



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2014

Mr. Ronn P. Garcia
Underwood, Wilson, Berry, Stein & Johnson, P.C.
P.O. Box 16197
Lubbock, Texas 79490

OR2014-15070

Dear Mr. Garcia:

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# 534360.

The Region 17 Education Service Center (the "center"), which you represent, received two requests for information related to milk, ice cream novelties, and specialty beverage bids for the West Texas Food Service Cooperative full service delivery competitive sealed bid proposal for the 2014-2016 school years, including bidders and their pricing information. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the 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 two interested third parties. We have considered the submitted arguments and reviewed the submitted information.

Initially, you note a portion of the submitted information is not responsive to the present request because it is not related to the milk, ice cream novelties, and specialty beverage bids. This ruling does not address the public availability of the non-responsive information and the center need not release it in response to this request.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from two third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the center may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

One of the third parties raises section 552.101 of the Government Code and cites to Open Records Decision No. 652 (1997). 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. Open Records Decision No. 652 addressed under what circumstances the Texas Natural Resource Conservation Commission, which has been renamed the Texas Commission on Environmental Quality (the "commission"), must withhold from the public "trade secret" information pursuant to section 382.041 of the Health and Safety Code. *See ORD 652* at 1 (addressing whether Health and Safety Code section 382.041 supplants common-law trade secret protection for certain information filed with the commission). Thus, we understand the third party to assert its information is confidential under section 382.041 of the Health and Safety Code. Section 382.041 provides in relevant part that "a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). By its own terms, section 382.041 pertains only to information submitted to the commission. *See id.*; *see also ORD 652* at 5. The bid proposal at issue here was submitted to the center. Consequently, none of the information at issue is made confidential by section 382.041 of the Health and Safety Code, and the center may not withhold it under section 552.101 on that basis.

Both third parties contend some of their information is excepted from 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 that are 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 the following:

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 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. *See id.*; *see also* ORD 661 at 5 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

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

One of the third parties objects to the release of its identity as a bidder as well as the pricing information it submitted in its closed bid. Upon review, we find that third party has demonstrated its pricing information, which we have marked, consists of commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the center must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find neither third party has demonstrated how the release of its remaining information would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* ORD 661 at 5-6 (1999) (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). Therefore, none of the remaining information may be withheld under section 552.110(b).

We further find the third parties have failed to establish a *prima facie* case their information meets the definition of a trade secret, and have failed to demonstrate the necessary factors to establish a trade secret claim for their 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). Consequently, the center may not withhold any of the submitted information under section 552.110(a) of the Government Code.

In summary, the center must withhold the information we have marked under section 552.110(b) of the Government Code, and 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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/ac

Ref: ID# 534360

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

bc: Third Parties
(w/o enclosures)