



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2009

Mr. Damon C. Derrick
Staff Attorney
Stephen F. Austin State University
P.O. Box 13065, SFA Station
Nacogdoches, Texas 75962-3065

OR2009-09232

Dear Mr. Derrick:

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# 347646.

Stephen F. Austin State University (the "university") received a request for information submitted by Kirksey; Perkins+Will ("Perkins"); and Randall Scott Architects, Inc. ("Randall") in response to a specified request for qualifications ("RFQ"). The university received an additional request for proposals submitted by J.E. Kingham Construction Company ("Kingham"); SpawGlass Construction Corp. ("SpawGlass"); and The Whiting-Turner Contracting Company ("Whiting") in response to a related RFQ. Although you take no position with respect to the public availability of the submitted information, you state that the submitted documents may contain proprietary information subject to exception under the Act. Accordingly, you provide documentation showing that the university notified Kingham, Kirksey, Perkins, Randall, SpawGlass, and Whiting of the requests for information and of their rights to submit arguments to this office as to why the submitted 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). Kirksey, Perkins, and Whiting have responded to this notice. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its

reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Kingham, Randall, and SpawGlass have not submitted comments to this office explaining why any portion of the submitted information relating to them should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of Kingham, Randall, or SpawGlass. Accordingly, none of the information pertaining to Kingham, Randall, or SpawGlass may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

We will now address the submitted arguments. Whiting claims its submitted information is 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. Section 552.104, however, 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). As the university has not claimed that any of the submitted information is excepted from disclosure under section 552.104, we find that this section is not applicable to Whiting's information. *See* Open Records Decision No. 592 (governmental body may waive section 552.104).

Next, Kirksey, Whiting, and Perkins assert that section 552.110 of the Government Code excepts from disclosure their respective information. Section 552.110 of the Government Code 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 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* 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

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.

Id.; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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.*; see also *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the arguments submitted by Kirksey, Perkins, and Whiting, and the information at issue, we find the information we have marked relating to Kirksey's and Perkins' customers must be withheld under section 552.110(a). Although Kirksey's and Perkins' documents contain other customer information, those customers are also identified on the companies' respective websites. We are unable to conclude that information published on Kirksey's or Perkins' websites constitutes a trade secret of either company. Further, we find that Kirksey, Perkins, and Whiting have failed to demonstrate how any portion of the remaining submitted information meets the definition of a trade secret, nor has Kirksey, Perkins, or Whiting demonstrated the necessary factors to establish a trade secret claim for the remaining information. See Open Records Decision Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). However, we conclude Whiting has established the release of its pricing information would cause it substantial competitive injury; therefore, the university must withhold this information, which we have marked, under section 552.110(b). Kirksey, Perkins, and Whiting have not demonstrated that substantial competitive injury would likely result from the release of any of the remaining information. See ORD 661 at 5-6. Accordingly, we determine none of the remaining submitted information may be withheld under section 552.110 of the Government Code.

Finally, Whiting raises section 552.131 of the Government Code. Section 552.131 is applicable to economic development information and provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business

prospect by the governmental body or by another person is excepted from [required public disclosure].

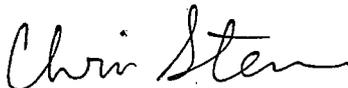
Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* Thus, the protection provided by section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. Because Whiting did not demonstrate that any of the remaining information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor did it make the specific factual or evidentiary showing required under section 552.110(b) that release of the remaining information would result in substantial competitive harm, we conclude that none of the remaining information may be withheld pursuant to section 552.131(a). Further, we note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the university does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the remaining information is excepted under section 552.131(b) of the Government Code.

In summary, the university must withhold the information we have marked under subsections 552.110(a) and 552.110(b) of the Government Code. The university must release the remaining requested information to the respective requestors.

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 347646

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Randall B. Scott
Randall Scott Architects
14755 Preston Road, Suite 730
Dallas, Texas 75254
(w/o enclosures)

Mr. Shawn K. Jackson
General Counsel
Kirksey
6909 Portwest Drive
Houston, Texas 77024
(w/o enclosures)

Mr. Richard Miller
Perkins & Will
10100 North Central Expressway, Suite 300
Dallas, Texas 75231
(w/o enclosures)

Mr. Wes Good
Kirksey
6909 Portwest Drive
Houston, Texas 77024
(w/o enclosures)

Mr. Espen S. Brooks
The Whiting - Turner Contracting Company
2301 West Plano Parkway, Suite 104
Plano, Texas 75075
(w/o enclosures)

Mr. John English
SpawGlass Construction Group
13800 West Road
Houston, Texas 77041
(w/o enclosures)

Mr. Stephan W. Schueler
Winstead
1100 JP Morgan Chase Tower
600 Travis Street
Houston, Texas 77002
(w/o enclosures)