



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2009

Mr. William L. Fly
University Attorney
Texas State University
601 University Drive
San Marcos, Texas 78666-4615

OR2009-16592

Dear Mr. Fly:

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# 361972.

Texas State University (the "university") received a request for a proposal submitted by SunGard Higher Education ("SunGard"), SunGard's best and final offer, the related contract with SunGard and any third-party contracts, and any scoring documentation used by the university to rank and select the winning vendor. You state that some of the requested information has been released. You claim that other responsive information is excepted from disclosure under section 552.111 of the Government Code. Although you take no position on the public availability of the rest of the submitted information, you believe that the remaining information may implicate SunGard's interests. You inform us that SunGard was notified of this request for information and of its right to submit arguments to this office as to why information relating to SunGard should not be released.¹ We received correspondence from an attorney for SunGard. We have considered all of the submitted arguments and reviewed the information you submitted.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

SunGard states, among other things, that information SunGard submitted to the university is marked confidential and is subject to a confidentiality agreement. We note that information is not confidential under the Act simply because the party that submitted the information anticipated or requested 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 does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Thus, the university must release the submitted information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary. *See* Open Records Decision No. 470 at 2 (1987).

SunGard also claims exceptions to disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “commercial 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(a)-(b).

The Supreme Court of Texas has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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, 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 [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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case

for the exception, and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude, however, 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) 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* 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 pricing, references, and other portions of the submitted information constitute the company's trade secrets under section 552.110(a). We also understand SunGard to claim that the information at issue is excepted from disclosure under section 552.110(b). Having considered all of SunGard's arguments and reviewed the information at issue, we have marked customer information that the university must withhold under section 552.110(a). Although SunGard also seeks to withhold other submitted customer information under section 552.110, we note that the identities of those customers are published on SunGard's website. We are unable to conclude that information SunGard has published on the Internet constitutes a trade secret of the company or that the release of such information under the Act would cause SunGard any substantial competitive harm. We find that SunGard has not demonstrated that any of the remaining information at issue constitutes a trade secret under section 552.110(a). We also find that SunGard has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause SunGard substantial competitive harm. We therefore conclude that the university may not withhold any of the remaining information under section 552.110. *See* Gov't Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 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

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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

With specific respect to SunGard's pricing information, SunGard informs us that its proposal and best and final offer were submitted to the university pursuant to a contract between SunGard and the Texas Department of Information Resources. 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." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Likewise, the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). 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 at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. See Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Therefore, the university may not withhold any of SunGard's pricing information under section 552.110.

Next, we address the university's claim under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111

not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

The university claims section 552.111 for information relating to its evaluation of the prospective vendors' proposals and best and final offers. You contend that the information at issue contains advice, opinions, and recommendations relating to policy matters. Based on your representations and our review of the information at issue, we conclude that the university may withhold the information we have marked under section 552.111. We conclude that the remaining information at issue does not constitute advice, opinions, or recommendations and may not be withheld under section 552.111.

We note that some of the submitted information may be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

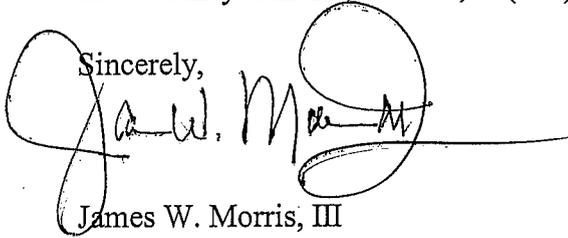
In summary: (1) the university must withhold the information we have marked under section 552.110 of the Government Code; and (2) the university may withhold the information we have marked under section 552.111 of the Government Code. The rest of the submitted information must be released, but any information protected by copyright 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 361972

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. Matthew T. Lehman
Corporate Counsel
SunGard Data Systems, Inc.
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(w/o enclosures)