



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

March 21, 2003

Mr. George E. Grimes, Jr.  
Walsh, Anderson, Brown  
Schulze & Aldridge, P.C.  
100 N. E. Loop 410, Suite 1000  
San Antonio, Texas 78216

OR2003-1950

Dear Mr. Grimes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178216.

The Judson Independent School District (the "district"), which you represent, received a request for seven categories of information relating to projects for a new elementary school and a new middle school. You advise that you are releasing some of the requested information. You state that the remaining requested information may be confidential under section 552.110 of the Government Code but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office and provide documentation showing that you have notified eleven interested third parties in relation to one project (Affirmed General Contracting, L.P. ("Affirmed"), Bartlett Cocke, L.P. ("Bartlett"), Brae Burn Construction Co., Ltd. L.L.P. ("Brae Burn"), Eaton Contracting Co, Inc. ("Eaton"), Guido Brothers Construction Company ("Guido Brothers"), Joeris General Contractors, Ltd. ("Joeris"), Koontz McCombs Construction, Ltd. ("Koontz"), Kunz Construction Company, Inc. ("Kunz"), G.W. Mitchell & Sons, Inc. ("Mitchell"), Peco, Inc. ("Peco"), and STR Constructors, Ltd. ("STR")), and ten interested third parties in relation to the other project (Affirmed, Bartlett, BFW Construction Co., Ltd ("BFW"), Cadence McShane Corporation ("Cadence"), C.F. Jordan, L.P. ("Jordan"), Drymalla Construction Co., Ltd. ("Drymalla"), Mitchell, Joeris, Peco, and Satterfield & Pontikes Construction, Inc. ("Satterfield"), 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).

As of the date of this ruling, this office has received responses on behalf of Bartlett, BFW, Cadence, Eaton, Guido Brothers, Joeris, Mitchell, and Satterfield objecting to the release of some of their information. We have considered all arguments and have reviewed the submitted information.

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, none of the remaining third parties has submitted to this office its reasons explaining why its information should not be released. Therefore, Brae Burn, Drymalla, Jordan, Koontz, Kunz, Peco, and STR have provided us no basis to conclude that their information is excepted from disclosure under section 552.110. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, the information of these parties must be released, except as noted below. We note that you have submitted Affirmed's information, which is responsive to the request from an agent for Affirmed. Affirmed is entitled to its own information.

Bartlett and Satterfield claim that their proposals are excepted under section 552.101 of the Government Code in conjunction with section 44.035 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However, Bartlett and Satterfield cite the predecessor to the current statute, which was last amended by the 77<sup>th</sup> Legislature in 2001. The current section 44.035 provides:

- (a) The board of trustees of a school district that is considering a construction contract using a method specified by Section 44.031(a) must, before advertising, determine which method provides the best value for the district.
- (b) The district shall base its selection among offerors on criteria authorized to be used under Section 44.031(b). The district shall publish in the request for bids, proposals, or qualifications the criteria that will be used to evaluate the offerors and the relative weights given to the criteria.
- (c) The district shall document the basis of its selection and shall make the evaluations public not later than the seventh day after the date the contract is awarded.

Thus, nothing in section 44.035 makes information confidential. We therefore conclude that none of Bartlett's or Satterfield's information may be withheld pursuant to section 552.101 in conjunction with section 44.035.

Next, we note that BFW argues that its financial information is confidential, and cites Open Records Decision No. 652 (1997) in support. However, that decision addressed the application of trade secret protection 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 Texas Commission on Environmental Quality (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). Thus, section 382.041 only applies to certain information submitted to the commission, and is inapplicable in this instance. *See* ORD No. 652. Further, we are aware of no other source of law that makes such information confidential, and thus, this information may not be withheld under section 552.101.

BFW and Cadence claim that some of their information is excepted from disclosure under section 552.104 because release would give advantage to a competitor or bidder. Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Therefore, we do not consider BFW's or Cadence's claims under section 552.104.

All of the responding parties claim that portions of their information are excepted under section 552.110 of the Government Code. This exception 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) "[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[.]" *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) 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. *See* 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); *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). We note that, generally, information is not made confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977), Open Records Decision No. 479 (1987). *See also* Open Records Decision No. 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110).

Upon considering the submitted arguments and the information at issue, we conclude that the information we have marked in Bartlett’s, BFW’s, Cadence’s, and Satterfield’s proposals must be withheld under section 552.110(a). We further find that Bartlett, Cadence, Eaton,

---

<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 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 [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).

