



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 26, 2016

Mr. Augustin Rivera, Jr.
General Counsel
Del Mar College District
101 Baldwin Boulevard
Corpus Christi, Texas 78404

OR2016-01928

Dear Mr. Rivera:

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# 595484.

Del Mar College (the "college") received a request for all competing responses submitted to the college in response to a specified request for proposals. Additionally, the college received a second request from a different requestor for all competing responses submitted to the college in response to the same specified request for proposals. Although the college takes no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of CM Labs Simulations, Inc. ("CM") and Kongsberg GlobalSim, Inc. ("Kongsberg"). Accordingly, you state, and provide documentation showing, you notified CM and Kongsberg of the request 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 CM and Kongsberg. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note CM makes arguments for withholding certain information that was not submitted by the college to this office for review. Because such information was not submitted by the governmental body, this ruling does not address any such information, and is limited to the information submitted as responsive by the college. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must

submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

We also note CM and Kongsberg generally raise section 552.101 of the Government Code for portions of their information. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. However, CM and Kongsberg have not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any portion of the submitted information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the college may not withhold any portion of the submitted information under section 552.101 on behalf of CM or Kongsberg.

CM and Kongsberg claim portions of the submitted information are excepted under section 552.110 of the Government Code, which 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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 5 (1990) (party must establish prima facie case that information is trade secret). Section 757 provides that 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.¹ 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 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. *See* Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular 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; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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* Open Records Decision No. 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).

CM and Kongsberg claim section 552.110(b) of the Government Code for portions of their respective information. Upon review, we find CM has demonstrated the information we have marked consists of commercial or financial information, the release of which would cause substantial competitive harm to CM. Further, we find Kongsberg has demonstrated the pricing information we have marked constitutes commercial or financial information, the release of which would cause substantial competitive injury to Kongsberg. Therefore, the college must withhold the information we have marked under section 552.110(b).² However,

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).

²As our ruling is dispositive, we need not address CM’s remaining argument under section 552.110(a) of the Government Code for this information.

upon review, we find CM and Kongsberg have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the respective companies substantial competitive harm. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, 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 (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), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Further, we note the pricing information of a winning bidder, such as CM, is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3. Accordingly, none of the remaining information may be withheld under section 552.110(b).

CM and Kongsberg also state portions of their respective information constitute trade secrets. Upon review, we find Kongsberg and CM have established a *prima facie* case the information we have marked, Kongsberg's client reference information, and CM's client information constitute trade secret information for purposes of section 552.110(a). Accordingly, to the extent Kongsberg's client reference information and CM's client information is not publicly available on the companies' websites, the college must withhold the client reference and client information at issue under section 552.110(a). Additionally, the college must withhold the information we have marked within Kongsberg's information under section 552.110(a). However, upon review, we find CM and Kongsberg have failed to establish a *prima facie* case the remaining information at issue meets the definition of a trade secret and have not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 402. Accordingly, no portion of the remaining information may be withheld under section 552.110(a).

We note portions of the remaining 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 college must withhold the information we have marked under section 552.110(b) of the Government Code. The college must withhold the information we have marked, and to the extent it is not publicly available on the companies' websites, Kongsberg's client reference information and CM's client information under section 552.110(a) of the Government Code. As no other exceptions to disclosure have been raised, the remaining information must be released; however, any information subject to copyright may be released only 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,

A handwritten signature in cursive script that reads "Cole Hutchison".

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 595484

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Mr. Paolo Paoletta
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(w/o enclosures)