



ATTORNEY GENERAL OF TEXAS
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March 27, 2009

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OR2009-03975

Dear Ms. Fowler:

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# 338390.

Blinn College (the "college"), which you represent, received a request for all records pertaining to Request for Proposal #069 - Emergency Notification System. You claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code.¹ Although you raise no other exceptions to disclosure for the submitted information you indicate that it may implicate the proprietary interests of third parties.² Pursuant to section 552.305 of the Government Code, you state and provide documentation that you notified the third parties of the request and of their right to submit arguments to this

¹Although, you state in your brief that you are raising section 552.103 of the Government Code as an exception to disclosure of the requested information and Agile Communications Group and 3n Global, Inc., also mention section 552.103, neither you nor the third parties have provided any arguments regarding the applicability of this section. *See* Gov't Code § 552.103 (exception to disclosure relating to litigation or settlement negotiations involving the state or political subdivision). Since no arguments concerning section 552.103 have been submitted, we do not address this exception. *See id.* §§ 552.301(b), (e), .302. Based on the submitted arguments, we understand you to raise section 552.104 of the Government Code.

²The third parties are as follows: Agile Communications Group, Alertnow, AMTELCO, ATI Systems, Avtex/City Watch, Blackboard Connect Inc., BroadBlast, Dialogic Communications Corporation, E2 Campus Omnilert LLC, Global Security Systems, 3n Global, Inc., Mobile Campus, MIR3 Inc., MIS Sciences Corporation, Purvis Systems, Skytel, SwiftReach Networks, Timecruiser Computing Corporation, and USA Mobility.

office as to why the information should not be released. *See* Gov't Code § 552.305(d); *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 to disclosure under Act in certain circumstances). We have received arguments from representatives of Agile Communications Group ("Agile"), 3n Global, Inc. ("3n"), and Dialogic Communications Corporation ("DCC"). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that the information we have marked is not responsive to the instant request for information because it was created after the date of the request. This ruling does not address the public availability of any information that is not responsive to the request, and the college is not required to release that information in response to the request.

Next, we note that 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 only received comments from Agile, 3n, and DCC explaining why their submitted information should not be released. Therefore, the other third parties have not provided us with any basis to conclude that they have protected proprietary interests in the 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. Thus, none of the submitted information may be withheld on the basis of the other third parties' proprietary interests.

Next, Agile informs us that its proposal was sent to the college as a "sealed bid" and both Agile and the college indicate that there was an expectation that the submitted proposals would "be treated confidentially." 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 did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, the submitted information must be released unless it falls within an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The

purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). We note that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See id.* At 8-9. Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). We note that, generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990).

The college inform us, and the submitted information confirms, that the submitted information relates to a request for proposals where the bidding has concluded and a vendor, 3n, has been selected. The college, Agile, 3n, and DCC all argue that release of the submitted information could harm the third parties interests in future competitive bidding situations. Upon review of the arguments, we find that the college, Agile, 3n, and DCC have failed to demonstrate how the release of the information at issue would cause potential harm to the college's interests in a particular competitive situation. Therefore, we find the college, Agile, 3n, and DCC have failed to demonstrate the applicability of section 552.104 of the Government Code to the submitted information, and it may not be withheld on this basis.

We understand Agile, 3n, and DCC to argue that their respective proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which 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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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. Open Records Decision No. 402 (1983).

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. *Id.* § 552.110(b); *see also* 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).

Having considered the arguments of Agile, 3n, and DCC, we conclude that Agile, 3n, and DCC have failed to demonstrate that any portion of the information in their proposals fits within the definition of a trade secret. Agile, 3n, and DCC have also not established any of

³The 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 other 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).

the trade secret factors with respect to any of the information in their proposals. Thus, none of the information of Agile, 3n, and DCC may be withheld under section 552.110(a) of the Government Code.

We understand Agile, 3n, and DCC to contend that portions of their proposals are excepted under section 552.110(b). Upon review of 3n's arguments and its information, we find that 3n has established that some of its customer information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the college must withhold the information we have marked in 3n's proposal under section 552.110(b) of the Government Code. We note that 3n has published the identities of some of its customers on its website. Thus, 3n has failed to demonstrate that release of this information would cause 3n substantial competitive injury. Additionally, Agile, 3n, and DCC have made only conclusory allegations that the release of the remaining information in the submitted proposals would result in substantial damage to the competitive position of Agile, 3n, or DCC. *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). Furthermore, we note that the pricing information of a winning bidder, such as 3n, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *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). Thus, Agile, 3n, and DCC have not demonstrated that substantial competitive injury would result from the release of any of the remaining information at issue. Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

Next, we note that some of the e-mail addresses in the submitted information are subject to section 552.137 of the Government Code.⁴ Section 552.137 states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). We have marked the e-mail addresses

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

in the submitted information that are not of a type specifically excluded by section 552.137(c). Accordingly, the college must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless their owners affirmatively consent to their disclosure.

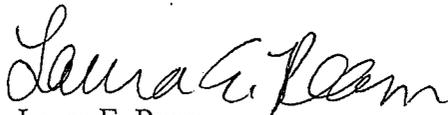
Finally, we note that some of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow 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).

In summary, the college must withhold the information we have marked in 3n's proposal under section 552.110(b) of the Government Code. The college must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their disclosure. The remaining information 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,



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Open Records Division

LER/jb

Ref: ID# 338390

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