



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 10, 2010

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

OR2010-02057

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# 370215.

Blinn College (the "college") received a request for all written vendor responses received in response to a specified request for proposals. You claim the requested information is exempted from disclosure under section 552.104 of the Government Code.<sup>1</sup> You also indicate release of the submitted information may implicate the proprietary interests of third parties. Pursuant to section 552.305 of the Government Code, you state you have notified these third parties 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.<sup>2</sup> *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).

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<sup>1</sup>Although 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, you have not 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). Therefore, we do not address this exception. *See id.* §§ 552.301(b), (e), .302.

<sup>2</sup>The third parties are: Ciber, Inc. ("Ciber"), Jenzabar, SunGard Data Systems, Inc. ("SunGard"), Oracle, Higher Technology Solutions ("HTS"), and Precision Task Group ("Precision").

We have received comments from Ciber, Jenzabar, and SunGard. We have considered the submitted arguments and reviewed the submitted information.

We understand you to assert a portion of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2009-16405 (2009). In that ruling, we found the college must withhold a portion of the information at issue pertaining to SunGard pursuant to section 552.110(a) of the Government Code, and release the remaining information in accordance with copyright law. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the college must continue to rely on the ruling as a previous determination and withhold or release the information pertaining to SunGard in accordance with Open Records Letter No. 2009-16405.<sup>3</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We understand the college to raise section 552.104 of the Government Code. Section 552.104 excepts 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, 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 the submitted information relates to a request for proposals where the bidding has concluded and a vendor, SunGard, has been selected. The college argues release of the submitted information could harm the third parties interests in future competitive bidding situations. Upon review, we find 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 that basis.

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<sup>3</sup>Because we are able to make this determination, we do not address SunGard's submitted arguments.

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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Oracle, HTS, or Precision explaining how release of the submitted information would affect their proprietary interests. Thus, we have no basis to conclude the release of any portion of the submitted information would implicate their proprietary interests. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, the college may not withhold any portion of the submitted information belonging to Oracle, HTS, or Precision on the basis of any proprietary interest these third parties may have in the information.

Ciber and Jenzabar assert portions of their submitted information are excepted under section 552.110 of the Government Code. Section 552.110 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 2. 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); ORD 661.

Ciber argues its pricing information is a protected trade secret. Jenzabar argues a portion of its pricing information is a protected trade secret. 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 319 at 3, 306 at 3. Therefore, we find Ciber and Jenzabar have failed to establish that any of the pricing information at issue is a trade secret. Both Ciber and Jenzabar also assert

section 552.110(a) for portions of their remaining information. Upon review, however, we find neither Ciber nor Jenzabar has demonstrated that any portion of the submitted information constitutes a trade secret. Thus, no portion of the submitted information may be withheld under section 552.110(a) of the Government Code.

Both Ciber and Jenzabar seek to withhold portions of their submitted information under section 552.110(b). Upon review, we conclude Ciber has established the release of its pricing information would cause the company substantial competitive injury. Further, we find Jenzabar has established the release of its customer list and a portion of its pricing information would cause it substantial competitive injury. Therefore, the college must withhold this information, which we have marked, under section 552.110(b). However, we find neither Ciber nor Jenzabar has made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause either company substantial competitive harm. *See* ORD 319 at 3 (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, or qualifications and experience). We therefore conclude the college may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note portions of the remaining information are 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 continue to rely on Open Records Letter No. 2009-16405 as a previous determination and withhold or release the information pertaining to SunGard in accordance with that ruling. The college must withhold the information we marked under section 552.110(b) of the Government Code. The remaining 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](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,



Matt Entsminger  
Assistant Attorney General  
Open Records Division

MRE/rl

Ref: ID# 370215

Enc. Submitted documents

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