



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2012

Mr. Clayton T. Holland
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Building 1, Suite 300
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Austin, Texas 78746

OR2012-18382

Dear Mr. Holland:

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# 471048 (ORR-1117).

Austin Community College ("ACC"), which you represent, received a request for two specified proposals submitted in response to ACC's request for proposals number 946-11012VJ - Student Loan Default Prevention Services. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of third parties might be implicated. Accordingly, you notified ECMC Solutions Corp. ("ECMC") and Texas Guaranteed Student Loan Corporation ("TG") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 applicability of exception in certain circumstances). We have received comments from ECMC and TG. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state ACC will rely on Open Records Letter No. 2012-12722 (2012) and release TG's proposal in accordance with that ruling.¹ In that decision, we ruled ACC must withhold the information we marked under section 552.136 of the Government Code, and must release the remaining information, including TG's proposal, in accordance with copyright law. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). TG asserts, however, that Open Records Letter No. 2012-12722 is not a previous determination "because the request is different and concerns different parties." Upon review, however, we find the instant request for TG's proposal is a request for the same information that was addressed in the prior ruling, the ruling was addressed to the same governmental body, and the ruling concluded that the information was or was not excepted from disclosure. Therefore, as we have no indication the law, facts, and circumstances on which the previous ruling was based have changed, ACC must continue to rely on Open Records Letter No. 2012-12722 as a previous determination and withhold or release the identical information in accordance with that ruling. *See id.*

Although ECMC argues the submitted information is excepted from disclosure pursuant to federal copyright law, we note copyright law does not make information confidential. *See* Open Records Decision No. 660 at 5 (1999). 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.

ECMC claims portions of its proposal are excepted from public 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, which holds a trade secret to be:

¹We note Open Records Letter No. 2012-12722 refers to the Texas Guaranteed Student Loan Corporation as "TG Higher Edge."

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 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 Open Records Decision No. 552 at 5 (1990)*. 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)*. We note pricing information pertaining to a particular proposal or 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." *See RESTATEMENT OF TORTS § 757 cmt. b; Huffines*, 314 S.W.2d at 776; *Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982)*.

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

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).

We find ECMC has established release of its pricing and customer information would cause the company substantial competitive injury. Therefore, ACC must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find ECMC has made only conclusory allegations that the release of the remaining information it seeks to withhold would result in substantial damage to the company’s competitive position. Thus, ECMC has not demonstrated substantial competitive injury would result from the release of any of its remaining information. *See generally* Open Records Decision Nos. 661, 509 at 5 (1988), 319 at 3. Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

ECMC asserts portions of its remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find ECMC has established a *prima facie* case that some of its information is a trade secret. Therefore, ACC must withhold the information we have marked under section 552.110(a) of the Government Code. However, ECMC has failed to demonstrate the necessary factors to establish a trade secret claim for its 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Therefore, ACC may not withhold any of the remaining information under section 552.110(a) of the Government Code.

We note some of the remaining information is subject to 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). An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument” and includes an account number. *Id.* § 552.136(a). This office has concluded that an insurance policy number is an access device number for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Therefore, ACC must

³The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, ACC must continue to rely on Open Records Letter No. 2012-12722 as a previous determination and withhold or release the identical information in accordance with that ruling. ACC must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining submitted information must be released; however, any information 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 471048

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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