



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2009

Mr. Scott A. Kelly
Deputy General Counsel
Texas A&M University System
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College Station, Texas 77845-3424

OR2009-13321

Dear Mr. Kelly:

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# 356207.

Texas A&M University (the "university") received a request for the responses to a specified request for proposals. Although you take no position with respect to the public availability of the submitted proposals, you indicate their release may implicate the proprietary interests of Institutional Network Communications, L.L.C. ("INC"), Cox Southwest Holdings, L.P. ("Cox"), Lamont Digital Systems, Inc. d/b/a Campus Televideo ("CTV"), NWS Communications ("NWS"), and Falls Earth Station, Inc. ("Falls Earth"). Accordingly, you state, and provide documentation showing that, you notified these companies of the request and of each company's right to submit arguments to this office as to why the submitted proposals should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from CTV and NWS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from INC, Cox, or Falls Earth explaining why their information should not be released.

Thus, we have no basis for concluding that any portion of the submitted information pertaining to these companies constitutes proprietary information, and the university may not withhold any portion of their information on that basis. *See* 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.

NWS claims portions of its proposal are excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which excepts from disclosure private facts about an individual. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is excepted from required public disclosure by the common-law right of privacy if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Id.* at 685. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). We note that common-law privacy protects the privacy interests of individuals, but not of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). In this instance, the information at issue pertains to a business and not to an individual. Accordingly, we find no portion of the submitted information is protected under the doctrine of common-law privacy. Therefore, the university may not withhold any portion of the submitted information under section 552.101 in conjunction with common-law privacy.

NWS also 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 university does not seek to withhold any information pursuant to this exception, none of the submitted information may be withheld on this basis.

Section 552.110 of the Government Code 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 exempts from disclosure "[a] trade secret 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. 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 a single or ephemeral event 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.¹ 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. See 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

¹The 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. 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).

result from release of the information at issue. *See id.*; *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

NWS contends portions of its information qualify as trade secret information under section 552.110(a). Upon review, we find NWS has made a *prima facie* case that some of its client information is protected as trade secret information. We note, however, that NWS publishes the identities of most of its clients on its website. In light of NWS' own publication of such information, we cannot conclude that the identities of these published clients qualify as trade secrets. Furthermore, we determine that NWS has failed to demonstrate that any portion of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the university must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We determine that no portion of the remaining submitted information is excepted from disclosure under section 552.110(a) of the Government Code.

CTV and NWS claim their information is subject to section 552.110(b). Upon review of NWS' arguments and its information, we find NWS has established that its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the university must withhold the pricing information we have marked under section 552.110(b) of the Government Code. We note, however, that the pricing information of a winning bidder, such as CTV, 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, CTV's pricing information may not be withheld on that basis.

CTV also argues its customer information is subject to section 552.110(b). Upon review of CTV's arguments and its information, we find CTV has made a specific factual or evidentiary showing that the release of some of its customer information, which we have marked, would cause it substantial competitive harm. Therefore, the university must withhold the information we have marked in CTV's information under section 552.110(b) of the Government Code. We note, however, that CTV has published the identity of one of its customers on its website. Thus, CTV has failed to demonstrate that release of this customer's information would cause it substantial competitive injury.

Additionally, CTV and NWS have made only conclusory allegations that the release of the remaining information in their proposals would result in substantial damage to each company's competitive position. Thus, the companies have not demonstrated that substantial competitive injury would result from the release of any of their remaining information at issue. *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), 319 at 3 (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). Accordingly, none of NWS' or CTV's remaining information may be withheld under section 552.110(b).

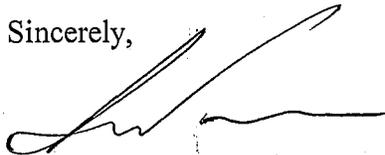
Finally, we note that some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672. A governmental body must allow inspection of copyrighted 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 university must withhold the information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The remaining information must be released to the requestor 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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 356207

Enc. Submitted documents

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