



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 5, 2009

Mr. Hans P. Graff  
Assistant General Counsel  
Houston Independent School District  
Mattie Mae White Educational Support Center  
4400 West 18<sup>th</sup> Street  
Houston, Texas 77092-8501

OR2009-03313A

Dear Mr. Graff:

This office issued Open Records Letter No. 2009-03313 (2009) on March 12, 2009. This decision serves as the substitute for the decision issued on that date. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 335862.

The Houston Independent School District (the "district") received a request for information pertaining to vendor proposal submissions for RFP 08-03-05. You do not take a position as to whether the submitted information is excepted under the Act; however, you indicate that you notified the following third parties of the district's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: Centennial Contractors Enterprises, Inc. ("Centennial"); Fort Bend Mechanical, Ltd. ("FBM"); The Gil Ramirez Group, LLC ("Ramirez"); Hallmark Group ("Hallmark"); Horizon Group International LLC (Horizon); KBR; P2MG, Inc. ("P2MG"); Reytec/CBIC ("Reytec"); RHJ-JOC, Inc. ("RHJ-JOC"); The Trevino Group, Inc. ("Trevino"); and Warcon Facilities Services ("Warcon").<sup>1</sup> *See* Gov't

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<sup>1</sup>The district informs us that FBM, Ramirez, Horizon, KBR, and Reytec were awarded contracts pursuant to the RFP.

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). In correspondence to this office, Centennial, FBM, Hallmark, Horizon, KBR, Reytec, and RHJ-JOC assert that some of the requested information is excepted under various sections of the Government Code. We have reviewed the submitted arguments and information.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Ramirez, P2MG, Trevino, and Warcon have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of these third parties, and the district may not withhold any portion of the submitted information on that basis. *See* 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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information that other statutes make confidential. Chapter 901 of the Occupations Code, the Public Accountancy Act, addresses the licensing and regulation of accountants. Section 901.457(a) pertains to the accountant-client privilege and provides the following

A license holder or a partner, member, officer, shareholder, or employee of a license holder may not voluntarily disclose information communicated to the license holder or a partner, member, shareholder, or employee of the license holder by a client in connection with services provided to the client by the license holder or a partner, member, shareholder, or employee of the license holder, except with the permission of the client or the client's representative.

Occ. Code § 901.457. Horizon informs us that the proposal it submitted to the district contains letters from Horizon's certified public accountant and asserts these letters are confidential under section 901.457 of the Occupations Code. We note, however, that section 901.457 only governs the circumstances under which licensed accountants may disclose information communicated to them by their clients in connection with the accountants' services. *Id.* Section 901.457 does not address the public disclosure of information held by the client or the client's representative. Here, Horizon is the client of the accountant-client communications at issue. Section 901.457 does not prohibit Horizon from publicly disclosing the communications at issue to the public. Consequently, section 901.457 does not make the communications provided to the district by Horizon

confidential. We therefore conclude that the district may not withhold this information under section 552.101 of the Government Code on the basis of section 901.457 of the Occupations Code. *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), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). *See generally In re Patel*, 218 S.W.3d 911, 920 n.6 (Tex. App.—Corpus Christi 2007, orig. proceeding) (“Other than citing section 901.457 of the [O]ccupations [C]ode, neither party has provided authority for the proposition that an accountant-client evidentiary privilege exists in Texas, and we find none.”).

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 the following:

[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) (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.

Reytec asserts that some of its information is confidential under common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). However, the doctrine of common-law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Accordingly, Reytec has no privacy interest in any of the submitted information, and the district may not withhold any of the information at issue under section 552.101 on that ground.

Hallmark also assert that some of its information is excepted under section 552.101; however, it does 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 ORD 478 at 2. Therefore, none of Hallmark's information may be withheld on that ground.

KBR claims portions of its information 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, KBR has not submitted any explanations of how this exception applies to its bid proposal. Furthermore, section 552.102(a) applies only to information in a personnel file of a government employee. See *id.* Therefore, KBR has failed to demonstrate how section 552.102(a) applies to its bid proposal, and no portion of the proposal may be withheld on this basis.

FBM, Hallmark, and Reytec assert that some of their information is excepted under section 552.104 of the Government Code. We note that 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). The district did not assert section 552.104; therefore, the district may not withhold

any of the information at issue pursuant to that section. *See* ORD 592 (governmental body may waive section 552.104).