Guido, Joeris, Mitchell, and Satterfield have demonstrated that portions of their information constitute commercial or financial information the disclosure of which would cause substantial competitive harm. This information, which we have marked, must be withheld under section 552.110(b). None of these parties have demonstrated that any of their remaining information constitutes trade secret information under section 552.110(a) or commercial or financial information protected under section 552.110(b).

However, Bartlett's, BFW's, Drymalla's, Eaton's, Mitchell's, Peco's, and Satterfield's proposals contain personal e-mail addresses of private individuals that must be withheld under section 552.137 of the Government Code. Section 552.137 requires the district to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. *See* Gov't Code § 552.137(a), (b). Section 552.137 does not apply to a general e-mail address of a business or to a government employee's work e-mail address. These parties do not inform us that a member of the public has affirmatively consented to the release of any of the personal e-mail addresses contained in the submitted materials. Therefore, these e-mail addresses must be withheld under section 552.137. We have marked the types of e-mail addresses that must be withheld.

Finally, we note that portions of the submitted proposals are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, we have marked the information in the Bartlett, BFW, Cadence, Eaton, Guido, Joeris, Mitchell, and Satterfield proposals that must be withheld under section 552.110. We have marked the types of e-mail addresses in the Bartlett, BFW, Drymalla, Eaton, Mitchell, Peco, and Satterfield proposals that must be withheld under section 552.137. The remaining submitted information must be released, but the district must comply with the copyright law and is not required to furnish copies of information that is copyrighted.

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 Dep't of Pub. 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,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/lmt

Ref: ID# 178216

Enc. Submitted documents

c: Mr. Eddie Daly  
Vice President of Construction  
Affirmed General Contracting, L.P.  
12015 Radium Drive  
San Antonio, Texas 78216  
(w/o enclosures)

Mr. Richard C. McSwain  
Curry & Associates  
Centre Plaza, Suite 495  
45 NE Loop 410  
San Antonio, Texas 78216  
(w/o enclosures)

Mr. Douglas M. Becker  
Gray & Becker  
900 West Avenue  
Austin, Texas 78701-2210  
(w/o enclosures)

Ms. Calley D. Callahan  
Knolle & Holcomb  
6805 Capital of Texas Hwy North, Suite 330  
Austin, Texas 78731  
(w/o enclosures)

Mr. Lane Mitchell  
G.W. Mitchell & Sons  
P.O. Box 12638  
San Antonio, Texas 78212  
(w/o enclosures)

Mr. William W. Sommers  
The Gardner Law Firm  
745 East Mulberry Avenue, Suite 100  
San Antonio, Texas 78212-3149  
(w/o enclosures)

Mr. Thomas L. Guido, President  
Guido Brothers Construction Co.  
8526 Vidor  
San Antonio, Texas 78216  
(w/o enclosures)

Mr. Kevin M. Warburton  
The Gardner Law Firm  
745 East Mulberry Ave., Suite 100  
San Antonio, Texas 78212-3149  
(w/o enclosures)

Mr. Hans Gor, President  
Affirmed General Contracting, LP  
12015 Radium  
San Antonio, Texas 78216  
(w/o enclosures)

Mr. James R. Pearson  
Vice President  
C.F. Jordan, LP  
10223 McAllister Freeway, Ste. 201  
San Antonio, Texas 78216-4664  
(w/o enclosures)

Mr. Earl W. Pitchford, President  
Drymalla Construction Co., Ltd.  
P. O. Box 698  
Columbus, Texas 78934  
(w/o enclosures)

Mr. Tom Wright  
Vice President  
Peco, Inc., dba Peco Construction Co.  
5400-2 New Hwy 90 West  
San Antonio, Texas 78227  
(w/o enclosures)

Mr. Timothy A. Pixley, President  
Brae Burn Construction Company  
Limited LLP  
6655 Rookin  
Houston, Texas 77074  
(w/o enclosures)

Mr. Gerald W. Turman, President  
Koontz Mccombs Construction, Ltd.  
755 E. Mulberry, Suite 100  
San Antonio, Texas 78212  
(w/o enclosures)

Mr. E.M. Cooney, III  
Vice President  
Kunz Construction Company, Inc.  
P. O. Box 790140  
San Antonio, Texas 78279  
(w/o enclosures)

Mr. T. R. Kennedy  
President  
STR Constructors, Ltd.  
12118 Valliant #102  
San Antonio, Texas 78216  
(w/o enclosures)