



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 14, 2006

Ms. Laura Garza Jimenez  
County Attorney  
Nueces County  
901 Leopard, Room 207  
Corpus Christi, Texas 78401-3680

OR2006-06293

Dear Ms. Jimenez:

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# 251558.

The Nueces County Attorney (the "county") received a request for information relating to the Regional Fairgrounds Project, RFP No. 2624-05. You state that some of the requested information either has been or will be released. You assert that some of the remaining responsive information that you have submitted falls within the scope of section 552.027 of the Government Code. You take no position with respect to the public availability of the rest of the submitted information. You believe, however, that the remaining information implicates the proprietary interests of Marshall Company, Ltd. ("Marshall"), Teal Construction Company ("Teal"), and Zachry Construction Corporation ("Zachry"). You notified Marshall, Teal, and Zachry of this request for information and of their right to submit arguments to this office as to why the remaining information should not be released.<sup>1</sup> We received correspondence from attorneys for Marshall and Zachry and from the requestor.<sup>2</sup>

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<sup>1</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

<sup>2</sup>See Gov't Code § 552.304 (any 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 of the submitted arguments and have reviewed the submitted information.

Initially, we address the county's arguments under section 552.027 of the Government Code. Section 552.027 provides as follows:

(a) A governmental body is not required under [the Act] to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. You state that the county obtained some of the submitted information from D&B, formerly Dun and Bradstreet ("D&B"), as part of its research regarding the companies who responded to RFP No. 2624-05. You also state that this information is commercially available. Based on your representations and our review of the information in question, we agree that the information that was obtained from D&B falls within the scope of section 552.027 of the Government Code and need not be released to the requestor.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Teal. Thus, Teal has not demonstrated that any of the remaining information at issue is proprietary for the purposes of the Act. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 66 at 5-6 (1999).

Both Marshall and Zachry have submitted arguments under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to 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.” 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). 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 section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.<sup>3</sup> *See* Open Records Decision No. 552 at 5 (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. *See* Open Records Decision No. 402 (1983).

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<sup>3</sup>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 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).

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).

Marshall asserts that some of the submitted information is excepted from disclosure under section 552.110(b). Having considered the company's arguments and reviewed the information at issue, we conclude that Marshall has sufficiently demonstrated that public disclosure of that information would likely result in substantial competitive injury. Therefore, the information relating to Marshall that we have marked must be withheld under section 552.110(b) of the Government Code.

Zachry contends that portions of the submitted information, including information relating to Zachry's customers, are excepted from disclosure under section 552.110(b). Zachry also argues that much of the same information, including Zachry's customer information, constitutes trade secret information under section 552.110(a). With respect to the customer information at issue, we note that Zachry routinely publishes both the identities of its customers and the details of projects that the company undertakes for its customers on Zachry's Internet website. In light of Zachry's own publication of such information, we are unable to conclude that the identities of Zachry's customers and the details of their projects qualify as trade secrets of the company. Likewise, we are not persuaded that the release of such information under the Act would be likely to cause Zachry any substantial competitive harm. We therefore conclude that the county may not withhold any of the submitted information that relates to Zachry's customers under section 552.110.

Having considered Zachry's other arguments and reviewed the rest of the information for which the company claims section 552.110, we conclude that Zachry has sufficiently shown that the release of some of the information in question would likely result in substantial competitive injury to Zachry. Therefore, the information relating to Zachry that we have marked must also be withheld under section 552.110(b) of the Government Code. We find that Zachry has not sufficiently shown, for purposes of section 552.110(b), that the release of any of the remaining information at issue would be likely to cause substantial competitive injury. We also find that Zachry has not demonstrated that any of the remaining information at issue qualifies as a trade secret under section 552.110(a). We therefore conclude that the county may not withhold any other submitted information that relates to Zachry under section 552.110 of the Government Code. *See* Open Records Decision Nos. 509 at 5 (1988) (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), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

With regard to the public availability of pricing information, we are informed that Zachry was the winning bidder. Federal cases applying the analogous Freedom of Information Act exemption to prices in awarded government contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000). Moreover, we believe that the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 514 (1988). Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Govt. Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

We note that section 552.136 of the Government Code is applicable to some of the remaining information.<sup>4</sup> This exception provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

Govt. Code § 552.136. We have marked the information that the county must withhold under section 552.136.

Lastly, we note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not

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<sup>4</sup>Unlike other exceptions to disclosure, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Govt. Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) the D&B information falls within the scope of section 552.027 of the Government Code and need not be released to the requestor; (2) the county must withhold the information relating to Marshall and Zachry that we have marked under section 552.110 of the Government Code; and (3) the county also must withhold the information that we have marked under section 552.136 of the Government Code. The rest of the submitted information must be released. In releasing copyrighted information, the county must comply 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. Govt. 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 Depot of Pub. Safety v. Galbraith*, 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. 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,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 251558

Enc: Submitted documents

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