



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 9, 2004

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2004-0201

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194085.

The Texas A&M University System (the "system") received a request for (1) copies of all invitations to bid for heavy construction, building construction, special trade, demolition, and site work at Prairie View A&M University from January 1, 2002 through October 10, 2003, (2) copies of every winning bid proposal and the contract awarded for all such projects, and (3) copies of "every contract entered into where a HUB subcontractor was verified as per represented on the winning Invitation to Bid for Heavy Construction, Building Construction, Special Trade, Demolition and Site Work at Prairie View A&M University" for the same time period. You state that information responsive to the third item in the request does not exist. *See 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) (governmental body not required to disclose information that did not exist at time request was received).

You also state that as to the first two items of the request, the requestor has narrowed his request to include only two specified projects and to exclude two other projects. You further state that the requestor "has advised that he is only interested in the basic contracts and does not need specifications, performance bonds, etc., that constitute a sizeable portion of construction contracts." You state that you will provide the requestor with the invitations to bid and contracts. Although you take no position with respect to the requested proposals, you claim that the requested proposals may contain proprietary information subject to exception under the Public Information Act (the "Act"). You state, and provide documentation showing, that you have notified third parties Certified LVI Environmental, J.T. Vaughn Construction Company, Inc. ("Vaughn"), and Bartlett Cocke, L.P. ("Bartlett Cocke") of the request and of their right to submit arguments to this office as to why

information pertaining to each third party should not be released. *See* Gov't Code § 552.305(d); *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 to disclosure under Act in certain circumstances). We have received correspondence from Vaughn and the attorney for Bartlett Cocke. We have reviewed their arguments and the submitted information.

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, Certified LVI Environmental has not submitted any comments to this office explaining how release of the requested information would affect its proprietary interests. Thus, we have no basis to conclude that Certified LVI Environmental has 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). Thus, the submitted information related to Certified LVI Environmental must be released.

Vaughn argues that some of its information is excepted under section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception is designed to protect the interests of governmental bodies, not third parties. *Id.* Because section 552.104 is designed to protect the interests of governmental bodies and not third parties, and the system does not raise section 552.104, none of the submitted information is excepted from disclosure under that exception.

Vaughn also claims that portions of its information are excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101; *see also* Open Records Decision Nos. 611 at 1 (1992) (relating to common-law privacy), 600 at 4 (1992) (relating to constitutional privacy), 478 at 2 (1987) (relating to statutory confidentiality). We note that Vaughn has not asserted any law, and we are not aware of any law, that makes any portion of the requested information confidential under section 552.101. Accordingly, we conclude that the system may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Both Vaughn and Bartlett Cocke argue that portions of their information are excepted under section 552.110 of the Government Code. This section 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); *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 party’s claim for exception as valid under that component if that party establishes a prima facie case for the exception, and no one submits an argument that rebuts the claim as a matter of law.¹ *See* Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

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

¹The 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).

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).

Having considered Vaughn's arguments, we find that it has neither shown that any of the information at issue meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim. Thus, we are unable to conclude that section 552.110(a) applies to its information. *See* Open Records Decision No. 402 (1983). In addition, we find that Vaughn has made only conclusory allegations that release of the submitted information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support this allegation. Accordingly, no portion of Vaughn's information may be withheld pursuant to section 552.110(b).

Bartlett Cocke asserts that portions of its information are excepted as trade secrets under section 552.110(a) and as commercial and financial information excepted under section 552.110(b). After reviewing Bartlett Cocke's arguments and the submitted information, we conclude that Bartlett Cocke has established the applicability of section 552.110 to some of the submitted information.² Thus, the system must withhold the information related to Bartlett Cocke that we have marked. The remaining information related to Bartlett Cocke must be released.

In summary, the system must withhold the information related to Bartlett Cocke that we have marked under section 552.110 of the Government Code. The remaining submitted 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).

²We also note that you state the system returned Part 3 of Bartlett Cocke's proposal to Bartlett Cocke prior to receiving the present request, and thus you have not submitted this information for our review. We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990).

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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 194085

Enc. Submitted documents

c: Mr. Rick Berman
Business Manager
Sid's Recycling & Demolition
5353 Memorial Drive, Suite 3069
Houston, Texas 77007
(w/o enclosures)

W. F. Wallace, III
Certified LVI Environmental
10500 Telephone Road
Houston, Texas 77075
(w/o enclosures)

Mr. J. .Thomas. Vaughn
Construction Company, Inc.
10355 Westpark Drive
Houston, Texas 77042-5312
(w/enclosures)

Mr. Duane C. Pozza
Bartlett Cocke, L.P.
8706 Lockway
San Antonio, Texas 78217
(w/o enclosures)