ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2010

Mr. Brian Nelson
General Counsel
Lone Star College System
5000 Research Forest Drive
The Woodlands, Texas 77381-4356

OR2010-02521

Dear Mr. Nelson:

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# 370876.

The Lone Star College System (the "system") received a request for six categories of information pertaining to Competitive Sealed Proposal number 10-500. You state that you have released categories 3, 4, and 6 to the requestor. You also state that categories 2 and 5 do not exist.[1] Although you take no position with respect to the public availability of the submitted information, you state that its release may implicate the proprietary interests of Satterfield & Pontikes Construction, Inc. ("Satterfield"), Miner-Dederick Construction, LLP ("Miner-Dederick"), J.T. Vaughn Construction, LLC ("Vaughn"), Gamma Construction ("Gamma"), SpawGlass Construction Corp. ("SpawGlass"), Linbeck Group, LLC ("Linbeck"), Summit Builders ("Summit"), Martin Harris State Construction ("Martin Harris"), and D.E. Harvey Builders ("D.E. Harvey") (collectively, the "third parties"). Accordingly, you state that you have notified the third parties of the request 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); *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 the applicability of exception to disclose under

[1] The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

Act in certain circumstances). We have received comments from Satterfield and Linbeck. We have reviewed the submitted comments and information.

We note that 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, Miner-Dederick, Vaughn, Gamma, SpawGlass, Summit, Martin Harris, and D.E. Harvey have not submitted any comments to this office explaining how release of the information at issue would affect their proprietary interests. Accordingly, none of the information pertaining to Miner-Dedrick, Vaughn, Gamma, SpawGlass, Summit, Martin Harris, or D.E. Harvey may be withheld based on the proprietary interests of those third parties. *See id.* § 552.110; 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).

Next, we note Satterfield submitted arguments regarding information beyond that which the system submitted to this office for our review. This ruling does not address such information, and is limited to the information submitted as responsive to the request by the system. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Linbeck states, among other things, that the release of a portion of the submitted information could violate confidentiality agreements between Linbeck and certain third parties. We note provisions of the Act cannot be overruled or repealed by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision No. 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 system 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).

Satterfield and Linbeck both claim portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code.[2] Section 552.110 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) "commercial or financial information for which it is demonstrated based on specific

[2] Although Satterfield claims in its brief to this office that portions of the submitted information are excepted from disclosure under section 552.001 of the Government Code, this is not an exception to disclosure under the Act. Accordingly, we understand Satterfield to claim section 552.110 as the proper exception.

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 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 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.[3] *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information at issue 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) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that

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[3] 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 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).

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* ORD 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Satterfield and Linbeck contend portions of their information qualify as trade secret information under section 552.110(a). Upon review, we find Linbeck has made a *prima facie* case that some of its client information is protected as trade secret information. We note, however, Linbeck publishes the identities of some of its clients on its website. In light of Linbeck's own publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. Furthermore, we determine Satterfield and Linbeck have failed to demonstrate that any portion of the remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the system must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We determine that no portion of the remaining information is excepted from disclosure under section 552.110(a).

Satterfield and Linbeck also claim their information is subject to section 552.110(b). We note that although Linbeck argues its remaining customer information is subject to section 552.110(b), as previously stated, Linbeck has published the identities of some of its customers on its website; thus, Linbeck has failed to demonstrate that release of these customers' information would cause it substantial competitive injury. Furthermore, we find Satterfield and Linbeck have failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to the companies. *See* ORD 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). Thus, the companies have not demonstrated that substantial competitive injury would result from the release of any of the remaining information. Accordingly, the system may not withhold any of the remaining information under section 552.110(b).

We note that some of the remaining 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).

In summary, the system must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released, but only 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,

James McGuire
Assistant Attorney General
Open Records Division

JM/eeg

Ref: ID# 370876

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Janet Townsley
Satterfield & Pontikes Construction, Inc.
11000 Equity Drive, Suite 100
Houston, Texas 77041
(w/o enclosures)

Mr. Thad S. Miner
Miner-Dederick Construction, LLP
1532 Peden
Houston, Texas 77006
(w/o enclosures)

Mr. Mike Simpson
J.T. Vaughn Construction, LLC
10355 Westpark Drive
Houston, Texas 77042
(w/o enclosures)

Mr. Keith Williams
Gamma Construction
2808 Joanel
Houston, Texas 77027
(w/o enclosures)

Mr. Michael P. Emmons
SpawGlass Construction Corp.
13800 West Road
Houston, Texas 77041
(w/o enclosures)

Mr. Troy Garrett
Linbeck Group, LLC
3900 Essex Lane, Suite 1200
Houston, Texas 77027
(w/o enclosures)

Mr. Paul Stick
Summit Builders
4265 San Felipe, Suite 1100
Houston, Texas 77027
(w/o enclosures)

Mr. Don Stephens
Martin Harris State Construction
14520 Wunderlich Drive, Suite 220
Houston, Texas 77069
(w/o enclosures)

Mr. Mark Hammer
D.E. Harvey Builders
3630 Westchase
Houston, Texas 77042
(w/o enclosures)