



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2010

Ms. Neera Chatterjee
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2010-05425

Dear Ms. Chatterjee:

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# 376729.

The University of Texas Medical Branch at Galveston (the "university") received a request for copies of bids submitted in response to Request for Bids number 10-41. The university takes no position as to the release of the information responsive to this request. However, you indicate that the submitted information may implicate the proprietary interests of Jani-King International ("Jani-King"), C&D Janitor Service, Inc. ("C&D"), C&S Janitorial Services ("C&S"), Marfran Cleaning, LLC ("Marfran"), and American Janitorial Services ("AJS"). Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the university has notified Jani-King, C&D, C&S, Marfran, and AJS of this request and of their right to submit arguments to this office explaining why this information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 applicability of exception in certain circumstances). We have received comments from AJS. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Jani-King, C&D, C&S, or Marfran. Thus, we have no basis for concluding that any portion of the submitted information constitutes the proprietary information of these third parties. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party

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 university may not withhold any of the submitted information based on the proprietary interests of Jani-King, C&D, C&S, or Marfran.

AJS argues that a portion of its information is excepted from disclosure pursuant to sections 552.104 and 552.110.¹ Section 552.104 excepts “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the university, not the proprietary interests of private parties such as AJS. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the university did not raise section 552.104 as an exception to disclosure. Therefore, the university may not withhold any of the responsive information under section 552.104 of the Government Code.

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

The Supreme Court of Texas 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.

¹While AJS claims section 552.101 in conjunction with section 552.110, we note that exceptions under the Act do not constitute statutory law for purposes of section 552.101.

Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a third party's claim for exception as valid under section 552.110(a) if the third party establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990). 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. *See* Open Records Decision No. 402 (1983). We note that pricing information pertaining to a particular 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." Restatement of Torts § 757 cmt. b (1939).

Section 552.110(b) 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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

AJS argues that its pricing and service information are protected under section 552.110. Upon review, we find that a portion of AJS's information, which we have marked, must be withheld pursuant to section 552.110(b). However, we find that AJS has failed to demonstrate how any portion of the remaining information at issue meets the definition of a trade secret, nor has AJS demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* Open Records Decision Nos. 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), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience,

²The 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.

and pricing not excepted under section 552.110). We also find that AJS has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause the company substantial competitive harm. *See* ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Therefore, the university may not withhold any of the remaining information pursuant to section 552.110 of the Government Code.

Section 552.136 of the Government Code states that “[n]otwithstanding 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 concluded that insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the university must withhold the insurance policy numbers you have marked under section 552.136.³

We also note you have marked a social security number pursuant to section 552.147(b) of the Government Code. Section 552.147 excepts from disclosure a living person’s social security number. Thus, the university may withhold the social security number you have marked under the section 552.147 of the Government Code.⁴

We note that some of the remaining information is protected by copyright law. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the university must withhold the information we have marked under section 552.110 and the information you have marked under section 552.136. The university may withhold the information you have marked under section 552.147. The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.

³We 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.

⁴Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147.

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,

Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

Ref: ID# 376729

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Sincerely,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

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Enc. Submitted documents

c: Requestor
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