



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2009

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-14532

Dear Ms. Chatterjee:

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# 358263.

The University of Texas Medical Branch at Galveston (the "university") received a request for information pertaining to RFP 09-07-JOC. You state the university is releasing some of the responsive information. You state the university will redact social security numbers from the submitted information pursuant to section 552.147 of the Government Code.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.136 and 552.137 of the Government Code. You do not take a position as to whether the remainder of the submitted information is excepted under the Act; however, you state that its release may implicate the proprietary rights of the third parties. You state, and provide documentation showing, that you have notified J.T. Vaughn Construction, L.L.C. ("Vaughn"), Jamail and Smith Construction ("Jamail"), Horizon Targa Joint Venture ("Horizon/Targa"), RLH Construction, Inc. ("RLH"), Structura, Inc. ("Structura"), The Trevino Group ("Trevino"), RHJ-JOC ("RHJ"), and REYTEC/CBIC ("REYTEC") of their right to submit arguments to this office as to why the submitted information should not be released.² 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). We have received correspondence from Jamail, Horizon/Targa, and RLH. We have considered the submitted arguments and reviewed the submitted information.

¹We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office.

²You inform us that because the university and Vaughn have reached an agreement with the requestor regarding the release of Vaughn's information, the university is no longer seeking a ruling on the documents pertaining to Vaughn.

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 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 correspondence from Structura, Trevino, RHJ, or REYTEC 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 third parties 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 (1990).

Horizon/Targa contends that the information relating to claims filed against the company in its submitted proposal is confidential under section 552.101 of the Government Code. 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 common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). We note that common-law privacy protects the privacy interests of individuals, not those of corporations and 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 organization and not to an individual. Accordingly, we find no portion of this information is protected under the doctrine of common-law privacy and the university may not withhold the information at issue on this basis.

Horizon/Targa also raises section 552.102 of the Government Code for information in its proposal relating to key personnel, organizational charts, and resumes. Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a); *see also Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Section 552.102 only applies to information in a personnel file of an employee of a governmental body. The information Horizon/Targa seeks to withhold is not contained in the personnel file of a governmental employee. Thus, we determine that section 552.102 does not apply to this information, and it may not be withheld on that basis.

Jamail contends that portions of its information are protected under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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 claim an exception to disclosure under section 552.104 of the Government Code, it may not withhold any of Jamail's information under that exception. *See* ORD 592 (governmental body may waive section 552.104).

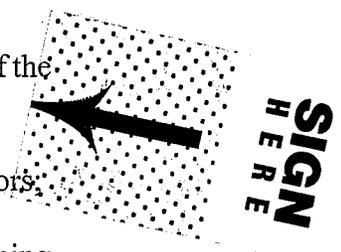
Horizon/Targa, Jamail, and RLH contend that section 552.110 of the Government Code is applicable to portions of their proposals. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the 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. *See* ORD 552. 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). 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 the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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. *See id.* § 552.110(b); *see also* ORD 661 at 5-6.

Horizon/Targa and Jamail contend that portions of their proposals contain trade secrets. Having considered the parties’ arguments and reviewed the information at issue, we conclude that Horizon/Targa has established that a portion of its client information is a trade secret under section 552.110(a). Therefore, the university must withhold the information we have marked under section 552.110(a). However, Horizon/Targa publishes the identities of some of its clients on Targa’s website. Thus, we conclude that this information, which Targa makes publicly available, is not a trade secret and may not be withheld under section 552.110(a). We further conclude that Horizon/Targa has not demonstrated that any

of its remaining information constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. Likewise, Jamail has not established that any of its information constitutes a trade secret or demonstrated the factors necessary to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 com. b (1939) (defining a trade secret as a process or device for continuous use in the operation of the business); ORD 552 at 5-6. Thus, the university may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Horizon/Targa, Jamail, and RLH also contend that some of their information must be withheld under section 552.110(b). Having considered the parties' claims and reviewed the information at issue, we conclude that Horizon/Targa, Jamail, and RLH have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 661, 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), 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). Accordingly, the university may not withhold any of the remaining information under section 552.110(b) of the Government Code.

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.” Gov’t Code § 552.136(b); *see also* § 552.136(a) (definition of “access device number” includes account numbers). The university must withhold the insurance policy numbers you have marked, as well as the bank account numbers we have marked, pursuant to section 552.136 of the Government Code.

Section 552.137 of the Government Code provides that “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 [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). However, section 552.137 does not apply to an e-mail address that is:

(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(c). The university seeks to withhold the e-mail addresses you have marked under section 552.137 of the Government Code. We note that the e-mail addresses at issue are contained in responses to a request for bids or proposals. As such, this information is not excepted under section 552.137 and it may not be withheld under this exception.

We note the remaining information includes what appears to be a DD-214 form or military discharge record subject to section 552.140 of the Government Code.³ Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). The submitted information reflects that the university first came into possession of this form, which we have marked, after September 1, 2003. Therefore, the university must withhold this form pursuant to section 552.140 of the Government Code.

We also note that portions of the submitted information appear to be protected by copyright. In addition, Jamail and Horizon/Targa assert copyright protection for their information. 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 materials that are subject to copyright protection 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 and 552.140 of the Government Code. The university must withhold the information you have marked, as well as the information we have marked, under section 552.136 of the Government Code. The remaining information must be released; however, in releasing any information that is copyrighted, the university must comply with applicable 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

³The Office of the Attorney General will raise a mandatory exception like section 552.140 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 358269

Enc. Submitted documents

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