 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. We also note the pricing information of a winning bidder, such as B. E. Smith, 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 system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

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.

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](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 'Sarah Casterline', followed by a large, stylized circular flourish.

Sarah Casterline  
Assistant Attorney General  
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SEC/som

Ref: ID# 455777

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