



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2012

Mr. Ronny H. Wall
Associate General Counsel
Office of the General Counsel
Texas Tech University System
P.O. Box 42021
Lubbock, Texas 79409

OR2012-20084

Dear Mr. Wall:

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# 473781.

Texas Tech University (the "university") received three requests for all proposals submitted in response to RFP 2012-494 for elevator maintenance services, including all amendments or revisions, all communications regarding the proposals, scoring sheets, and any documents submitted as clarification for a proposal. You state you have released some of the information to the third requestor. Although you take no position with respect to the public availability of the remaining requested information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified EMR Elevator, Inc. ("EMR"), KONE Elevators & Escalators ("KONE"), ThyssenKrupp Elevator Americas ("ThyssenKrupp"), Schindler Elevator Corporation ("Schindler"), Otis Elevator Company ("Otis"), and Premier Elevator Services, Inc. ("Premier") of the requests and 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 parties 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 submitted by EMR and Premier. We have considered the submitted arguments and reviewed the submitted information.

Initially, we 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 letter, we have not received arguments from KONE, ThyssenKrupp, Schindler, or Otis. Thus, these companies have not demonstrated 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 university may not withhold the submitted information on the basis of any proprietary interests these companies may have in the information.

Next, we note Premier argues against the release of information that was not submitted by the university. This ruling does not address information that was not submitted by the university and is limited to the information the university has submitted as responsive for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. EMR raises section 552.101 in conjunction with 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 EMR's arguments with respect to section 252.049 of the Local Government Code under section 552.110 of the Government Code.

EMR and Premier argue portions of their information 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:

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.¹ 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 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

¹The 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).

§ 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.

EMR claims its submitted customer information constitutes a trade secret under section 552.110(a). We note EMR has published the identities of some of its customers on its website, making this information publicly available. Thus, we are unable to find that the information EMR has published on its website constitutes a trade secret under section 552.110(a). With the exception of that information, we conclude EMR has established a *prima facie* claim for its customer information. Accordingly, the university must withhold the customer information we have marked under section 552.110(a). Upon review of the remaining information, we conclude EMR and Premier have failed to establish a *prima facie* case that their information meets the definition of a trade secret, nor have EMR and Premier demonstrated the necessary factors to establish a trade secret claim for their information. *See* RESTATEMENT OF TORTS § 757 cmt. b; ORDs 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, and experience not excepted under section 552.110). Accordingly, the university must withhold the customer information we have marked under section 552.110(a), and none of the remaining information may be withheld under section 552.110(a).

EMR and Premier each claim portions of their information constitute commercial and financial information, that if released, would cause each company substantial competitive harm. In advancing its arguments, Premier relies 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 at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (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 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). 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 Premier's interest in the submitted information.

After reviewing the submitted arguments and the information at issue, we find EMR has established that release of its financial statements, balance sheets, profit loss statements, and

pricing information would cause the company substantial competitive injury. Therefore, we find the university must withhold this information, which we have marked under section 552.110(b). However, as previously noted, EMR has published the identities of some customers on its website, making this information publicly available. Thus, EMR has failed to demonstrate that release of the information it has published on its website would cause it substantial competitive injury. We note that although Premier seeks to withhold its pricing information, it 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). Further, we find that EMR and Premier have made only conclusory allegations that the release of their remaining information would result in substantial damage to their competitive position. Thus, we find EMR and Premier have failed to demonstrate that the release of any of their remaining information would cause them substantial competitive harm. *See* ORD 661 at 5. Accordingly, the university may not withhold any of the remaining information under section 552.110(b) of the Government Code.

With regard to EMR's customer information that is not protected by section 552.110, we address EMR's claim under section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. EMR claims its customer information is protected as a trade secret under section 552.101 of the Government Code pursuant to judicial decision and cites to *Guy Carpenter & Co., Inc. v. Provenzale*, 334 F.3d 459 (5th Cir. 2003) and *Bandit Messenger of Austin, Inc. v. Contreras*, No. 03-00-00359-CV (Tex. App.—Austin Oct. 26, 2000), 2000 WL 1587664 (not designated for publication). However, upon our review, we find these cases do not determine the confidentiality of any information for purposes of the Act. Therefore, we find that none of the remaining customer information may be withheld under section 552.101 of the Government Code in conjunction with these two judicial decisions.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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."² Gov't Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access

² The 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).

device"). Therefore, the university must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code.

We note some of the submitted information 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 university must withhold the information we have marked under sections 552.110(a), 552.110(b), and 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.

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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

³The submitted information contains social security numbers. Section 552.147 of the Government Code permits a governmental body to redact the social security number of a living person without requesting a decision from this office. See Gov't Code § 552.147(b).

Ref: ID#473781

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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