



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2009

Mr. Eric D. Bentley
Assistant General Counsel
University of Houston System
311 Ezekiel Cullen Building
Houston, Texas 77204-2028

OR2009-11403

Dear Mr. Bentley:

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# 352203.

The University of Houston (the "university") received a request for the responses from companies which the university selected for interviews or presentations in connection with a specified RFQ and information pertaining to the interviews or presentations, including records of the university and hand-outs or materials submitted by the interviewed or presenting companies. Although the university takes no position with respect to the public availability of the requested information, you believe that the request may implicate the proprietary interests of EEReed Construction, L.P., Hardin Construction Company, L.L.C. ("Hardin"), Manhattan Construction Company, Inc., Pepper Lawson Construction, L.P. ("Pepper"), Skanska USA Building, Inc., Spawglass Construction Corporation ("Spawglass"), Turner Construction Company ("Turner"), Walbridge/Bartlett Cocke, and Yates Construction. Accordingly, you state, and provide documentation showing, the university 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). Turner and a representative of Hardin have responded to the notice and argued their information is excepted from disclosure under section 552.110 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that the requestor seeks only those responses submitted by companies which were selected by the university for interviews or presentations and information pertaining to the presentations and interviews. Thus, the responses submitted to the university by EEReed Construction, L.P., Manhattan Construction Company, Inc., Skanska USA Building, Inc., Walbridge/Bartlett Cocke, and Yates Construction, as well as the remaining information which does not pertain to the interviews or presentations, are not responsive to the instant request. The university need not release nonresponsive information in response to this request and this ruling will not address that information.

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. Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Pepper or Spawglass explaining why their submitted information should not be released. Therefore, we have no basis to conclude that these third parties have 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 Pepper or Spawglass.

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. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property 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). 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:

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 Huffines*, 314 S.W.2d 763, 776; 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* 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 exemption 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.*; ORD 661 at 5-6.

Hardin asserts portions of its information, including its pricing proposal, are excepted from disclosure under section 552.110(a). We note 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Upon review of Hardin’s arguments and the submitted information, we find that Hardin has failed to establish a *prima facie* claim that any of the submitted information it seeks to withhold qualifies as a trade secret under section 552.110(a).

Both Hardin and Turner assert portions of their information are excepted from disclosure under subsection 552.110(b). Upon review of Turner’s arguments and the submitted information, we find that Turner has established that release of its pricing information would cause it substantial competitive harm. Therefore, the university must withhold the pricing information we have marked under section 552.110(b) of the Government Code. However, we find that Hardin and Turner have made only conclusory allegations that release of Hardin’s information and Turner’s remaining information would cause each company substantial competitive harm and neither company has provided a specific factual or evidentiary showing to support such an allegation for purposes of section 552.110(b). *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 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). Additionally, we note that the pricing information of a winning bidder, such as Hardin in this instance, is generally not excepted under section 552.110. *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, we believe the public has a strong interest in the release of prices in government contract awards. We therefore conclude that the university must withhold only the information we have marked under section 552.110(b) of the Government Code.

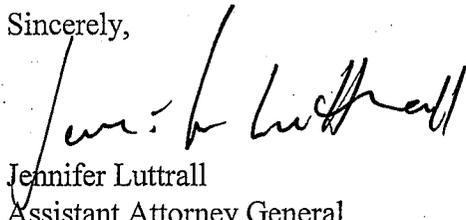
Finally, we note that some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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 university must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining responsive information must be released, but any information subject to copyright may only be released in accordance with federal 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 352203

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Matthew J. Sullivan
DuBois Bryant & Campbell LLP
700 Lavaca Street, Suite 1300
Austin, Texas 78701
(w/o enclosures)

Mr. Joe Price
EEReed Construction, L.P.
333 Commerce Green Boulevard
Sugarland, Texas 77478
(w/o enclosures)

Mr. Matt Murphy
Hardin Construction Company, LLC
3101 Bee Caves Road, Suite 270
Austin, Texas 78746
(w/o enclosures)

Mr. Andrew Robertson
Manhattan Construction Company, Inc.
2120 Montrose Boulevard
Houston, Texas 77006
(w/o enclosures)

Mr. Brad Christensen
Pepper-Lawson Construction, L.P.
4555 Katy Hockley Cut-off Road
Houston, Texas 77493
(w/o enclosures)

Mr. Ronnie Howe
Skanska USA Building, Inc.
1776 Yorktown, Suite 690
Houston, Texas 77056
(w/o enclosures)

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

Mr. Glen W. Anderson
Turner Construction Company
2001 North Lamar
Dallas, Texas 75202
(w/o enclosures)

Mr. Nathan Olson
Walbridge/Bartlett Cocke
8706 Lockway
San Antonio, Texas 78217
(w/o enclosures)

Mr. Randy Powell
Yates Construction
14607 San Pedro Avenue, Suite 190
San Antonio, Texas 78232
(w/o enclosures)