



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2009

Ms. Maria Miller
Public Information Officer
Dallas County Community College District
1601 South Lamar, Suite 208
Dallas, Texas 75215-1816

OR2009-17651

Dear Ms. Miller:

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# 364139.

The Dallas County Community College District (the "district") received a request for all responses submitted for request for proposal numbers "11542 Student Outcomes & Curric Eval 0309" and "11507 Student Tracking System DW." Although the district takes no position with respect to the public availability of the submitted bid proposals, you state their release may implicate the proprietary interests of Centrieva Corporation ("Centrieva"), Engineerica Systems, Inc. ("ESI"), Hyland Software, Inc. ("HSI"), Instructional Design Solutions, LLC ("IDS"), Nuventive, Rapid Insight, Inc. ("RII"), Synchronous Solutions, Inc. ("SSI"), TaskStream, Think Education Solutions, LLC ("TES"), TK20 Inc. ("TK20"), and Zogo Technologies, LLC ("Zogo"). Accordingly, you state the district notified these companies of the request and of each company's right to submit arguments to this office as to why the submitted bid 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 Centrieva, IDS, Nuventive, TaskStream, and TES. We have considered the submitted arguments and reviewed the submitted information.

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 not received comments from ESI, HSI, RII, SSI, TK20, or Zogo explaining why their submitted proposals should not be released. Therefore, we have no basis to conclude ESI, HSI, RII, SSI, TK20, and Zogo have protected proprietary interests in their submitted information. *See id.* § 552.110; 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. Consequently, the district may not withhold ESI's, HSI's, RII's, SSI's, TK20's, or Zogo's submitted proposals on the basis of any proprietary interests these companies may have in the information.

IDS and Nuventive assert their proposals are confidential because they specifically labeled the proposals as proprietary and confidential prior to submitting the information to the district. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests 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 through an 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 section 552.110 of the Government Code). Consequently, unless IDS's and Nuventive's proposals come within an exception to disclosure, they must be released, notwithstanding any expectation or agreement to the contrary.

IDS claims its submitted bid proposal is subject to 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. However, IDS has not directed our attention to any law, nor are we aware of any law, that makes IDS's submitted proposal confidential. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the district may not withhold IDS's bid proposal under section 552.101 of the Government Code.

Nuventive asserts its information and TES asserts portions of its information are excepted from disclosure pursuant to 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. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the district does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Nuventive's and TES's information. *See* ORD 592 (governmental body may waive section 552.104).

TES also asserts portions of its information are excepted from disclosure under sections 552.128 and 552.139 of the Government Code. Section 552.128 excepts from required public disclosure "[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]" Gov't Code § 552.128(a). Section 552.139 excepts from required public disclosure information related to computer network security, design, operation, defense, or vulnerability. *Id.* § 552.139. TES has not provided any arguments explaining how these exceptions apply to its information. Thus, we find TES has failed to demonstrate the applicability of these exceptions to its information. Consequently, none of TES's information may be withheld under section 552.128 or section 552.139 of the Government Code.

Centrieva, IDS, Nuventive, TaskStream, and TES claim portions or all of their submitted proposals are excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "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." *Id.* § 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 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 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 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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.¹ Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision Nos. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Centrieva, IDS, Nuventive, TaskStream, and TES claim some of their information constitutes trade secrets under section 552.110(a). Upon review, we find TaskStream has established its customer information, which we have marked, constitutes a trade secret and must be withheld under section 552.110(a). We find, however, Centrieva, IDS, Nuventive, TaskStream, and TES have not demonstrated how the remaining information at issue meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, and qualifications not ordinarily excepted from disclosure under statutory predecessor to

¹The 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 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).

section 552.110). Consequently, the district may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Centrieva, IDS, Nuventive, TaskStream, and TES also claim the remaining information at issue constitutes commercial information that, if released, would cause each company substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find Nuventive and TaskStream have established release of their pricing information would cause them substantial competitive injury. Therefore, the district must withhold this information, which we have marked, under section 552.110(b). We find, however, that Centrieva, IDS, Nuventive, TaskStream, and TES have made only general conclusory assertions that release of the remaining information at issue would cause the companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such assertions. *See* Open Records Decision Nos. 661, 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. Therefore, the district may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

We note Centrieva's information contains an insurance policy number. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.²

Gov't Code § 552.136. We conclude the insurance policy number we have marked constitutes an access device number for purposes of section 552.136. Thus, the district must

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the marked insurance policy number in under section 552.136 of the Government Code.

IDS asserts its information, and we note some of HSI's, TES's, SSI's, and TK20's 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). Accordingly, IDS's, HSI's, TES's, SSI's, and TK20's information must be released to the requestor in accordance with copyright law.

In summary, the district must withhold the marked customer information under section 552.110(a) of the Government Code, the marked pricing information under section 552.110(b) of the Government Code, and the marked insurance policy number under section 552.136 of the Government Code. The remaining information must be released, but IDS's, HSI's, TES's, SSI's, and TK20's information must 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,



Leah B. Wingerson
Assistant Attorney General
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LBW/dls

Ref: ID# 364139

Enc. Submitted documents

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