



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 15, 2003

Mr. Terrell I. Murphy
Executive Director
Texas Commission for the Blind
P.O. Box 12866
Austin, Texas 78711

OR2003-2554

Dear Mr. Terrell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179392.

The Texas Commission for the Blind (the "commission") received a request for ten categories of information related to food service contracts at military dining facilities issued under the Randolph-Sheppard Act. You advise that you are making some of the requested information available to the requestor. You further advise that you have no documents that are responsive to four categories of the request.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You inform this office that you have notified four interested third parties (Cantu Enterprises, Inc. ("Cantu"), Food Services, Inc (FSI), Roland Marshall ("Rolmar"),

¹ The requestor disputes the commission's contention that it has no information responsive to certain categories of the request. Thus, we are faced with a factual dispute between the commission and the requestor regarding whether the commission has certain information in its possession. We cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Based on your representations, we conclude that the commission does not possess information responsive to four categories of the request. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). We further note that in his comments, the requestor clarifies a portion of his request to include information in addition to that which the commission believes to be responsive, and further states in relation to another portion of the request, that "if [the commission] did not use 'set-aside' funds for the listed purposes, we request documents showing the purpose for which the funds were used." The requestor must submit another written request to the commission in relation to the additional information sought in order for it to be considered a request for this information under the Act. See Gov't Code § 552.301(a), (c); Open Records Decision No. 304 at 2 (1982).

and Allen Tharp (“Tharp”) 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 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). This office has received responses from all four of the third parties objecting to the release of their information. We have also received written comments submitted by the requestor. *See* Gov’t Code § 552.304 (providing that interested person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). We have considered all arguments and have reviewed the submitted representative sample of information.²

We note that 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). All four of the third parties claim that their information is excepted from disclosure under section 552.104 because release would give advantage to a competitor or bidder. However, 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 the third parties’ claims under section 552.104.

We now turn to the commission’s claim under section 552.104. Section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.,* Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision 541 (1990). In this case, you indicate that the contracts at issue have been awarded. Thus, we will address your arguments under section 552.104 pertaining to the commission as a competitor in the marketplace.

² We assume that the “sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office. We further note that Rolmar and Tharp make arguments for some information that the commission has not submitted. This ruling does not address this information, and is limited to the information submitted by the commission. *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).

When a governmental body seeks protection as a competitor, we have stated that it must be afforded the right to claim the “competitive advantage” aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991) (holding that Teacher Retirement System, as entity that is authorized by both constitutional and statutory law to invest in securities, may be deemed, with regard to its investments, competitor in marketplace for purposes of section 552.104). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10. We note that the requirement under section 552.022(a) that certain categories of information are public and not excepted from required disclosure unless expressly confidential under law does not apply to information excepted under this section. *See id.* § 552.104(b).

You inform this office that the commission has been designated by the Secretary of the Department of Education (the “DOE”) as the state licensing agency under the Randolph-Sheppard Act, 20 U.S.C. § 107, and that the Randolph-Sheppard Act authorizes the DOE to prescribe regulations for the operation of cafeterias on federal property by blind vendors. You state that through this program, the commission competes for contracts at military bases, and that blind vendors trained and licensed through the commission’s Randolph-Sheppard program compete for assignment to these contracts. Further, you explain that the commission maintains an ongoing pursuit of similar contract opportunities in the same “Federal Procurement competitive environment.”

You argue that release of the submitted information would supply competitors with information needed to determine profit levels being achieved by the commission in the military contracts. You claim that competitors could then access the vendors’ dining hall staffing strategies and other expense strategies. As a consequence, you argue, competitors could present bid strategies at the next solicitation of the military contract that could eliminate the commission from the competitive bid range. Based on the commission’s arguments and our review of the submitted information, we find that the commission has demonstrated that it has specific marketplace interests; therefore, the commission may be considered a “competitor” for purposes of section 552.104. *See* Open Records Decision No. 593 (1991). Furthermore, we conclude the commission has shown that release of some of the information would bring about a specific harm to the commission’s marketplace interests. Accordingly, we conclude that the commission may withhold the information we have marked under section 552.104. As section 552.104 is dispositive for this information, we need not address the commission’s or the third parties’ remaining claims for it.

We now address the commission’s and third parties’ claims for the remaining submitted information. The commission, Cantu, Rolmar, FSI, and Tharp claim that the information is

excepted under section 552.110. 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) “[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.³ *See* Open Records Decision No. 552 at 5 (1990).

³ 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).

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).

Upon consideration of the commission's, Cantu's, Rolmar's, FSI's, and Tharp's arguments and review of the remaining submitted information, we find that neither the commission nor the third parties have demonstrated that any of the information is excepted as either trade secret information under section 552.110(a), or commercial or financial information under section 552.110(b). In relation to Cantu's arguments, 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). Likewise, a governmental body may not withhold information that is subject to chapter 552 of the Government Code on the basis of the governmental body's promise to keep the information confidential unless the governmental body has specific statutory authority to make such a promise. *See* Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986). Cantu does not inform us that the commission has such statutory authority, nor does the commission indicate that it has such authority. Thus, the information at issue may not be withheld from disclosure on the basis of an agreement to do so or because Cantu anticipated or requested confidentiality in providing information to the commission.

Further, Cantu claims that some of its information is excepted under section 552.128 of the Government Code. Section 552.128 of the Government Code provides as follows:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. Cantu does not represent, nor does it appear from reviewing the information at issue, that any of the information was provided to the commission by potential contractors or vendors in order to become certified as historically underutilized or disadvantaged businesses under a certification program. Instead, a review of the submitted information indicates that it was supplied pursuant to an agreement to serve as a subcontractor to the commission. Under these circumstances, we find that section 552.128 does not apply to any of the information, and none of it may be withheld on that basis.

In summary, you may withhold the information we have marked under section 552.104. The remaining information 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 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# 179392

Enc. Submitted documents

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