



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2009

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport
P.O. Box 619428
Dallas/Fort Worth International Airport, Texas 75261-9428

OR2009-03079

Dear Ms. Constantine:

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# 336930.

The Dallas-Fort Worth International Airport Board (the "board") received a request for the responses to Bid Solicitation No. 7003883 by three named entities. You state you do not have information responsive to one of the named companies. You inform us you are releasing some of the requested information to the requestor. Although you take no position as to whether the submitted responses are excepted under the Act, you state that release of this information may implicate the privacy or proprietary interests of a third party. Accordingly, you inform us, and provide documentation reflecting, that you have notified John Bean Technologies Corporation ("JBTC") and ERMC IV, L.P. ("ERMC") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released to the requestor.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (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 received correspondence on behalf of JBTC and ERMC. We have considered the submitted arguments and reviewed the submitted information.

JBTC and ERMC assert that their information is excepted under 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.

¹JBTC informs us that it was formerly known as FMC Technologies, Inc.

However, JBTC or ERMC do not cite to any specific law, and we are not aware of any, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, the board may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Next, JBTC and ERMC raise section 552.104 of the Government Code for their information. This section 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 board does not seek to withhold any information pursuant to this exception, none of the submitted information may be withheld on this basis.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information, the release of which would cause a third party substantial competitive harm. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret 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 trade secret from section 757 of the RESTATEMENT OF TORTS. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2 (1990). Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade

secret factors.² This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. See ORD 552 at 5. 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. See 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; see *Huffines*, 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. Gov't Code § 552.110(b); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

JBTC argues its operational approach, references, contractor qualification statement, pricing information, organizational chart, training methods, and annual and monthly reporting methods are trade secrets under section 552.110(a). Upon review, we agree that some of JBTC's customer information is a trade secret under section 552.110(a). Therefore, the board must withhold the customer information we have marked under section 552.110(a) as a trade secret. However, we note JBTC has made the identities of some of its customers, which it seeks to withhold, publicly available on its website. Thus, JBTC has failed to demonstrate the information published on its website is a trade secret. We also note that some of the customer information that JBTC seeks to withhold pertains to customers that are acting as references for the company. We find that JBTC has not established that this customer information is excepted from disclosure under section 552.110(a). See Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Moreover, JBTC has not demonstrated how the remaining information at issue meets the definition of a trade secret. See ORD 552 at 5

²The following are the six factors that the Restatement gives 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).

(party must establish *prima facie* case that information is a trade secret). Accordingly, the board may not withhold any of JBTC's remaining information under section 552.110(a).

JBTC and ERMC both claim their information at issue is subject to section 552.110(b). Upon review, we find ERMC has demonstrated release of its pricing information would cause it specific competitive harm. Thus, the board must withhold the pricing information we have marked under section 552.110(b) of the Government Code. As noted above, JBTC published the identities of some of its customers on its website. Thus, JBTC has failed to demonstrate release of this information would cause it substantial competitive harm. Additionally, upon review of JBTC's and ERMC's remaining arguments, we find each company has provided conclusory arguments that release of their remaining information would result in substantial competitive harm to their companies. *See* Open Records Decision Nos. 661 (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), 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 is too speculative), 319 at 3 (1982). Accordingly, we conclude that none of the remaining information is excepted from disclosure under section 552.110(b) of the Government Code.

In summary, the board must withhold the customer information we have marked in JBTC's submitted information under section 552.110(a) and the pricing information we have marked in ERMC's proposal under section 552.110(b). The remaining information must be released.

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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/cc

Ref: ID# 336930

Enc. Submitted documents

cc: Requestor
(w/o enclosures)