



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2007

Mr. James F. Gaertner
President
Sam Houston State University
Box 2026
Huntsville, Texas 77341-2026

OR2007-15328

Dear Mr. Gaertner:

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# 295274.

Sam Houston State University (the "university") received a request for a copy of a food service contract, and information pertaining to the university's most recent request for proposals ("RFP") for food service. The university takes no position on whether the requested information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of third party Aramark Educational Services, L.L.C. ("Aramark"). Accordingly, you inform us, and provide documentation showing, that you notified Aramark of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). Aramark claims that the contract is not subject to the Act. Alternatively, Aramark claims that portions of the contract are excepted under sections 552.102, 552.104, 552.110, 552.116, 552.117, 552.1235, and 552.125 of the Government Code. We have considered the submitted arguments and have reviewed the information you submitted.

Initially, we note that you have only submitted information pertaining to the requested contract. The requestor also requested the date of the university's last RFP and a list of respondents to this RFP. Thus, to the extent you maintain such information, we assume that

you have released it. If you have not released this information, you must do so now. *See* Gov't Code §§ 552.021, .221, .301, .302.

Aramark contends, among other things, that the submitted contract is not subject to the Act. The Act is applicable to “public information,” as defined by section 552.002 of the Government Code. Section 552.002 provides that “public information” consists of

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.

Gov't Code § 552.002(a)(1)-(2). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The university states that the information at issue consists of its current food service contract with Aramark. This information, which is held by the university, clearly consists of “information collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by [the university].” Gov't Code § 552.002(a)(1). Thus, the contract is public information for the purposes of section 552.002 and must be released, unless it comes within an exception to public disclosure. *See id.* § 552.021.

Next, we must address the university's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(D). The university received the request for information on September 4, 2007, but did not submit a copy of the contract until November 7, 2007. Thus, the department failed to comply with the requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 interest exists where some other source of law makes the

information confidential or when third-party interests are at stake. Open Records Decision No. 630 at 3 (1994). Here, because a third party's interests are implicated, we will consider whether any portions of the contract must be withheld to protect Aramark's interests.

Aramark claims that the contract should be withheld from disclosure under sections 552.104, 552.116, and 552.125 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.116 excepts from disclosure "an audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.033, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code." *Id.* § 552.116. Section 552.125 excepts "any documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act." *Id.* § 552.125. Sections 552.104, 552.116, and 552.125 are discretionary exceptions which protect 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 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the university does not seek to withhold any information pursuant to sections 552.104, 552.116, and 552.125, these sections are not applicable to the information at issue.

Next, Aramark raises sections 552.102, 552.117, and 552.1235 of the Government Code on behalf of the university. Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy [.]” Gov't Code § 552.102(a). Section 552.102(a) is applicable only to the personnel records of employees of governmental bodies. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 444 at 3-4 (1986), 423 at 2 (1984). In this instance, none of the information in question is maintained in the personnel files of the university. Therefore, section 552.102 is not applicable to any of the information at issue.

Aramark asserts some of the information in the contract is excepted from disclosure under section 552.117. Section 552.117 is designed to protect the personal information of the employees of governmental bodies from disclosure. *See* Gov't Code § 552.117. Upon review of Aramark's argument and the contract, we find that none of the information pertains to personal information of a university employee. Therefore, no portion of the contract may be withheld under section 552.117.

Next, Aramark raises section 552.1235 of the Government Code. Section 552.1235(a) of the Government Code excepts "the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” Gov't Code § 552.1235. However, the information at issue is a food service provider contract between the university

and Aramark, and no portion of the contract contains any identifying information of any such private grantor or donor to the university. Therefore, section 552.1235 is inapplicable and no portion of the contract may be withheld under this exception.

We next turn to Aramark's claims under section 552.110 of the Government Code. 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 id.* § 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 exempted 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. ORD 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). 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.*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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).

Aramark seeks to withhold the contract under section 552.110(a) as a trade secret. However, Aramark has simply submitted general arguments and has failed to establish that the information meets the definition of a trade secret. Further, Aramark has not demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 552 at 5-6 (1990); *see also* Restatement of Torts § 757 cmt. b (1939) (information is generally not trade secret if 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”). Accordingly, no portion of the contract may be withheld under section 552.110(a) of the Government Code.

Aramark also objects to the release of the contract based on section 552.110(b). We find that Aramark has failed to provide specific factual evidence demonstrating that release of any portion of the contract would result in substantial competitive harm. *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). Further, we note that Aramark was the winning bidder of this RFP, and 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). *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* ORD 514 (public has interest in knowing prices charged by government contractors). Accordingly, none of the submitted information is protected under section 552.110 and, therefore, must be released to the requestor.

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,



M. Alan Akin
Assistant Attorney General
Open Records Division

MAA/mcf

Ref: ID# 295274

Enc. Submitted documents

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