



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2006

Ms. Carol Longoria
Public Information Coordinator
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2006-05956

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 250845.

The University of Texas at Arlington (the "university") received a request for proposals submitted in response to a specified RFP for renovations and general contracting services (PP2006-005). You do not take a position as to whether the submitted information is excepted under the Act; however, you state, and provide documentation showing, that you notified all interested third parties of the university's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the requestor.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (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). Parker and NTS assert that some of the submitted information is excepted under section 552.110 of the Government Code. We have reviewed the submitted information and arguments.

¹The university contacted the following third parties: Alliance Construction Management Corporation; Ed Parker, Inc. ("Parker"); Environmental Protection Services Company; Harrison Walker & Harper; Harrison Quality Construction; Hill & Wilkinson, Ltd.; Jamail Construction; LINCC Contractors, Ltd.; NTS Construction ("NTS"); Oxford Associates, Inc.; and Ponce Contractors, Inc.

Initially, 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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither Alliance Construction Management Corporation, Environmental Protection Services Company, Harrison Walker & Harper, Harrison Quality Construction, Hill & Wilkinson, Ltd., Jamail Construction, LINCO Contractors, Ltd., Oxford Associates, Inc., nor Ponce Contractors, Inc. has submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of these companies, and the university may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). 542 at 3 (1990).

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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 single or ephemeral events 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 Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers

the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) excepts from disclosure "[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." 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 requested information. *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). However, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors), 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 to section 552.110). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors).

²The following are the six factors that the Restatement gives 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).

We find Parker and NTS have established that the release of some of the information at issue would cause each company substantial competitive injury; therefore, the university must withhold this information, which we have marked, under section 552.110(b). But we find that Parker and NTS have made only conclusory allegations that release of the remaining information at issue would cause either company substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. In addition, we conclude that Parker and NTS have failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See* Open Records Decision No. 402 (1983). Thus, the university may not withhold any of the remaining information under section 552.110.

We note that the submitted information contains insurance policy numbers. Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The university must withhold the insurance policy numbers we have marked under section 552.136.

Finally, we note that some of the materials at issue may be 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 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).

To conclude, the university must withhold the information marked under sections 552.110 and 552.136 of the Government Code. The university must release the remaining information, but any copyrighted information may only 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).

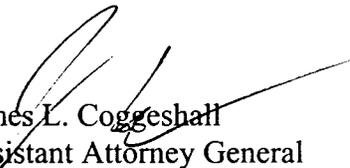
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 250845

Enc. Submitted documents

c: Ms. Adrienne O'Keefe
Bates Investigations
4131 Spicewood Springs Road, #J2
Austin, Texas 78759
(w/o enclosures)

Mr. Ismael Espudo
LINCO Contractors, Ltd.
1301 East Debbie Lane, Suite 102
Mansfield, Texas 76063
(w/o enclosures)

Ms. Sheri Harrison
Harrison Quality Construction
4818 Dozier Road
Carrollton, Texas 75010
(w/o enclosures)

Mr. Clint McCann
Oxford Associates, Inc.
3519 Miles Street
Dallas, Texas 75209
(w/o enclosures)

Jamail Construction
16875 Diana Lane
Houston, Texas 77058
(w/o enclosures)

Mr. Neal Sitzes
Harrison Walker & Harper
222 East Hickory Street
Paris, Texas 75460-2698
(w/o enclosures)

Mr. Jim Cano
Alliance Construction Management Corporation
2924 West Story Road
Irving, Texas 75038
(w/o enclosures)

c: Mr. Charles A. Buescher
Hill & Wilkinson, Ltd.
800 Klein Road, Suite 100
Plano, Texas 75074
(w/o enclosures)

Ms. Elizabeth P. Chavez
Ponce Contractors, Inc.
P.O. Box 1708538
Dallas, Texas 75217
(w/o enclosures)

Mr. Anthony R. Vera
Ed Parker, Inc.
P.O. Box 1289
Fort Worth, Texas 76101
(w/o enclosures)

Ms. Debbie Koon
NTS Construction
2270 Springlake Road, Suite 400
Dallas, Texas 75234
(w/o enclosures)

Ms. Abby Bahreini
Environmental Protection Services Company
P.O. Box 940712
Plano, Texas 75094
(w/o enclosures)