



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2010

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

OR2010-04383

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# 373998.

The Dallas County Community College District (the "district") received a request for all submissions for request for proposals ("RFP") 11663. Although the district takes no position with respect to the public availability of the submitted information, you indicate its release may implicate the proprietary interests of the following third parties: Already Gear, Authentic Promotions, Combustion Media, Inc., Crosspine Enterprises, Inc. d/b/a/ The Richey Company ("Richey"), Design Center Signs, Gardner Resources, The Donna Bender Co. ("Bender"), Holden Custom Products, Imprint Resources, Integrated Document Solutions, Inc. ("IDS"), Mastercraft Printed Products and Services, Inc. ("Mastercraft"), Proforma A-Z Specialties ("Proforma"), Promotional Designs, Inc., Regali Inc., Sir Speedy #4102, and Texas Tees and Sports Apparel. Accordingly, you state, and provide documentation showing, the district notified these third parties of the district's receipt of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestor. *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). We have considered comments submitted by Richey, Bender, IDS, and Mastercraft and reviewed the submitted proposals.

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 received comments only from Richey, Bender, IDS, and Mastercraft explaining why their proposals should not be released. Therefore, we have no basis to conclude any of the remaining notified companies has 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. Accordingly, the district may not withhold these companies' proposals on the basis of any proprietary interest they may have in them.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Mastercraft claims portions of its proposal are excepted from disclosure under section 552.104. However, section 552.104 is a discretionary exception that protects the interests of a governmental body and does not protect the interests of a third party. *See id.* The district did not raise section 552.104. Therefore, no portion of Mastercraft's proposal may be withheld under section 552.104.

Richey, Bender, IDS, and Mastercraft claim portions of their 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." Gov't Code § 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* ORD 552 at 5. 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 and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Bender claims its joint venture information, company profile, references, question responses, and benchmark items are trade secrets under section 552.110(a). Mastercraft claims its

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).

support plan is a trade secret under section 552.110(a). As previously stated, in order to prevail on its trade secret claim, a third party must establish the information meets the definition of a trade secret. Bender has not submitted any arguments in support of its claim that the information it seeks to withhold is a trade secret. *See* ORD 552 at 5 (party must establish *prima facie* case that information is trade secret), 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). The support plan information Mastercraft seeks to withhold as a trade secret pertains specifically to RFP 11663. Information pertaining to a specific contract with a governmental body 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 Nos. 319 at 3, 306 at 3. Consequently, the district may not withhold any portion of Bender's or Mastercraft's proposals as trade secrets under section 552.110(a).

Richey, Bender, IDS, and Mastercraft assert the references/customer lists in their proposals are excepted from disclosure under section 552.110(b). The companies assert the release of this information would cause them substantial competitive harm. Upon review, we find the references/customer lists we have marked must be withheld under section 552.110(b). Mastercraft, however, seeks to withhold the identity and contact information of a customer whose identity has been published on Mastercraft's website. Thus, Mastercraft has failed to demonstrate how release of this customer's information here would cause Mastercraft substantial competitive injury. Therefore, the identity and contact information of this customer may not be withheld under section 552.110(b).

Bender and Mastercraft also seek to withhold pricing information in their proposals under section 552.110(b). Upon review, we find Bender has established release of its pricing information would cause it substantial competitive injury. Therefore, this pricing information, which we have marked, must be withheld under section 552.110(b). We note, however, the pricing information of a winning bidder, such as Mastercraft, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *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, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the district may not withhold the pricing information in Mastercraft's proposal pursuant to section 552.110(b) of the Government Code.

Bender generally asserts its joint venture information, company profile, questionnaire responses, and benchmark items are excepted under section 552.110(b). IDS generally asserts its questionnaire responses are excepted under section 552.110(b). Mastercraft generally asserts its vendor list is excepted under section 552.110(b). Aside from general

assertions that release of this information would cause their companies harm, Bender, IDS, and Mastercraft have not provided any specific factual evidence demonstrating how the release of their information would cause the companies substantial competitive harm. *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). Therefore, none of the remaining information Bender, IDS, and Mastercraft seek to withhold is excepted under section 552.110(b).

Finally, Mastercraft asserts the cellular telephone numbers of its employees are excepted from disclosure under constitutional privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses constitutional privacy. Constitutional privacy consists of two types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). This office has stated on several occasions that an individual's home address and telephone number generally are not protected by constitutional or common-law privacy under section 552.101. *See* Open Records Decision Nos. 554 at 3 (1990) (disclosure of a person's home address and telephone number is not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers do not qualify as "intimate aspects of human affairs"). Therefore, the district may not withhold the cellular telephone numbers of Mastercraft employees under section 552.101 in conjunction with constitutional privacy.

We note Bender's, Mastercraft's, Proforma's, and Richey's proposals contain insurance policy numbers. 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.

Gov't Code § 552.136. This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Thus, the insurance policy numbers we marked in Bender's, Mastercraft's, Proforma's, and Richey's proposals must be withheld under section 552.136.²

In summary, the district must withhold the references/customer lists we marked in Richey's, Bender's, IDS's, and Mastercraft's proposals under section 552.110(b) of the Government Code. The district must withhold the pricing information we marked in Bender's proposal under section 552.110(b). The district must withhold the insurance policy numbers we marked in Bender's, Mastercraft's, Proforma's, and Richey's proposals under section 552.136. The remaining information must be released.

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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

²We 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 an insurance policy number, under section 552.136, without the necessity of requesting an attorney general decision.

Ref: ID# 373998

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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