



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 12, 2009

Mr. Eric D. Bentley
Assistant General Counsel
University of Houston System
311 East Cullen Building
Houston, Texas 77204-2028

OR2009-01846

Dear Mr. Bentley:

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# 335079.

The University of Houston (the "university") received a request for information related to the university's request for proposal number 730-DYNA. Although you raise no exception to disclosure of the requested information on behalf of the university, you state that the requested records may contain proprietary information. Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the university notified AVL North America, Inc. ("AVLNA"), the interested third party, of the request for information and of the company's right to submit arguments explaining why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in certain circumstances). We have received comments from AVLNA. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note that some of the information that AVLNA seeks to withhold, specifically, the 192-page AVLNA "Quotation," was not submitted by the university for our review.¹ This ruling does not address information beyond what the university has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

AVLNA claims that its information is subject to section 552.101 of the Government Code and that matters related to its proposal are required to be kept confidential. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, AVLNA has not directed our attention to any law, nor are we aware of any law, that makes the submitted information 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). Additionally, we note that information is not confidential under the Act simply because the party that submitted the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Therefore, unless the submitted information relating to AVLNA falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary. Therefore, the university may not withhold any of AVLNA's information under section 552.101 of the Government Code.

AVLNA asserts that its information is excepted from disclosure pursuant to section 552.104 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. However, 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 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 this exception, the university may not withhold any of the information at issue pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

¹The university has submitted only AVLNA's 17-page purchase order to this office for review.

AVLNA also claims that its information is 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).

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 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.² Open Records Decision No. 402 (1983).

²The 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).

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).

AVLNA contends that portions of its information qualify as trade secret information under section 552.110(a). We note that some of the information in question relates to pricing aspects of the contract that the university has awarded to AVLNA. 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. We find that AVLNA has not demonstrated that the information it seeks to withhold meets the definition of a trade secret, nor has AVLNA submitted any arguments demonstrating the factors necessary to establish a trade secret claim. Because AVLNA has not met its burden under section 552.110(a), the university may not withhold any of AVLNA's information under section 552.110(a) of the Government Code.

AVLNA also claims that the submitted records consist of commercial or financial information excepted under section 552.110(b) of the Government Code. We note that the 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). AVLNA only makes a generalized allegation that the release of the information it seeks to withhold under section 552.110(b) would result in substantial damage to the competitive position of the company. Thus, AVLNA has not demonstrated that substantial competitive injury would likely result from the release of the information at issue. *See* Open Records Decision No. 509 at 5 (1988) (stating that 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). Accordingly, the university may not withhold any of the submitted information under section 552.110(b) of the Government Code, and the information at issue must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 335079

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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