



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2009

Ms. Erin K. Stewart
Assistant General Counsel
University of North Texas System
Office of General Counsel
1155 Union Circle, #3I0907
Denton, Texas 76203-5017

OR2009-16487

Dear Ms. Stewart:

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# 362069 (UNT PIR Nos. 10-001 and 10-012).

The University of North Texas (the "university") received two requests from different requestors for all proposals pertaining to the music hall renovation. Although you take no position with respect to the public availability of the requested information, you state that release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the university has notified the interested third parties of the requests and of their right to submit arguments to this office explaining why their information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

¹The notified third parties are: AUI Contractors, Inc. ("AUI"); HC Beck, Ltd. ("Beck"); Constructors & Associates, Inc. ("Constructors"); EMJ Corporation ("EMJ"); Vratsinas Construction Company ("VCC"); Byrne Construction Services ("Byrne"); JE Dunn Construction Company ("JE Dunn"); Holder Construction Group, LLC ("Holder"); Adolphson and Peterson Construction; Turner Construction Company; McCaslin-Hill Construction, Inc.; Lockton Companies, LLC; Lemco Construction Service, L.P.; Joe Funk Construction Engineer, Inc.; Construction Zone of Texas, LLC; Basecom, Inc.; and Aguirre Roden.

Initially, we must address the university's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). You inform us that the university received the second request on September 29, 2009. However, you did not request a ruling from our office with regard to the second request until October 15, 2009. Consequently, we find that the university failed to comply with the procedural requirements of section 552.301 with regard to the second request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because third party interests are at stake, we will address whether the submitted information must be withheld to protect the interests of the third parties.

Next, 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have received comments from AUI, Beck, Constructors, EMJ, VCC, Byrne, JE Dunn, and Holder explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in the submitted information. *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). Accordingly, the university may not withhold any portion of the submitted information on the basis of any proprietary interest that the remaining third parties may have in this information.

Turning to the submitted arguments, we first address Beck's contention that its information is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of

access to it.” *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body’s physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Beck argues that its information is not subject to the Act because Beck itself is not a governmental body. However, we note that Beck’s information is in the possession of the university, which is a governmental body as defined by section 552.003, and was collected, assembled, or maintained in connection with the transaction of the university’s official business. Therefore, we conclude that the Beck’s information is subject to the Act and must be released, unless the university or Beck demonstrates that the information falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302. Thus, we will consider Beck’s arguments against disclosure, along with the remaining third parties’ arguments to withhold their information.

AUI claims that its financial statements are confidential pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. 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 section encompasses the doctrine of common-law privacy, which protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82.

This office has generally found that personal financial information not relating to a financial transaction between an individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We note, however, that common-law privacy protects the 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) (cited in *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). Thus, AUI’s information is not protected by common-law privacy and may not be withheld on that basis under section 552.101.

Beck, JE Dunn, and Byrne assert that their information is excepted from disclosure 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. We note that section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 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 raise section 552.104, this section is not applicable to the requested information. *See* ORD 592 (section 552.104 may be waived by

governmental body). Therefore, the university may not withhold any of Beck's, JE Dunn's, or Byrne's information under section 552.104 of the Government Code.

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 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* 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

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).

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 ORD 661 at 5-6.

In advancing its arguments, Beck relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). See also *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Beck’s interest in its information.

AUI, Beck, VCC, and Byrne each assert that portions of their information constitute trade secrets that are excepted from disclosure under section 552.110(a). Upon review, we find that AUI, Beck, VCC, and Byrne have failed to demonstrate how any of their information at issue meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. 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). We note that pricing information pertaining to a particular proposal or 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; ORD Nos. 319 at 3, 306 at 3 (1982). Therefore, AUI, Beck, VCC, and Byrne have failed to establish that any portion of their information constitutes a protected trade secret under section 552.110(a) of the Government Code, and none of their information may be withheld on that basis.

AUI, Beck, Constructors, EMJ, VCC, Byrne, JE Dunn, and Holder all claim that portions of their submitted information are excepted from disclosure under section 552.110(b). Upon review, we find that Beck, Constructors, and JE Dunn have established that their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause these companies substantial competitive injury. Beck has also established that release of its financial statements, which we have marked, would cause the company substantial competitive harm. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find that AUI, Beck, Constructors, EMJ, VCC, Byrne, JE Dunn, and Holder have all failed to provide specific factual evidence demonstrating that release of any of the remaining information at issue would result in substantial competitive harm to their interests. 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), 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, we determine that no portion of the remaining information at issue is excepted from disclosure under section 552.110(b) of the Government Code.

