



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 26, 2010

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2010-13017

Dear Ms. McGowan:

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# 391651.

The Dallas Independent School District (the "district") received a request for the technical qualifications submissions for BP#4 – 2008 Bond Program. You claim that the requested information is excepted from disclosure under section 552.110 of the Government Code. You also believe that the requested information may implicate the interests of third parties.¹ You inform us that the third parties were notified of this request for information and of their right to submit arguments to this office as to why the information should not be released.² We received correspondence from attorneys for Funk and Journeyman. We have considered all the submitted arguments and reviewed the submitted information.

We first note that an interested third party is allowed ten business days from the date of its receipt of a governmental body's notice under section 552.305 of the Government Code to

¹You inform us that the third parties concerned are Dodson Construction ("Dodson"); Joe Funk Construction Engineers, Inc. ("Funk"); Hagler Construction Company ("Hagler"); C. D. Henderson Construction Group, LLC ("Henderson"); IDEA Construction ("IDEA"); Journeyman Construction, Inc. ("Journeyman"); Phillips May Corporation ("Phillips May"); Prime Contractors, Inc. ("Prime"); and 3i Construction, LC ("3i").

²See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Dodson, Hagler, Henderson, IDEA, Phillips May, Prime, or 3i. Therefore, because none of those parties has demonstrated that any of information at issue is proprietary for the purposes of the Act, the district may not withhold any of the submitted information on the basis of any interest that Dodson, Hagler, Henderson, IDEA, Phillips May, Prime, or 3i may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the arguments submitted by Funk, Journeyman, and the district. Funk states, among other things, that its proposal was submitted to the district with the expectation that the company's information would be kept confidential. We note that information is not confidential under the Act simply because the party that submitted the information anticipated or requested 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 by 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 Gov't Code § 552.110). Accordingly, Funk's information must be released unless it falls within an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Both Funk and Journeyman claim section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104(a). We note that this exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties such as Funk and Journeyman. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the district did not claim an exception to disclosure under section 552.104. Therefore, the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Both Funk and Journeyman also claim section 552.110 of the Government Code, as does the district. Section 552.110 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). We note that this exception protects only the interests of the third parties that have provided information to a governmental body, not those of the governmental body itself. Accordingly, we consider only the arguments we received from Funk and Journeyman under section 552.110.

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.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see 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 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. We cannot conclude that section 552.110(a) is applicable, however, 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).

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

Funk contends that its entire proposal to the district constitutes a trade secret under section 552.110(a). Both Funk and Journeyman claim section 552.110(b) for their financial statements and Dun & Bradstreet information. Additionally, Funk argues that the release

³The 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).

of its proposal would undermine the competitive bidding system, cause bidders to be hesitant to include information in their proposals, and “irreparably harm owners, such as the [d]istrict[.]” In advancing this argument, Funk appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption in the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of Gov’t Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Funk’s interests in withholding its proposal.

Having considered the parties’ arguments and reviewed the information at issue, we find that Funk has not demonstrated that its proposal constitutes a trade secret under section 552.110(a). We also find that neither Funk nor Journeyman has made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the submitted information would cause either company substantial competitive harm. We therefore conclude that the district may not withhold any of the submitted information under section 552.110. *See* Gov’t Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov’t Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

We note that the submitted information includes insurance policy numbers. Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of [the Act], 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.”⁴ Gov’t Code § 552.136(b). This office has determined that an insurance policy number is an “access device” for

⁴This office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). The district must withhold the insurance policy numbers we have marked under section 552.136.⁵

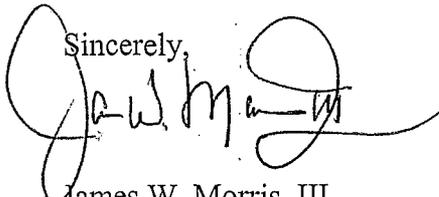
We also note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1978); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials 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.

In summary, the district must withhold the marked insurance policy numbers under section 552.136 of the Government Code. The rest of the submitted information must be released, but any copyrighted information may only 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, 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 W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

⁵We note that 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# 391651

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Ms. Lindsey Lautin Reinhardt
Goins, Underkofler, Crawford & Langdon, LLP
1201 Elm Street, Suite 4800
Dallas, Texas 75270
(w/o enclosures)

Mr. R. Carson Fisk
Ford, Nassen & Baldwin
111 Congress Avenue, Suite 1010
Austin, Texas 78701
(w/o enclosures)

Mr. Kevin Dodson
Dodson Construction
3333 Lee Parkway, Suite 600
Dallas, Texas 75219
(w/o enclosures)

Mr. Randall Hagler
Hagler Construction Company
1825 Summit Avenue #210
Plano, Texas 75074
(w/o enclosures)

Mr. Lance Aaron
C. D. Henderson Construction Group, LLC
1985 Forest Lane
Garland, Texas 75042
(w/o enclosures)

Mr. C. Mark Reid
IDEA Construction
13650 Floyd Circle
Dallas, Texas 75243
(w/o enclosures)

Mr. Gilbert May
Phillips May Corporation
4861 Sharp Street
Dallas, Texas 75247
(w/o enclosures)

Mr. Brad Bell
Prime Contractors, Inc.
525 North Sam Houston Parkway E, Suite 172
Houston, Texas 77060
(w/o enclosures)

Mr. Tom Fagg
3i Construction, LLC
400 North Saint Paul Street, Suite 420
Dallas, Texas 75201
(w/o enclosures)