ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2013

Ms. Cheryl T. Mehl
Counsel for the Temple Independent School District
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4201 West Parmer Lane, Suite A-100
Austin, Texas 78727

OR2013-15051

Dear Ms. Mehl:

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# 497760.

The Temple Independent School District (the "district"), which you represent, received two requests from different requestors for the proposal submitted by Dahill Office Technology Corporation ("Dahill") for a specified request for proposals (the "RFP"), information pertaining to the results for all the proposals submitted for the RFP, and information pertaining to the committee members who scored the proposals. You state the district will provide the second requestor with some of the information responsive to his request. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state you believe the release of the submitted information may implicate the interests of Dahill. Accordingly, you state, and provide documentation demonstrating, the district notified Dahill of the request for information and of its right to submit arguments stating why its 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); 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 arguments from an attorney representing Dahill. We have reviewed the submitted information and the submitted arguments.

You contend the portions of the second request seeking written justification of the scoring for each committee member and the qualifications for each committee member that justifies their abilities to score the vendors requires the district to create new information. We note that, in responding to a request for information under the Act, a governmental body is not required to answer factual questions, conduct legal research, or create responsive information that does not exist at the time the request was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1 (1990). Additionally, the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *See Economic Opportunities Dev. Corp.*, 562 S.W.2d 266; *see also* Open Records Decision Nos. 452 at 3 (1986), 362 at 2 (1983). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume the district has made a good-faith effort to do so.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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).

You explain the district's board of trustees approved the award of the contract to Dahill; however, as of the date of the present requests for information, the contract with Dahill has not been finalized and executed. However, you also state the district "has no interest of its own to assert in relation to th[ese requests]." As such, we find you have failed to demonstrate disclosure of the submitted information would cause any harm to the district's interests for the purposes of section 552.104. Accordingly, the district may not withhold the submitted information under section 552.104.

Dahill submits arguments against disclosure of some of its information 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see*

also Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

> [A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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.[1] *See* RESTATEMENT OF TORTS § 757 cmt. b. 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 5-6. 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).

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[1]There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
> (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 to [its] competitors;
> (5) the amount of effort or money expended by [the company] in developing the information; and
> (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).

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.*; Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Dahill claims some of its information constitutes trade secrets. Upon review, we find Dahill has established a *prima facie* case some of its customer information constitutes trade secrets. Accordingly, the district must withhold Dahill's customer information we have marked under section 552.110(a). We note, however, that Dahill published the identity of one of its customers on its website, thereby making this information publicly available. Because Dahill has published this information, it has failed to demonstrate this information is a trade secret, and it may not be withheld under section 552.110(a). We also 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." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776. We find Dahill has failed to demonstrate its remaining information for which it asserts section 552.110(a) meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the district may not withhold the remaining information on the basis of section 552.110(a).

Dahill also contends some of the remaining information is commercial or financial information, release of which would cause substantial competitive harm to Dahill. Upon review of Dahill's arguments under section 552.110(b), we conclude Dahill has established the release of the information we have marked would cause it substantial competitive injury. Accordingly, the district must withhold the information we have marked under section 552.110(b). However, as noted above, Dahill has published the identity of one of its customers on its website, making this information publicly available. We also note the pricing information of winning bidders of a government contract, such as Dahill, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *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 cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. Upon review, we find Dahill has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of Dahill's remaining information would cause the

company substantial competitive harm. *See* Open Records Decision Nos. 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 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the district may not withhold the remaining information under section 552.110(b).

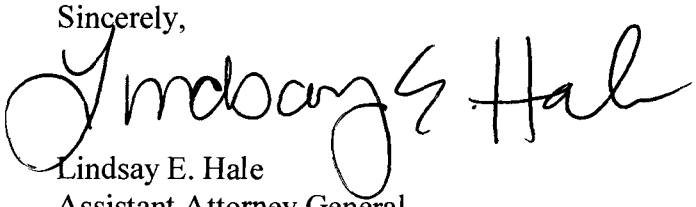
We note some of the remaining information appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection 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 of the Government Code. The district must release the remaining information; 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 497760

Enc. Submitted documents

c: Two Requestors
(w/o enclosures)

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