ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2009

Ms. Carrie Parsons
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Texas Department of Public Safety
P.O. Box 4087
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OR2009-02968

Dear Ms. Parsons:

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# 336534 (ORA #08-2236).

The Texas Department of Public Safety (the "department") received a request for information relating to a request for proposals regarding a grant management and accounting system. You state that some of the requested information either has been or will be released. You take no position on the public availability of the rest of the requested information. You believe, however, that the remaining information may implicate the proprietary interests of HTC Global Services ("HTC"); K2Share, LLC ("K2Share"); and Tetra Tech EM Inc. ("Tetra Tech"). You notified the interested parties of this request for information and of their right to submit arguments to this office as to why the information should not be released.[1] We received correspondence from Tetra Tech and an attorney for K2Share.[2] We have considered all of the submitted arguments and reviewed the submitted information.

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[1]*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

[2]We note that K2Share's correspondence with this office includes a copy of information that the company submitted to the department. This decision addresses only the information that the department submitted to this office in requesting this decision. *See* Gov't Code § 552.301(e)(1)(D).

We first note that an interested third party is allowed ten business days from the date of its receipt of a governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from HTC. Therefore, because HTC has not demonstrated that any of its information is proprietary for the purposes of the Act, the department may not withhold any of HTC's information on that basis. *See id.* § 552.110(a)-(b); Open Records Decision Nos.552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the arguments that we received from K2Share and Tetra Tech. Among other things, both parties state that they anticipated and/or requested confidentiality for information contained in their respective proposals. We note that information is not confidential under the Act simply because the party that submits 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). Consequently, the submitted information relating to K2Share and Tetra Tech must be released unless it falls within an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Both K2Share and Tetra Tech claim exceptions to disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to 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." 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 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 . . . . [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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a 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 the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.[3] *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information at issue 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) 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Among other things, Tetra Tech contends that disclosure of its information "would impair the [s]tate's ability to obtain similar information in the future." In submitting this argument, Tetra Tech appears to rely on the test pertaining to the applicability of the section 552(b)(4)

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[3]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];
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> (2) the extent to which it is known by employees and other involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (4) the value of the information to [the company] and [its] competitors;
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> (5) the amount of effort or money expended by [the company] in developing the information;
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> (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).

exemption under the federal Freedom of Information Act 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 that *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 that 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) 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 the interests of Tetra Tech and K2Share in withholding their respective information.

Having considered the parties' arguments and reviewed their information, we have marked information relating to some of K2Share's customers that the department must withhold under section 552.110(a). We also conclude that the department must withhold K2Share's cost proposal and financial statements, which we have marked, under section 552.110(b). To the extent that K2Share's marked customer information, cost proposal, and financial statements are contained in the submitted CD's, the department also must withhold that information under section 552.110. Although K2Share's proposal also contains other customer information, we note that some of those customers are identified on the company's Internet website. We are unable to conclude that information published on K2Share's website constitutes a trade secret of the company or that the release of such information would cause K2Share substantial competitive harm. We also note that some of the customer information that K2Share seeks to have withheld pertains to customers that are acting as references for the company. We conclude that K2Share has not established that this customer information is excepted from disclosure under section 552.110. We otherwise find that neither K2Share nor Tetra Tech has demonstrated that any of the remaining information at issue constitutes a trade secret under section 552.110(a). We also find that neither K2Share nor Tetra Tech has made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause either K2Share or Tetra Tech substantial competitive harm. We therefore conclude that the department may not withhold any of the remaining information under section 552.110. *See* Gov't Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 509 at 5 (1988) (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), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110

generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

With specific regard to Tetra Tech's pricing information, we note that the related RFP resulted in the award of a contract to Tetra Tech. Pricing information pertaining to a specific contract with a governmental body 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); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Therefore, the department may not withhold Tetra Tech's pricing information under section 552.110.

We note that some of the remaining information falls within the scope of section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of [the Act], 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."[4] Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked insurance policy numbers that the department must withhold under section 552.136.

We also note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the department must withhold the information that we have marked under sections 552.110 and 552.136 of the Government Code.[5] The rest of the submitted

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[4]Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

[5]We note that the remaining information relating to K2Share includes 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.

information must be released. Any information that is protected by copyright must be released in accordance with copyright law.

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,

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 336534

Enc: Submitted documents

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