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. 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." 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* Open Records Decision No. 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 single or ephemeral events 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.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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

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<sup>2</sup>The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); ORD 319 at 3, 306 at 3.

Section 552.110(b) excepts from disclosure "[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." 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 requested information.<sup>3</sup> *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). However, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *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.

Having considered the submitted arguments and reviewed the information at issue, we find Centennial, FBM, Hallmark, Horizon, and KBR have established that the release of some of the information at issue would cause substantial competitive injury; therefore, the district must withhold this information, which we have marked, under section 552.110(b). However, Centennial, FBM, and Hallmark have made some of their customer information publicly available on their websites. Because these companies published their own information, we are unable to conclude that such information is proprietary. We also find Centennial, FBM, Hallmark, Horizon, KBR, RHJ-JOC, and Reytec have made only conclusory allegations that release of the remaining information at issue would cause substantial competitive injury, and

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<sup>3</sup>In the submitted section 552.110 arguments, some of the interested third parties rely on the test announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), concerning the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal entity. *See Nat'l Parks*, 498 F.2d 765. Although this office applied the *National Parks* test at one time to the statutory predecessor to section 552.110, the Third Court of Appeals overturned that standard in holding that *National Parks* was not a judicial decision for purposes of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (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 at issue would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing Seventy-sixth Legislature's enactment of Gov't Code § 552.110(b)).

has provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110(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 section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). These companies have also failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See* ORD 402. Thus, the district may not withhold any of the remaining information under section 552.110.

FBM also raises section 552.128 of the Government Code, which is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov't Code § 552.128(a). The district does not inform us that FBM submitted its proposal to the district in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

*Id.* § 552.128(c). FBM submitted its proposal to the district in connection with a proposed contractual relationship with the district. We therefore conclude that the district may not withhold any of the submitted information under section 552.128 of the Government Code.

The submitted information contains account and insurance policy numbers. Section 552.136(b) of the Government Code provides that “[n]otwithstanding 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.” The district must withhold the account and insurance policy numbers we have marked under section 552.136.

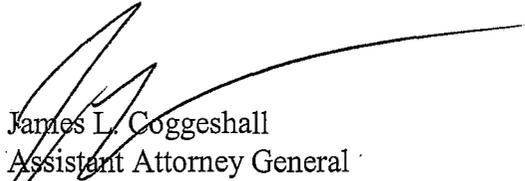
Some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials 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).

To conclude, the district must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The district must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.<sup>4</sup>

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](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 L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/cc

Ref: ID# 335862

Enc. Cover letter

cc: Requestor  
(w/ enclosure)

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<sup>4</sup>We note that the submitted 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.

Ms. Debra Dowden-Crockett  
Centennial Contractors Enterprises, Inc.  
8500 Leesburg Pike, Suite 500  
Vienna, Virginia 22182  
(w/ enclosure)

Fort Bend Mechanical, Ltd.  
c/o Mr. Clay T. Grover  
Feldman, Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057  
(w/ enclosure)

Mr. Gil Ramirez  
The Gil Ramirez Group, LLC  
9333 Bryant Street  
Houston, Texas 77075  
(w/ enclosure)

Mr. Jason R. Freeman  
Hallmark Group  
12425 Chimneyrock Road  
Houston, Texas 77092  
(w/ enclosure)

Mr. James Chipman  
KBR  
2451 Crystal Drive, Suite 164  
Arlington, Virginia 22202  
(w/ enclosure)

Mr. Michael E. Nelson  
P2MG, Inc.  
10303 NW Freeway, Suite 102  
Houston, Texas 77092  
(w/ enclosure)

Ms. Ester Francis  
Reytec/CBIC  
2616 South Loop West, Suite 330  
Houston, Texas 77054  
(w/ enclosure)

Ms. Eva Jackson  
RHJ-JOC, Inc.  
7643 South Freeway  
Houston, Texas 77021  
(w/ enclosure)

Mr. Dale R. Trevino  
The Trevino Group, Inc.  
1616 West 22<sup>nd</sup> Street  
Houston, Texas 77008  
(w/ enclosure)

Mr. Wendall Robbins III  
Warcon Facilities Services  
13124 Player Road  
Houston, Texas 77045  
(w/ enclosure)