



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 22, 2008

Ms. Renee Byas
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OR2008-14435

Dear Ms. Byas:

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# 325509.

The Houston Community College (the "college") received two requests from different requestors for the bid proposals submitted in response to the RFP for job order contracting.¹ One of the requestors also requests a copy of the original RFP solicitation. You state you have released one of the requested bid proposals to the requestors in accordance with our ruling in Open Records Letter No. 2008-04281 (2008). *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You also state you have provided additional requested information to the requestors. Although you take no position with respect to the remaining requested information, you claim the information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, you notified Kellogg Brown & Root ("KBR"), Alpha Building Corporation ("Alpha"), Centennial Contractors Enterprises, Inc. ("Centennial"), Puente Group, Basic Industries, Greenway Enterprises, Inc., LINCO Contractors, Jamail Construction, South Coast Construction Services, Anslow Bailey, Turner Construction, Pyramid Constructors, Trevino Group, 3V

¹ As you have not submitted a copy of the second request, we take our description of that request from your brief. Although not submitting a request is generally a procedural violation under section 552.301(e)(1)(B) of the Government Code, in this instance, the second request is a subset of the first request; thus, there is no procedural violation.

Company, A. J. Solutions, Brazos Commercial Contractors, MC & Sons Construction, and LMC Corporation of the college's receipt of the requests for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestors. 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). We have considered comments submitted by KBR, Alpha, and Centennial, and reviewed the submitted bid proposals.

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 information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have received comments only from KBR, Alpha, and Centennial explaining why their submitted bid proposals should not be released. Therefore, we have no basis to conclude any of the remaining notified companies has protected proprietary interests in their submitted information. See *id.* § 552.110; 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). Accordingly, the college may not withhold these companies' proposals on the basis of any proprietary interest they may have in them.

Centennial and Alpha claim their submitted bid proposals are subject to section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, neither company has directed our attention to any law, nor are we aware of any law, that makes the submitted proposals confidential. See, e.g., Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the college may not withhold Centennial's and Alpha's bid proposals under section 552.101 of the Government Code.

KBR claims portions of its submitted bid proposal are excepted under section 552.101 in conjunction with the federal Freedom of Information Act ("FOIA"), chapter 552 of the United States Code. In Attorney General Opinion MW-95 (1979), this office determined FOIA does not apply to records held by a Texas agency or its political subdivision. Furthermore, this office has stated in numerous opinions information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. See Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). Therefore, none of KBR's bid proposal may be withheld under FOIA.

KBR also claims portions of its submitted bid proposal are excepted under section 552.101 in conjunction with section 1905 of title 18 of the United States Code, which provides in pertinent part:

[w]hoever, being an officer or employee of the United States or of any department or agency thereof, . . . , or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; . . . ; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905. This statute makes disclosure of trade secret information by federal government employees criminally punishable; however, it does not make information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Furthermore, by its terms, this statute pertains only to employees and agents of the federal government. Therefore, we find section 1905 of title 18 of the United States Code does not make any part of KBR's bid proposal confidential. As such, KBR's proposal may not be withheld under section 552.101 of the Government Code in conjunction with section 1905 of title 18 of the United States Code.

Centennial and KBR also claim portions of their submitted bid proposals are excepted under section 552.102(a) of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, Centennial and KBR have not submitted any explanations of how this exception applies to their bid proposals. Furthermore, section 552.102(a) applies only to information in a personnel file of a government employee. *See id.* Therefore, Centennial and KBR have failed to demonstrate how section 552.102(a) applies to their bid proposals, and no portion of their proposals may be withheld on this basis.

Centennial asserts its bid proposal is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. However, section 552.104 is a

discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 college does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Centennial's bid proposal. *See* ORD 592 (governmental body may waive section 552.104).

KBR, Centennial, and Alpha claim their submitted bid proposals are excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure 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." *See* Gov't Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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" aspect 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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information

meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² Open Records Decision No. 402 (1983).

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).

Among other things, Centennial argues the release of its bid proposal could deter vendors such as Centennial from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, Centennial appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under FOIA to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also* *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See* *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b)).

² 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 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).

by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Centennial's interests in its bid proposal.

Upon review of KBR's, Centennial's, and Alpha's submitted arguments and bid proposals, we find each company has established some of its customer information, which we have marked, constitutes trade secrets and must be withheld under section 552.110(a). However, we note all three companies have made the remainder of their customer information they seek to withhold publicly available on their websites. Because these companies published this customer information, we conclude the companies failed to demonstrate they consider this information to be trade secret information. Furthermore, we find KBR, Centennial, and Alpha have not demonstrated any of the remaining information in their bid proposals meets the definition of a trade secret. Thus, none of the remaining information may be withheld under section 552.110(a).

KBR, Centennial, and Alpha assert their remaining information is excepted under section 552.110(b). Upon review, we find these companies have established release of their pricing information would cause them substantial competitive injury; therefore, the college must withhold this information, which we have marked, under section 552.110(b). We find, however, KBR, Centennial, and Alpha have made only conclusory allegations that release of their remaining information would cause the companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Therefore, the college may not withhold any of their remaining information under section 552.110(b).

We note the remaining information contains insurance policy numbers. Section 552.136 of the Government Code provides:

(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.

Gov't Code § 552.136. We conclude the insurance policy numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the college must withhold the marked insurance policy numbers under section 552.136 of the Government Code.

We note part of the remaining information appears to 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). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

In summary, the college must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released in accordance with copyright law.³

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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

³ We note the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

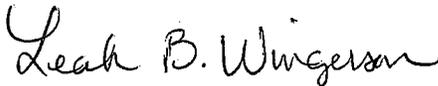
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Leah B. Wingerson
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Open Records Division

LBW/ma

Ref: ID# 325509

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