



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2009

Ms. Lauri Schneidau Ruiz
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OR2009-06049

Dear Ms. Ruiz:

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# 342138.

The University of Houston (the "university") received a request for information relating to a specified RFP, including the bid tabulation sheets, correspondence between the "Director of Purchasing and the Department," and copies of the submitted bids.¹ While you raise no exceptions on behalf of the university regarding the requested information, you indicate that it may contain proprietary information excepted from disclosure under the Act. Accordingly, you state that you have notified the interested third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released.² 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 in certain

¹You state the university sought and received clarification of the information requested from the requestor. See Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify or narrow request).

²The third parties are as follows: Foliot Furniture ("Foliot"); University Loft Co. ("University Loft"); We Bid Furniture ("We Bid"); Vanguard Environments ("Vanguard"); Motif Modern Living ("Motif"); Paradigm Furnishings, LLC ("Paradigm"); and Southwest Contract ("Southwest").

circumstances). We have received correspondence from Foliot and University Loft. We have considered the submitted arguments and the submitted information.

Initially, 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 not received comments from We Bid, Vanguard, Motif, Paradigm, or Southwest explaining why the submitted information should not be released. Therefore, we have no basis to conclude that any of these third parties has a protected proprietary interest 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. Accordingly, the university may not withhold any portion of the submitted information based upon the proprietary interests of these third parties.

We understand University Loft to raise the federal Trade Secrets Act, section 1905 of title 18 of the United States Code, in conjunction with section 552.101 of the Government Code.³ 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. This exception encompasses information that another statute makes confidential. The Trade Secrets Act provides in pertinent part:

[w]hoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), 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; or permits any income return or copy thereof or any book containing any abstract or particulars

³Although University Loft raises section 1985 of title 18 of the United States Code, we note that section does not exist and the correct section for the Trade Secrets Act is section 1905. *See* 18 U.S.C. § 1905 (2008). Further, as University Loft raises the Trade Secrets Act, we understand them to claim section 552.101 of the Government Code as an exception to disclosure.

thereof to be seen or examined by any person except as provided by law; 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 (2008). By its terms, this statute pertains only to employees and agents of the federal government. State employees who are assigned to federal government agencies in some circumstances may be deemed federal employees for certain purposes. 5 U.S.C. § 3374 (2001). However, in this case there is no indication of such an assignment pertinent to the responsive information. The federal courts have held that no basis exists to justify transforming officers and employees of state agencies into federal officers and employees for purposes of the Trade Secrets Act. *St. Michael's Convalescent Hospital v. State of Cal.*, 643 F.2d 1369 (9th Cir. 1981). We conclude that the Trade Secrets Act does not prohibit the university from disclosing the responsive information. Therefore, the subject information is not excepted from public disclosure under section 552.101 of the Government Code in conjunction with the Trade Secrets Act.

Foliot asserts that portions of its proposal are excepted under section 552.104 of the Government Code, which 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, and is not intended to protect the interests of third parties. *See* Open Records Decision No. 592 (1991). As the university does not raise section 552.104, this section is not applicable to the submitted information. *Id.* (section 552.104 may be waived by governmental body).

Next, University Loft and Foliot each claim portions of their information are excepted from disclosure under section 552.110 of the Government Code. This section 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." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.1958); *see also* ORD 552 at 2. 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. 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; and
- (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). This office has held 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 No. 402 (1983).

Having considered Foliot's and University Loft's arguments, we conclude Foliot has established a *prima facie* case that its client information constitutes a trade secret. Therefore, the university must withhold this information, which we have marked, pursuant to section 552.110(a) of the Government Code. However, we find Foliot has failed to demonstrate how any of its remaining information constitutes a trade secret, and University Loft has failed to demonstrate how any of its information constitutes a trade secret. *See* ORD 552 at 5-6. Therefore, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

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.” Gov’t Code § 552.110(b). 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. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

University Loft asserts the release of its voluntarily provided information could discourage private parties from providing proprietary information needed by government officials, and would thus harm future procurement efforts by the state. This argument relies on the test pertaining to the applicability of the section 552(b)(4)⁴ exemption under the federal Freedom of Information Act (“FOIA”) 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). The *National Parks* test states that commercial and financial information is confidential if disclosure is likely to impair the government’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. 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 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 proposals from private parties is not a relevant consideration under section 552.110. *Id.* Therefore, we will only consider each third party’s own interests in the information at issue.

Upon review of Foliot’s and University Loft’s remaining arguments, we find each company has only provided conclusory arguments that release of the remaining information at issue would result in substantial competitive harm to the 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

⁴We note that although University Lofts cites 5 U.S.C.A. § 522 for this argument, the correct section is 5 U.S.C.A. § 552. *See* 5 U.S.C.A. § 552 (2008).

future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note the pricing information of a winning bidder, such as University Loft in this instance, 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). Accordingly, the university may not withhold any portion of the remaining information under section 552.110(b).

In summary, the university must withhold the information we have marked in Foliot's submitted information under section 552.110(a) of the Government Code. 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,



Greg Henderson
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Open Records Division

GH/rl

Ref: ID# 342138

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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