We note that a portion of Byrne’s information is excepted from disclosure under section 552.136 of the Government Code.³ Section 552.136 states 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.” *Id.* § 552.136(b). Upon review, we find that the insurance policy numbers in the remaining information are access device numbers under section 552.136. Accordingly, the university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, the university must withhold the information we have marked in Beck’s, Constructors’, and JE Dunn’s proposals under section 552.110(b) of the Government Code. The university must also withhold the insurance policy numbers we have marked in Byrne’s

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

proposal under section 552.136 of the Government Code. The remaining information must be released.

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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 362069

Enc. Submitted documents

c: Requestors (2)
(w/o enclosures)

Mr. Travis Noble, LEED AP
Assistant Vice President
17177 Preston Road, Suite 210
Dallas, Texas 75248
(w/o enclosures)

Mr. Ryan McClendon
Executive Vice President, VCC
600 East Las Colinas, Suite 1225
Irving, Texas 75039
(w/o enclosures)

Mr. William Hodges
Senior Vice President
Adolfson & Peterson Construction
1900 Firman Drive, Suite 700
Richardson, Texas 75081
(w/o enclosures)

Mr. Drew Smith
Senior Vice President
EMJ Corporation
5525 North MacArthur Boulevard Suite
400
Irving, Texas 75038
(w/o enclosures)

Mr. Abrar Sheriff
Vice President
Turner Construction Company
2001 North Lamar, Suite 100
Dallas, Texas 75202
(w/o enclosures)

Mr. Steve Calhoun
Vice President
McCaslin-Hill Construction, Inc.
1301 West Beltline Road, Suite 117
Carrollton, Texas 75006

Mr. John Avila, Jr.
President & CEO
Thos. S. Byrne, Ltd.
3100 West 7th Street, Suite 200
Fort Worth, Texas 76107
(w/o enclosures)

Mr. Paul E. Higgins
LEED AP/Managing Director
HC Beck, Ltd.
1807 Ross Avenue, Suite 500
Dallas, Texas 75201
(w/o enclosures)

Ms. Debra J. Scarborough
AFSB, Vice President
Lockton Companies, LLC
444 West 47th Street, Suite 900
Kansas City, Missouri 64112
(w/o enclosures)

Ms. Judy Lembke
President
Lemco Construction Service, L.P.
14131 Midway Road, Suite 660
Addison, Texas 75001
(w/o enclosures)

Mr. Mitchell Meyers
Vice President
Joe Funk Construction Engineer, Inc.
11226 Indian Trail
Dallas, Texas 75205
(w/o enclosures)

Ms. Sandra Bernard
President
Construction Zone of Texas, LLC
1420 Springhill Road
Aubrey, Texas 76227
(w/o enclosures)

Mr. Oscar Oaxaca
President
Basecom, Inc.
5450 East Loop 820 South
Fort Worth, Texas 76119
(w/o enclosures)

Mr. David C. Oxford
Vice President
AUI Contractors, Inc.
4775 North Freeway
Fort Worth, Texas 76106
(w/o enclosures)

Mr. Bill Dawkins
Senior Vice President
Aguirre Roden
12700 Park Central Drive, Floor 15
Dallas, Texas 75251
(w/o enclosures)

Mr. Joseph Cribbin
Senior Vice President
Constructors & Associates, Inc.
3333 Welborn Street, Suite 200
Dallas, Texas 75219
(w/o enclosures)

Mr. Mitchell Meyers
Vice President
Joe Funk Construction Engineer, Inc.
11226 Indian Trail
Dallas, Texas 75205
(w/o enclosures)

Ms. Sandra Bernard
President
Construction Zone of Texas, LLC
1420 Springhill Road
Aubrey, Texas 76227
(w/o enclosures)

Mr. Douglas J. Clough
Regional Office Director
Holder Construction Group, LLC
4600 Fuller Drive, Suite 375
Irving, Texas 75038
(w/o enclosures)