



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2007

Ms. Jennifer Kaufman
Assistant General Counsel
Office of General Counsel
Texas Higher Education Coordinating Board
P. O. Box 12788
Austin, Texas 78711

OR2007-00700

Dear Ms. Kaufman:

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# 269664.

The Texas Higher Education Coordinating Board (the "board") received two requests for a copy of the winning proposal, contract, and change orders pertaining to the board's Financial Audits RFP #781-6-510 and #781-6-437. You state that you have released some information. Although the board takes no position as to the disclosure of the remaining requested information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the board notified KPMG LLP ("KPMG") of the requests for information and of their right to submit arguments to this office as to why the requested information should not be released. *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). KPMG has responded to the notice and argues that some of the submitted information is excepted under section 552.110 of the Government Code. We have considered the submitted argument and reviewed the submitted information.

Initially we note that the board has released Attachment 3, which consists of the agreement for professional services between the board and KPMG. In their arguments, KPMG claims

that pages 1-7 of their contract with the board is excepted from disclosure. If the contract KPMG refers to is different from the agreement released by the board, it was not submitted and therefore, this ruling does not address the contract.

Section 552.110 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 id.* § 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.); 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 Act is excepted 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. 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. *Id.* § 552.110(b); Open Records Decision No. 661 (1999).

After reviewing the submitted information and the argument of KPMG, we find that KPMG has made a *prima facie* case that some of the information at issue is protected as trade secret information. Because we have received no argument to rebut KPMG’s claim as a matter of law, we have marked the client information in the submitted documents that the board must withhold pursuant to section 552.110(a) of the Government Code. However, we determine that KPMG has failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. We therefore determine that no portion of the remaining submitted information is excepted from disclosure under section 552.110(a).

Further, we find that KPMG has failed to provide specific factual evidence demonstrating that release of the submitted information would result in substantial competitive harm to the company. KPMG made conclusory allegations only. We also note that the pricing information of a winning bidder, in this instance KPMG, 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). *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). Accordingly, we determine that none of the submitted information is excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that *substantial competitive injury* would result from release of particular information at issue).

In summary, the board must withhold KPMG's client information we have marked under section 552.110(a) of the Government Code. The remaining submitted information must be released to the requestors.

However, some of the materials are 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).

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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/krl

Ref: ID# 269664

Enc. Submitted documents

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