



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 8, 2010

Ms. Cathy L. Booth  
Superintendent  
Nixon-Smiley Consolidated Independent School District  
800 Rancho Road  
Nixon, Texas 78140-0400

OR2010-00392

Dear Ms. Booth:

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# 366633.

The Nixon-Smiley Consolidated School District (the "district") received six requests for information related to a specified bid proposal. You state you have released some of the information. You claim that the submitted information is excepted from disclosure under section 552.110 of the Government Code. You also explain that the submitted information may contain third parties' proprietary information subject to exception under the Act. Accordingly, you have notified Baird/Williams Construction ("Baird"), Guido Brothers Construction ("Guido"), Koontz McCombs Construction, Ltd. ("Koontz"), Roth Construction, Inc. ("Roth"), D.L. Bandy Constructors, Inc. ("Bandy"), Galaxy Builders, Ltd. ("Galaxy"), PM2i, Journeyman Construction, Inc. ("Journeyman"), Don Krueger Construction Co. ("Krueger"), Bartlett Cocke, L.P. ("Bartlett"), FTWOODS Construction Services, Inc. ("FTWOODS"), JOERIS General Contractors, Ltd. ("JOERIS"), Weaver & Jacobs Construction ("Weaver"), F.A. Nunnally Co. ("F.A."), O'Haver Contractors ("O'Haver"), W.B. Kibler Construction ("Kibler"), Gaeke Construction Company, Inc. ("Gaeke"), Drymalla Construction Co. ("Drymalla"), and Kencon Constructors/Construction Managers, Ltd. ("Kencon") of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and

explain applicability of exception to disclosure under certain circumstances). We have considered the exception you claim and reviewed the submitted information. We have also considered comments received from Kencon, Roth, O'Haver, Galaxy, Drymalla, Kibler, Bartlett, Guido, Gaeke, and Baird.

You assert the submitted information is excepted under section 552.110 of the Government Code. However, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the district's arguments under section 552.110 and none of the submitted information may be withheld on that basis. *See* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (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 (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received any correspondence from Koontz, Bandy, PM2i, Journeyman, Krueger, FTWOODS, JOERIS, Weaver, or F.A. Thus, none of these private parties have demonstrated that they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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 district may not withhold the submitted information on the basis of any proprietary interest Koontz, Bandy, PM2i, Journeyman, Krueger, FTWOODS, JOERIS, Weaver, or F.A. may have in it.

We next address Bartlett's argument that the request for information is overly broad and should be properly narrowed. We note that a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this case, the district has reviewed its records and has determined that the submitted documents are responsive to the request. Accordingly, we will address the applicability of the claimed exceptions to the submitted information.

Baird asserts its information is 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 Baird's information. See ORD 592 (governmental body may waive section 552.104).~~

Kencon, Drymalla, Kibler, Guido, and Baird assert the submitted information is excepted from disclosure under section 552.101. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. Upon review, we find no portion of the submitted information contains highly intimate or embarrassing information. *See* Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by right to privacy), 554 (1990) (concluding that disclosure of a person's home address and phone number is not an invasion of privacy). Accordingly, no portion of the submitted information may be withheld under common-law privacy.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and (2) "[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(a)-(b).

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 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.<sup>1</sup> Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[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* Open Records Decision No. 661 at 5-6 (1999).

Upon review of Kibler's and Guido's arguments and the information at issue, we find that Kibler and Guido have made a *prima facie* case that portions of their customer lists, which we have marked, are protected as trade secret information. Thus, the district must withhold this information under section 552.110(a). However, we note that Kibler and Guido have published the identities of some of their customers on their website, making this information publicly available. Thus, Kibler and Guido have failed to demonstrate that the information it has published on its website is a trade secret. Moreover, we conclude that Kencon, Roth, O'Haver, Galaxy, Drymalla, Kibler, Bartlett, Guido, Gaeke, and Baird have failed to establish a *prima facie* case that any of the remaining information at issue is a trade secret protected by section 552.110(a). *See* Open Records Decision Nos. 319 at 3 (1982)

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<sup>1</sup>The 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).

(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); 402.

Drymalla and Bartlett also contend that a portion of their information is excepted under section 552.110(b). Among other things, Drymalla and Bartlett argue the release of their information would harm the district's ability to obtain detailed pricing and personnel information with regard to future bids. In advancing their arguments, Drymalla and Bartlett appear to rely 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). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that 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). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Drymalla's and Bartlett's interests in their information.

Upon review of the arguments submitted by O'Haver, Galaxy, Drymalla, Kibler, Bartlett, Guido, and Baird, we find these companies have established that their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the district must withhold the pricing information we have marked under section 552.110(b) of the Government Code. However, we find Kencon, Roth, O'Haver, Galaxy, Drymalla, Kibler, Bartlett, Guido, Gaeke, and Baird have made only conclusory allegations that the release of the remaining information each third-party seeks to withhold would result in substantial damage to their competitive position. Thus, Kencon, Roth, O'Haver, Galaxy, Drymalla, Kibler, Bartlett, Guido, Gaeke, and Baird have not demonstrated that substantial competitive injury would result from the release of any of the remaining information at issue. 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 (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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

We note the submitted information contains insurance policy numbers.<sup>2</sup> Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], 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). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Therefore, the district must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code.<sup>3</sup>

Finally, we note that some of the remaining information at issue appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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 district must withhold the information we have marked under section 552.110 and 552.136. The remaining information must be released, but any information protected by copyright 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](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

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception, such as section 552.136, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



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Assistant Attorney General  
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CS/cc

Ref: ID# 366633

Enc. Submitted documents

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