



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2011

Ms. Maria J. Rivera
Texas Higher Education Coordinating Board
Office of General Counsel
P.O. Box 12788
Austin, Texas 78711

OR2011-03786

Dear Ms. Rivera:

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# 411612.

The Texas Higher Education Coordinating Board (the "board") received a request for evaluation sheets and proposals submitted in response to board solicitation 781-3-11-3914 and the proposal evaluation guidance provided to the evaluation team. You state you will release some of the requested information. You take no position with respect to the public availability of the submitted information. However, you state the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified Weaver & Tidwell, L.L.P. ("Weaver") and Clifton Gunderson L.L.P. ("Clifton") of the request and of each company's right to submit arguments to this office as to why its 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 applicability of exception to disclosure under Act in certain circumstances). We have received comments from Clifton and from a representative of Weaver.¹ We have considered the submitted arguments and reviewed the submitted information.

¹Although Clifton raises sections 552.102 and 552.104 of the Government Code, it makes no arguments regarding the applicability of these sections. We, therefore, assume Clifton has withdrawn its claim that these exceptions apply to the submitted information.

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

Clifton and Weaver both raise section 552.110 of the Government Code for portions of their information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 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. 1958); *see also* Open Records Decision No. 552 (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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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) excepts from disclosure "[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). 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 requested information. *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).

Clifton and Weaver contend portions of their proposals consist of trade secrets excepted from disclosure under section 552.110(a). Upon review, we find Clifton and Weaver have established a *prima facie* case that some of their customer information constitutes trade secrets. Accordingly, the board must withhold the customer information we have marked in Clifton's and Weaver's proposals under section 552.110(a). We note, however, that Clifton and Weaver have made some of the customer information they seek to withhold publicly available on their respective websites. Because Clifton and Weaver have published this information, they have failed to demonstrate that this information is a trade secret, and none of it may be withheld under section 552.110(a). Additionally, we find Weaver has demonstrated that a portion of its remaining information, which concerns its methodology, constitutes a trade secret and, thus, must be withheld under section 552.110(a) of the Government Code. However, Clifton and Weaver have failed to demonstrate how any of their remaining information meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been

²The following are the six factors that the Restatement gives 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).

demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We note pricing information pertaining to a particular proposal or 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." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, Clifton and Weaver have failed to establish that any portion of their remaining information constitutes a protected trade secret under section 552.110(a) of the Government Code, and none of their remaining information may be withheld on that basis.

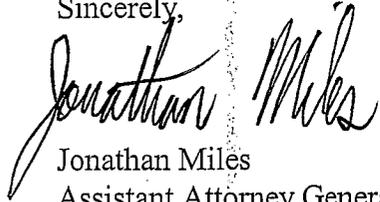
Clifton and Weaver also claim portions of their proposals are excepted from disclosure under section 552.110(b). Upon review, we find Weaver has established release of its pricing information would result in substantial competitive harm to the company. Therefore, the board must withhold the information we marked in Weaver's proposal under section 552.110(b). However, we find Clifton has failed to provide specific factual evidence demonstrating that release of any of its information, and Weaver has failed to demonstrate that the release of any of its remaining information, would result in substantial competitive harm to the companies. 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), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder, such as Clifton, 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 Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (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 board may not withhold any portion of Clifton's proposal, and any of the remaining information in Weaver's proposal, pursuant to section 552.110(b) of the Government Code.

In summary, the board must withhold the information we have marked under section 552.110(a) and section 552.110(b) of the Government Code. The remaining responsive 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 411612

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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