ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2010

Mr. Gary E. Keane
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Dallas/Fort Worth International Airport
P.O. Box 619428
DFW Airport, Texas 075261-9428

OR2010-06884

Dear Mr. Keane:

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# 379292.

The Dallas/Fort Worth International Airport Board (the "board") received a request for proposals submitted in response to solicitation number 7005221. You state you are releasing some information to the requestor. Although you take no position on the public availability of the submitted information, you indicate that it may contain proprietary information. You state, and provide documentation showing, that you have notified Cofely Airport Services, Inc. ("Cofely"), ERMC IV, L.P. ("ERMC"), Meridian Management Corporation ("Meridian"), and TDIndustries, Inc. ("TDI") of the request and of their opportunity to submit comments to this office as to why the submitted information should not be released to the requestor. *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 Act in certain circumstances). We have received comments from Cofely, ERMC, Meridian, and TDI. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Cofely and TDI seek to withhold information that was not submitted to this office by the board. This ruling does not address information that was not submitted by the governmental body, and is limited to the information submitted by the board. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General

must submit copy of specific information requested). Thus, we will only address Cofely's and TDI's arguments against disclosure of the information that was actually submitted to this office for our review.

Next, we understand ERMC to assert that portions of its information are confidential because the documents were marked as such when they were submitted to the board. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

We note ERMC raises section 552.101 of the Government Code for its submitted information. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 protects information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). However, ERMC has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the board may not withhold any of the submitted information under section 552.101 of the Government Code.

Both ERMC and TDI argue that some of their information is excepted from disclosure pursuant to section 552.104 of the Government Code. 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 board, not the proprietary interests of private parties such as ERMC and TDI. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the board did not raise section 552.104 as an exception to disclosure. Therefore, the board may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, we address Cofely's, ERMC's, Meridian's, and TDI's claims 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. *See* 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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

> 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 . . .. 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 Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.[1] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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). We note that pricing information is generally not a trade secret under section 552.110(a) because it is "simply information as to single or ephemeral events

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[1]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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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); *see also Huffines*, 314 S.W.2d at 776.

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.*; *see also* 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).

Upon review, we find that TDI has established a *prima facie* case that some of its customer information constitutes trade secrets. Thus, the board must withhold the information we have marked in TDI's proposal under section 552.110(a). We note, however, that TDI has made some of the customer information it seeks to withhold publicly available on its website. Because TDI has published this information, it has failed to demonstrate that this information is a trade secret and none of this information may be withheld under section 552.110(a). Additionally, we find Cofely, Meridian, and TDI have failed to establish how any of their remaining information constitutes trade secrets under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"). Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Next, ERMC, Meridian, and TDI argue, and we understand Cofely to assert, that remaining portions of their information are excepted from disclosure under section 552.110(b). Upon review, we find Cofely, ERMC, and Meridian 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 injury. Therefore, the board must withhold the information we have marked in Cofely's, ERMC's, and Meridian's proposals under section 552.110(b) of the Government Code. However, we find Cofely, ERMC, Meridian, and TDI have made conclusory or generalized allegations or failed to provide specific factual evidence demonstrating that release of any of the remaining submitted information would result in substantial competitive harm to their interests. *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), 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, we determine that no portion of the remaining information at issue is excepted from disclosure under section 552.110(b) of the Government Code.

Cofely also raises section 552.131 of the Government Code, which provides in part:

> (a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:
>
> (1) a trade secret of the business prospect; or
>
> (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.
>
> (b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" 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." *Id.* Thus, the protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); ORD 552, 661. Therefore, because we have already disposed of Cofely's claims under section 552.110, the board may not withhold any of the remaining information under section 552.131(a) of the Government Code.

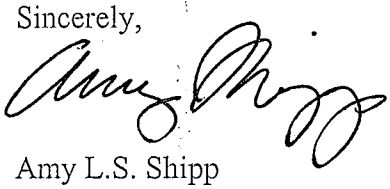
Section 552.131(b) protects information relating to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See* Gov't Code § 552.131(b). This aspect of section 552.131 protects the interests of governmental bodies, not those of third parties. Therefore, because the board does not claim this exception, none of Cofely's remaining information may be withheld under section 552.131(b) of the Government Code.

In summary, the board must withhold the information we have marked pursuant to section 552.110 of the Government Code. The remaining submitted information must be released to the requestor.

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,



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ALS/rl

Ref: ID# 379292

Enc. Submitted documents

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