



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 19, 2003

Mr. Randy Hendricks
Superintendent
Academy Independent School District
704 East Main Street
Little River-Academy, Texas 76554

OR2003-3345

Dear Mr. Hendricks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181200.

The Academy Independent School District (the "district") received a request for information under the Public Information Act, chapter 552 of the Government Code. We note that the district only seeks a ruling from this office regarding the public availability of a portion of the requested information, which you have submitted for our review. We assume that you have released the remainder of the requested information to the requestor. If not, you must release it immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You state that the district does not intend to submit comments explaining why the information you have submitted for our review should not be released. You indicate, however, that release of portions of the submitted information may implicate the proprietary interests of third parties. You state, and provide documentation showing, that you notified third parties Baird/Williams Construction, Ltd. ("Baird/Williams"), Best Construction Services, Inc. ("Best"), Chaney-Cox Construction, Inc. ("Chaney-Cox"), Cloud Construction Co., Inc. ("Cloud"), Coffman Commercial Construction, L.P. ("Coffman"), EBCO General Contractor, Ltd. ("EBCO"), FTWOODS Construction Services, Inc. ("FTWOODS"), Harrison, Walker & Harper, L.P. ("Harrison"), MW Builders of Texas, Inc. ("MW"), Vanguard Constructors, Inc. ("Vanguard"), and Walker Building Corporation ("Walker") of the request and of their right to submit arguments to this office as to why the information

should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the district's obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the 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 did not submit a copy of the written request for information to this office.

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). A compelling interest can be demonstrated where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). We have received comments from several third parties arguing that release of the requested proposals would implicate the third parties' proprietary interests.

We note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Best, Cloud, EBCO, and Walker have not submitted any comments to this office explaining how release of the requested information would affect their interests. Therefore, Best, Cloud, EBCO, and Walker have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 551.110(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. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Baird/Williams, Chaney-Cox, Coffman, FTWOODS, Harrison, MW, and Vanguard have submitted comments to this office contending that portions of the submitted information are excepted from disclosure. First, Baird/Williams, FTWOODS, and Vanguard argue that the proposals submitted by the district for our review should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the district does not raise section 552.104, this section does not apply to the requested information. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the district may not withhold the requested proposals under section 552.104.

Next, Baird/Williams, FTWOODS, Harrison, and Vanguard raise section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that other law makes confidential. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Baird/Williams, FTWOODS, Harrison, and Vanguard have not directed our attention to any law, nor are we aware of any law, under which any of the information that Baird/Williams, FTWOODS, Harrison, and Vanguard seek to have withheld is confidential for purposes of section 552.101. *See* Open Records Decision No. 455 (1987) (absent special circumstances, home addresses and telephone numbers of private citizens generally not protected under Public Information Act's privacy exceptions). Thus, we find Baird/Williams, FTWOODS, Harrison and Vanguard have not demonstrated that section 552.101 is applicable to any of the submitted information.

We note that Baird/Williams, Chaney-Cox, Coffman, FTWOODS, Harrison, MW, and Vanguard contend that information in their proposals 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Public Information Act (the "Act") is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Baird/Williams, Chaney-Cox, Coffman, FTWOODS, Harrison, and Vanguard contend that portions of their respective proposals are excepted under section 552.110(a). Upon review, however, we find that Baird/Williams, Chaney-Cox, Coffman, FTWOODS, Harrison, and Vanguard have not demonstrated that any portion of their respective proposals is excepted from disclosure as a trade secret under section 552.110(a). Accordingly, the submitted information pertaining to Baird/Williams, Chaney-Cox, Coffman, FTWOODS, Harrison, and Vanguard may not be withheld pursuant to section 552.110(a).

Next, Baird/Williams, Chaney-Cox, Coffman, FTWOODS, Harrison, MW, and Vanguard also contend that portions of their respective proposals are excepted under section 552.110(b). Upon review, we determine that Baird/Williams, FTWOODS, MW, and Vanguard have made a specific factual showing that release of the companies’ financial information would result in substantial competitive injury to the companies. We have marked the information in the proposals of Baird/Williams, FTWOODS, MW, and Vanguard that the district must withhold pursuant to section 552.110(b). With respect to the remaining information in the proposals of Baird/Williams, FTWOODS, MW, and Vanguard, however, we determine that Baird/Williams, FTWOODS, MW, and Vanguard have not established that the information is excepted under section 552.110(b). Accordingly, the district may not withhold the remaining submitted information pertaining to Baird/Williams, FTWOODS, MW, and Vanguard pursuant to section 552.110(b).

With respect to information in the proposals of Chaney-Cox, Coffman, and Harrison, we find that Chaney-Cox and Coffman have made conclusory statements that release of the information would be inimical to their business interests. Chaney-Cox and Coffman have not substantiated their comments with any specific factual evidence. Harrison has provided no comments explaining the applicability of section 552.110(b) to the information in its proposal. Thus, we are unable to determine that section 552.110(b) applies to the information pertaining to Chaney-Cox, Coffman or Harrison. *See* Open Records Decision Nos. 661 (1999), 509 at 5 (1988) (stating that 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 was entirely too speculative); *see also*

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).

We note that the submitted proposals of Best, Chaney-Cox, EBCO, and Harrison contain e-mail addresses. Section 552.137 of the Government Code provides:

(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.

Unless the relevant individuals have affirmatively consented to the release of the e-mail addresses, the district must withhold the e-mail addresses that we have marked under section 552.137 of the Government Code.

Finally, we note that some of the submitted information is 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 protected by copyright. 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, the district must withhold the information we have marked under section 552.110(b) of the Government Code. The marked e-mail addresses must be withheld under section 552.137 of the Government Code. The remainder of the submitted information must be released to the requestor in compliance with copyright law.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 181200

Enc: Submitted documents

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