



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2009

Ms. Cathy Boeker
Executive Administrator of External Affairs
Blinn College
902 College Avenue
Brenham, Texas 77833

OR2009-16405

Dear Ms. Boeker:

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# 361689.

Blinn College (the "college") received a request for responses from two named companies related to a specified request for proposal. You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code.¹ Although you raise no other exceptions to disclosure for the submitted information you indicate that it may implicate the proprietary interests of third parties. Pursuant to section 552.305 of the Government Code, you state and provide documentation showing, that you notified SunGard Higher Education, Inc. ("SunGard") and Datatel, Inc. ("Datatel") of the college's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the requestor. *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 comments from

¹Although, you state in your brief that you are raising section 552.103 of the Government Code as an exception to disclosure of the requested information and Datatel, Inc. also mentions section 552.103, neither you nor the third party have provided any arguments regarding the applicability of this section. *See* Gov't Code § 552.103 (exception to disclosure relating to litigation or settlement negotiations involving the state or political subdivision). Since no arguments concerning section 552.103 have been submitted, we do not address this exception. *See id.* §§ 552.301(b), (e), .302.

SunGard and Datatel. We have considered the submitted arguments and reviewed the submitted information.

Both Datatel and the college indicate that there was an expectation that the submitted proposals would be treated confidentially. 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 by agreement or contract. *See Attorney General Opinion JM-672 (1987)*; Open Records Decision Nos. 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.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, the submitted information must be released unless it falls within an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

The college and Datatel both argue that the submitted information is excepted under section 552.104 of the Government Code. Section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties; therefore we will not consider Datatel’s claims under section 552.104. *See Open Records Decision No. 592 at 8 (1991)*. However, we will address the college’s claim under section 552.104 of the Government Code for the submitted information. Section 552.104 of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See Open Records Decision No. 541 (1990)*. The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See Open Records Decision No. 593 (1991)*. In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See Open Records Decision Nos. 593 at 2 (1987)*, 463, 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See ORD 593 at 2*. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See ORD 541*.

The college informs us, and the submitted information confirms, that the submitted information relates to a request for proposal where the bidding has concluded and a vendor, SunGard, has been selected. The college argues that release of the submitted information could harm the third parties interests in future competitive bidding situations. Upon review of the arguments, we find that the college has failed to demonstrate how the release of the information at issue would cause potential harm to the college’s interests in a particular competitive situation. Therefore, we find the college has failed to demonstrate the

applicability of section 552.104 of the Government Code to the submitted information, and it may not be withheld on this basis.

SunGard and Datatel argue that portions of their proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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 Open Records Decision No. 552 at 2 (1990). 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). 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

²The Restatement of Torts lists the following six factors 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 other 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).

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.* § 552.110(b); *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

SunGard contends that its references, some of its pricing information, and other parts of its proposal constitute trade secrets under section 552.110(a). Having considered SunGard’s arguments and reviewed the information at issue, we conclude that the college must withhold one of SunGard’s references and features matrix, which we have marked, under section 552.110(a). We note that SunGard has published the identities of some of its clients on its website. Thus, SunGard has failed to demonstrate that the information it has published on its website is a trade secret. Further, we find SunGard has not demonstrated how the remaining information it seeks to withhold meets the definition of a trade secret, nor has SunGard demonstrated the necessary factors to establish a trade secret claim for this information. Consequently, the college may not withhold any of the remaining information under section 552.110(a) of the Government Code.

SunGard and Datatel also appear to contend that their remaining information is excepted from disclosure under section 552.110(b). However, we find that SunGard and Datatel have made only conclusory allegations that release of their remaining information would result in substantial competitive harm and has not provided a specific factual or evidentiary showing to support this allegation. *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 (1982). Thus, the college may not withhold any of the remaining information under section 552.110(b) of the Government Code.

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 (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 college must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released, but any copyrighted information 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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 361689

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Joseph A. Yemola
Corporate Counsel
SunGard Higher Education
4 Country View Road
Malvern, Pennsylvania 19355
(w/o enclosures)

Mr. David J. Gutch
Vice President Sales
Datatel
4375 Fair Lakes Court
Fairfax, Virginia 22033
(w/o enclosures)