



July 2, 2002

Ms. Carol Longoria  
Public Information Coordinator  
University of Texas System  
201 West 7<sup>th</sup> Street  
Austin, Texas 78701-2902

OR2002-3600

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165083.

The University of Texas System (the “system”) received a request for the proposals submitted by Centennial Contractors Enterprises, Inc. (“Centennial”) and Alpha Building Corporation (“Alpha”) under RFP No. 01JOC100. You claim that the submitted information may be excepted from disclosure under sections 552.101, 552.110, 552.113, and 552.131 of the Government Code. You state, and provide documentation showing, that you have notified Centennial and Alpha, interested third parties whose proprietary interests may be implicated by the request, of the request for information. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the “Act”) in certain circumstances). We have considered the exceptions you claim and the submitted third party arguments, and we have reviewed the submitted information.

At the outset, we address the system’s obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed

statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the system received the request for information on April 15, 2002. The system failed to submit a portion of Alpha's proposal until May 20, 2002. Consequently, the system failed to timely submit a portion of the specific information requested.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). In this case, we believe that the interests of a third party present a compelling reason to overcome the presumption that the submitted information is public. Consequently, we will consider the arguments submitted by Alpha with respect to this information.

Next, we note that the submitted documents include information that is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3) (emphasis added). The submitted information includes two executed contracts relating to the receipt or expenditure of public funds. Therefore, as prescribed by section 552.022, such information must be released unless it is confidential under other law. As there is no exception claimed with respect to these contracts, which we have marked, such information must be released to the requestor. Further, as there is no exception claimed with respect to the cover letters for these contracts, such letters must also be released to the requestor.

Centennial states that it submitted its proposal to the system with a statement indicating that such information was to remain confidential. Centennial argues that this statement "constitute[s] an enforceable promise by the [system] not to disclose Centennial's trade secrets." Alpha also argues that it has marked each page of its proposal with a statement indicating that such information should not be disclosed. However, information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986)*. Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

Alpha also argues that portions of its proposal are excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Alpha has not directed our attention to any law, nor are we aware of any law, under which any of the information in question is considered to be confidential for purposes of section 552.101. *See, e.g., Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy)*. Therefore, none of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

Alpha also raises section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986)*. The purpose of section 552.104 is to protect the purchasing interests of governmental bodies in competitive bidding situations prior to the awarding of a contract. *Open Records Decision No. 592 (1991)*. Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* As the system does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Thus, the system may not withhold any of the submitted information under section 552.104.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) commercial 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. *See Gov't Code § 552.110(a)-(b)*.

The Texas Supreme Court has adopted the definition of a “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 a single or ephemeral event 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>1</sup> *See Open Records Decision No. 552 at 5 (1990).*

Section 552.110(b) of the Government Code excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that

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<sup>1</sup>The 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 (1939); *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).*

substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Centennial argues that, with the exception of specified information it has classified as "releasable," its proposal is excepted from disclosure under both components of section 552.110. We also understand Centennial to contend that its entire proposal is a trade secret protected by section 552.110(a). Having considered Centennial's arguments and reviewed the submitted information, we conclude that Centennial has demonstrated that much of the information in its proposal must be withheld under section 552.110(b). Centennial has also made a prima facie case under section 552.110(a) for much of the information in its proposal and we have received no arguments to rebut this claim. We conclude, however, that Centennial has failed to demonstrate the applicability of either branch of section 552.110 to the remaining information in its proposal. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor). Accordingly, with the exception of the information we have marked for release, the system must withhold the information in Centennial's proposal under section 552.110.

Alpha argues that specified portions of its proposal are excepted from disclosure under both components of section 552.110. Having considered Alpha's arguments and reviewed the submitted information, we conclude that Alpha has demonstrated that much of the information in its proposal must be withheld under section 552.110(b). Alpha has also made a prima facie case under section 552.110(a) for much of the information in its proposal and we have received no arguments to rebut this claim. We conclude, however, that Alpha has failed to demonstrate the applicability of either branch of section 552.110 to the remaining information in its proposal that it seeks to withhold. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor). Accordingly, we have marked the information in Alpha's proposal that must be withheld under section 552.110.

Finally, we note that the submitted information also contains e-mail addresses obtained from the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This exception makes certain e-mail addresses confidential.<sup>2</sup> Section 552.137 provides:

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<sup>2</sup>House Bill 2589 also makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The system must, therefore, withhold e-mail addresses of members of the public under section 552.137. We have marked the types of e-mail addresses that must be withheld under section 552.137. We note that section 552.137 does not apply to a business' general e-mail address or to a government employee's work e-mail address.

To summarize: (1) we have marked two executed contracts that are subject to section 552.022(a)(3), and their respective cover letters, which must be released; (2) with the exception of the information we have marked for release, the system must withhold the information in Centennial's proposal under section 552.110; (3) we have marked the information in Alpha's proposal that must be withheld under section 552.110; (4) we have marked the types of e-mail addresses that must be withheld under section 552.137; and (5) the remaining information in Alpha's proposal must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 165083

Enc: Submitted documents

c: Mr. Greg Smith  
Conquest Construction  
265 El Dorado Blvd., Suite 411  
Webster, Texas 77058  
(w/o enclosures)

Ms. Kathleen K. Acock  
Alpha Building Corporation  
24850 Blanco Road  
San Antonio, Texas 78258  
(w/o enclosures)

Mr. W.M. Sweetser, Jr., P.E.  
Centennial Contractors Enterprises, Inc.  
8500 Leesburg Pike, Suite 500  
Vienna, Virginia 22182-2409  
(w/o enclosures)