ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2009

Mr. Brian S. Nelson
General Counsel
Lone Star College System
5000 Research Forest Drive
The Woodlands, Texas 77381-4356

OR2009-06974

Dear Mr. Nelson:

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# 343906 (OfficeMax File No. 225291-0143).

The Lone Star College System (the "system") received a request for a copy of all bid responses for office supplies. You take no position with respect to the public availability of the requested information, but believe that the request may implicate the proprietary interests of Challenge Office Products ("Challenge"), CompuPro Global ("CompuPro"), OfficeMax, Inc. ("OfficeMax"), Staples, Inc. ("Staples"), and Tejas Office Products, Inc. ("Tejas). Accordingly, you notified these entities of this request for information and of their right to submit arguments to this 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) (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). Challenge, OfficeMax, and Staples responded to the notice and argue that portions of the information at issue are excepted from disclosure under sections 552.104, 552.110, and 552.137 of the Government Code. We have considered the submitted arguments and reviewed 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 Tejas or CompuPro 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 system may not withhold any portion of the submitted information based upon the proprietary interests of these third parties.

Next, we address OfficeMax's argument that the "Program Overview" submitted as part of its bid proposal is not responsive to the request because it was not a requirement of the request for proposals ("RFP") and was provided "over and above what was requested by the RFP." The request seeks all bid responses for the office supplies RFP. We note that a governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). The system has submitted the "Program Overview" as information that the system deems to be responsive to this request for information. Further, we find that the "Program Overview" relates to information submitted in response to the RFP. Therefore, we conclude the information at issue is responsive to the request. Thus, we will examine the arguments for its exception from disclosure under the Act.

Staples contends that the requestor, as a competitor, should not be allowed to request Staples's pricing information under the Act. However, this office has determined the Act does not permit the consideration by a governmental body or this office of a requestor's intended use of information when responding to open records requests. *See* Gov't Code §§ 552.222(a) (stating governmental body may not inquire into purpose for which information will be used), .223 (requiring uniform treatment of all open records requests); *see* Open Records Decision Nos. 508 (1988) at 2 (motives of a person seeking information under the Act are irrelevant), 51 (1974). Therefore, the system may only withhold the information at issue if it is excepted from disclosure under the Act or made confidential by law.

Staples also asserts that its information should not be disclosed because the system is subject to a non-disclosure agreement. 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 through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision No. 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."). Consequently, unless the responsive information is encompassed by an exception to disclosure, it must be released to the requestor.

OfficeMax raises section 552.104 of the Government Code. 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 system does not seek to withhold any information pursuant to this exception, none of the submitted information may be withheld on this basis.

Challenge, OfficeMax, and Staples all assert that portions of their information are excepted 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;

> (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 to [its] competitors;
>
> (5) the amount of effort or money expended by [the company] in developing this 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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 2 (1990). 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 Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

After reviewing the submitted information and the arguments, we find that Challenge and Staples have made a *prima facie* case that their client information is protected as trade secret information. However, we determine that Challenge, OfficeMax, and Staples have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. We 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 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). Accordingly, the system must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code.

In addition, we conclude that Challenge, OfficeMax, and Staples have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information at issue would cause these companies substantial competitive harm. *See* ORD 319 (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). We note that the pricing information of a winning bidder, such as Staples, 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). 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). We, therefore, conclude that the system may not withhold any of the information at issue under section 552.110(b).

OfficeMax claims its proposal contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 provides in relevant part the following:

> (a) Except as otherwise provided by this section, 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 this chapter.
>
> . . .
>
> (c) Subsection (a) does not apply to an e-mail address:
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> . . .
>
> > (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . . [.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses at issue were provided to the system by OfficeMax in response to a request for bids or proposals. Thus, none of the e-mail addresses in the information at issue are excepted under section 552.137.

We note that portions of the submitted information contain insurance policy numbers. Section 552.136 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."[1] Gov't Code § 552.136. Accordingly, the system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note that some of the remaining 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 system must withhold the information we have marked under sections 552.110(a) and 552.136 of the Government Code. The remaining information must be released, but any information subject to copyright may only 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,

Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

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[1] The 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).

Ref: ID# 343906

Enc. Submitted documents

cc: Requestor
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