



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2014

Ms. Meridith L. Hayes
Counsel for the New Diana Independent School District
Walsh, Anderson, Gallegos, Green and Treviño, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2014-02050

Dear Ms. Hayes:

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# 512863.

The New Diana Independent School District (the "district"), which you represent, received a request for five categories of information related to the procurement of a construction manager-at-risk pertaining to the construction of 2014 district bond projects. You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. Although you take no position on the public availability of the remaining submitted information, you state the information may implicate the proprietary interests of a third party. Accordingly, you inform us, and provide documentation which shows, you notified Gallagher Construction Company, L.P., d/b/a Gallagher Construction Services ("Gallagher") of the request and of the company's right to submit comments to this office as to why its information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We received arguments on behalf of Gallagher. We have reviewed the submitted arguments and the information you submitted.

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) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). 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 state the information at issue, which you have numbered AG-001 through AG-248, relates to the procurement of a construction manager-at-risk pertaining to the construction of 2014 district bond projects. You further state the district is currently negotiating terms with the highest ranked proposer, and has not entered into a final contract. You assert the release of the information at issue would give an advantage to one of the bidders. Based on your representations and our review, we agree the district may withhold the information at issue, pages AG-001 through AG-248, under section 552.104 of the Government Code until such time as a contract has been executed.¹ *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is underway would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation).

Gallagher seeks to withhold information not submitted to this office by the district.² By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the district, this ruling does not address this information and is limited to the information submitted as responsive by the district.

Gallagher argues that information related to employees of Gallagher contained in its proposal is confidential under the doctrine of common-law privacy. Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101

¹As our ruling is dispositive, we need not consider the remaining argument against disclosure of this information.

²This information consists of the “financial history of the company,” a financial statement, and “a breakdown of Gallagher’s fee structure[.]”

encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82.

Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note education, prior employment, and personal information are ordinarily not private information subject to section 552.101. See Open Records Decision Nos. 554 (1990), 448 (1986). We further note an individual's name, address, and telephone number are generally not private information under common-law privacy. See ORD 554 at 3 (disclosure of person's name, address, or telephone number not an invasion of privacy). Upon review, we find Gallagher has failed to demonstrate any of the information in its proposal is private. Accordingly, the district may not withhold any of Gallagher's information under section 552.101 of the Government Code in conjunction with common-law privacy.

Gallagher raises section 552.110 of the Government Code for portions of its submitted information. Section 552.110 of the Government Code 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 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 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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 § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, 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 Gallagher has established a *prima facie* case that its customer information constitutes trade secret information for purposes of section 552.110(a) of the Government Code. However, to the extent any of the customer information Gallagher seeks to withhold has been published on the company’s website, any such information is not confidential under section 552.110(a). Accordingly, the district must withhold Gallagher’s customer information under section 552.110(a), provided the information has not been published on the company’s website.

However, Gallagher has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Gallagher has

³The 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *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). Therefore, none of Gallagher's remaining information may be withheld under section 552.110(a).

After further review, we determine Gallagher has made only conclusory allegations release of any of the remaining information it seeks to withhold would result in substantial competitive injury. *See* ORD 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). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b) of the Government Code.

To summarize: The district may withhold pages AG-001 through AG-248 under section 552.104 of the Government Code until such time as a contract has been executed. The district must withhold Gallagher's customer information under section 552.110(a) of the Government Code, provided Gallagher has not published the information on its website. The district must release the remaining information.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division
CN/bhf

Ref: ID# 512863

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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