



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2003

Ms. Meredith Ladd
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2003-7125

Dear Ms. Ladd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188952.

The Town of Flower Mound (the "town"), which you represent, received a request for copies of the proposals submitted to the town for the Storm Sewer and Planimetric Mapping Services RFSP# 303.¹ You claim that the requested information may be excepted from disclosure under section 552.110 of the Government Code. Additionally, you state that you have notified sixteen interested third parties of the request for information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 Chapter 552 of Government Code in certain circumstances). The agency has submitted the information at issue to this office. We also received correspondence from EI Technologies, LLC ("EI"), Freese and Nichols, Inc. ("Freese"), Kimley-Horn and Associates, Inc. ("Kimley-Horn"), and Vargis LLC ("Vargis"). We have considered all arguments and have reviewed the submitted information.

Initially, we note that several of the interested third parties have designated their information as confidential. However, information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that

¹The town twice sought and received a clarification of the request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract"). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We understand Kimley-Horn to assert section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990); *see also* Open Records Decision No. 373 (1983) (common-law privacy protects assets and income source information). Having reviewed Kimley-Horn's information, we find that any financial information concerns a company rather than an individual and is therefore not protected by common-law privacy. *See generally* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (corporation has no right to privacy). Therefore, none of Kimley-Horn's information may be withheld under section 552.101 of the Government Code and common-law privacy.

The town, EI, Freese, and Vargis assert section 552.110 of the Government Code. This section 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.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 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 Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Public Information Act (the "Act") is exempted 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).

Having reviewed the submitted briefs, we conclude that EI has established that its client information is excepted under section 552.110. We have marked the information that the town must withhold. However, we conclude that Freese and Vargis have not demonstrated that their information qualifies as trade secret for purposes of section 552.110(a) of the Government Code, nor has EI made such a demonstration in regard to the remainder of its information. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We also find that Freese and Vargis have not made the specific factual or evidentiary showing required under section 552.110(b) that the release of their information would likely result in substantial competitive harm to them, nor has EI made such a representation in regard to the remainder of its information. *See also* Open Records Decision Nos. 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). Furthermore, we conclude that the town has not demonstrated the applicability of either aspect of section 552.110 to any of the submitted information. Accordingly, pursuant to section 552.110, the town must withhold only the EI information we have marked.

Additionally, 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 decision, none of the remaining interested third parties have submitted to this office any reasons explaining why their information should not be released. Therefore, these parties have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g.,* 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). Therefore, the submitted information relating to the remaining interested third parties is not excepted from disclosure under section 552.110 of the Government Code.

Finally, we note that EI's and Kimley-Horn's proposals contain information that is 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 conclude that the town must withhold the information we have marked in EI's proposal under section 552.110 of the Government Code. The remaining submitted information must be released in accordance 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).

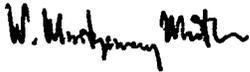
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 188952

Enc: Submitted documents

c: Ms. Stephanie Stahn
c/o Meredith Ladd
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201
(w/o enclosures)

Mr. Jeff Fitzgerald
Carter & Burgess, Inc.
777 Main Street
Fort Worth, Texas 76102
(w/o enclosures)

Mr. Paul Rossini
NTB Associates, Inc.
9101 LBJ Freeway, Suite 420
Dallas, Texas 75243
(w/o enclosures)

Mr. David Flores
Flores Technical Services
5805 Callaghan Road, Suite 202
San Antonio, Texas 78228
(w/o enclosures)

Mr. Kleber C. Miller
Shannon, Gracey, Ratliff &
Miller, L.L.P.
777 Main Street, Suite 3800
Fort Worth, Texas 76102
(w/o enclosures)

Mr. Larry Konty
Chief Operating Officer
Vargis LLC
208 Elden Street, Suite 204
Herndon, VA 20170
(w/o enclosures)

Ms. Susan Muleme
Inside Sales Associate
Triathlon
13800 Commerce Parkway
Richmond, BC
Canada V6V 2J3
(w/o enclosures)

Mr. Dale Orth
Applied Geographic Technologies
1412 W. Magnolia Ave.
Fort Worth, Texas 76104
(w/o enclosures)

IT Nexus, Inc.
5602 Westwood Lane
The Colony, Texas 78056
(w/o enclosures)

Mr. Andy Longoria
Tobin International, Ltd.
1355 Central Parkway S., Ste 500
San Antonio, Texas 78232
(w/o enclosures)

Mr. Nirav Shah
President
EI Technologies, LLC
19750 E. Parker Square Dr, Ste 100
Parker, Colorado 80134
(w/o enclosures)

Mr. Mike Shelton, AICP
Kimley-Horn and Associates, Inc.
801 Cherry Street, Unit 11, Suite 1100
Fort Worth, Texas 76102-6803
(w/o enclosures)

Mr. John McKenna
Landata Geo Services, Inc.
5730 Northwest Parkway, Suite 500
San Antonio, Texas 78249
(w/o enclosures)

Mr. J. Richard Perkins
Teague Nall and Perkins, Inc.
2001 W. Irving Blvd.
Irving, Texas 75061
(w/o enclosures)

Mr. Paul Kipp
Cobourn Linseisen & Ratcliff, Inc.
13100 Northwest Freeway, Suite 500
Houston, Texas 77040
(w/o enclosures)

Mr. John Dulski
Pinnacle Mapping Technologies, Inc.
261 Kates Cove
Buda, Texas 78610
(w/o enclosures)

Mr. Rene Garcia
Digital Mapping Services, L.P.
710 Buffalo St., Suite 700
Corpus Christi, Texas 78401
(w/o enclosures)