



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2006

Mr. Michael Garbarino
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2006-11386

Dear Mr. Garbarino:

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# 260579.

The Texas Education Agency (the "agency") received a request for "copies of the proposals submitted by Harcourt and National Evaluation Systems, Inc. [("NES")], in response to [the agency's] 2005 RFP No. 705-06-001, Development and Administration of Texas Educator Assessments." Although you take no position regarding the public availability of the requested information, you state that "[t]he two parties that submitted the responsive proposals to [the agency] each indicated that they contain proprietary information." Thus, pursuant to section 552.305 of the Government Code, you have notified Harcourt and NES of the request and of each company's 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 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 considered the claims asserted by Harcourt and NES, and reviewed the submitted information.

Initially, we address NES's contention that the requested information is not public information subject to disclosure under the Act. The Act is applicable to "public information." *See Gov't Code § 552.021.* "Public information" is defined as information

that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). In this instance, the information at issue consists of proposals submitted by the third parties in response to an RFP and relates to commercial negotiations involving the agency and a business prospect. We therefore determine the information at issue is public information as defined by section 552.002. Gov't Code § 552.002(a). Thus, the information at issue is subject to the Act and must be released, unless an exception to disclosure is shown to be applicable.

Next, we note and you acknowledge, that the agency has not complied with the procedural requirements of section 552.301 of the Government Code in requesting this ruling. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. *See id.* § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third-party interests can provide compelling reasons to withhold information, we will address the arguments submitted by Harcourt and NES.

Next, we note that NES raises sections 552.001 and 552.022 of the Government Code as bases for withholding its proposal. The preamble of the Act is codified at section 552.001 of the Government Code and it declares the basis for the policy of open government expressed in the Act. *See* Gov't Code § 552.001. Section 552.022 provides a list of eighteen categories of information that are expressly public and may not be withheld unless confidential under other law. *See id.* § 552.022. Thus, these sections are not exceptions to disclosure under the Act and therefore do not provide a basis for withholding information from disclosure. Further, although NES claims section 552.116 of the Government Code, it did not submit to this office written comments stating the reasons why this section would

allow the information to be withheld. Therefore, we find that NES has waived this exception. *See id.* §§ 552.301, .302.

NES contends that the requested information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. 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 is designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the agency does not raise section 552.104, this section is not applicable to the information at issue. *See Open Records Decision No. 592 (1991)* (stating that governmental body may waive Gov’t Code § 552.104). Therefore, the agency may not withhold any of the submitted information under section 552.104.

Harcourt and NES contend that portions of each company’s proposal are excepted from disclosure under section 552.110 of the Government Code, which protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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.

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 the following:

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). 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. *Id.*¹ 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).

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).

Upon review of information at issue, we find that NES has presented a *prima facie* case that portions of the information that it seeks to withhold are protected as trade secrets under section 552.110(a). Moreover, we have received no arguments to rebut this claim as a matter of law. Thus, we have marked the information that the agency must withhold under section 552.110(a). However, neither Harcourt nor NES has demonstrated that the remaining information meets the definition of a trade secret. We therefore determine that none of the remaining information is excepted from disclosure under section 552.110(a) of the Government Code.

We also find that Harcourt and NES have demonstrated that release of other portions of the submitted information would cause each company substantial competitive harm and must be withheld pursuant to section 552.110(b) of the Government Code. We have marked the submitted information that must be withheld under section 552.110(b). *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are the following: (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).

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 section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). However, we find that neither Harcourt nor NES has made the showing required by section 552.110(b) that the release of any of the remaining information would be likely to cause either company substantial competitive harm. We therefore conclude that none of the remaining information is excepted from disclosure under section 552.110(b).

NES also raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). Because NES has not demonstrated that the remaining information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor made the specific factual or evidentiary showing required under section 552.110(b) that the release of the information would result in substantial competitive harm, we also conclude that the agency may not withhold any of the remaining information pursuant to section 552.131(a). Furthermore, we note that section 552.131(b) is designed to protect the

interests of governmental bodies, not third parties. Accordingly, none of the remaining information is excepted under section 552.131(b) of the Government Code.

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).

In summary, the agency must withhold the information we have marked under section 552.110 of the Government Code. The agency must release the remaining information. In releasing information protected by copyright, the agency 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. 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. 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,



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Open Records Division

LJJ/dh

Ref: ID# 260579

Enc. Submitted documents

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