



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

July 2, 2012

Mr. R. Brooks Moore  
Managing Counsel, Governance  
The Texas A&M University System  
301 Tarrow Street, Sixth Floor  
College Station, Texas 77840-7896

OR2012-10148

Dear Mr. Moore:

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# 458420 (SO-12-044).

Texas A&M University (the "university") received a request for "the bids/proposals submitted in response to the Request for Proposal issued by [the university] on Project No. 02-3118." Although the university takes no position as to whether the requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you notified fifteen interested third parties of the request and of their right to submit arguments to this office as to why their information should not be released.<sup>1</sup> See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining 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 received comments from

---

<sup>1</sup>The university notified the following parties pursuant to section 552.305 of the Government Code: Bartlett Cocke General Contractors; Byrne | 3i Construction Services; CF Jordan Construction, L.L.C.; Drymalla Construction Co., Inc.; Joeris General Contractors; Kiewit Building Group; Mazanec Construction Co, Inc.; McCarthy Building Companies, Inc.; Pepper-Lawson Construction; Skanska USA Building, Inc.; SpawGlass Construction Corp.; Sundt Construction, Inc.; Tellepsen Builders, L.P.; JT Vaughn Construction; and JE Dunn Construction.

an attorney for Drymalla Construction Company, Inc. ("Drymalla"). We have considered the claimed exceptions and reviewed the submitted information.

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 not received comments from any of the remaining third parties explaining why their information should not be released. Therefore, we have no basis to conclude the remaining companies have a protected proprietary interest in the 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 university may not withhold any of the information at issue on the basis of any proprietary interest the remaining companies may have in it.

Drymalla claims that some of its information is excepted from disclosure 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. Gov't Code § 552.110(a), (b).

Section 552.110(a) excepts from disclosure "[a] trade secret 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. 1958); *see also* ORD 552 at 2. 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.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch 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 section 552.110(a) applies 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. *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." 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 requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

Having considered Drymalla's arguments and reviewed the information at issue, we find Drymalla has failed to demonstrate that any of the information at issue meets the definition of a trade secret nor has Drymalla demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.110(a). We also find Drymalla has made only conclusory allegations that release of the information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See id.* § 552.110(b). Therefore, the university may not withhold any of the information at issue pursuant to section 552.110 of the Government Code.

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 the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685

---

<sup>2</sup>The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

(Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82.

This office has found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 545 (1990) (finding financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989).

Drymalla claims the monthly salary amounts for different categories of employees listed in Attachment F are protected by common-law privacy. Drymalla explains that while the monetary information at issue pertains to types or categories of employees, "the individuals who would fill these specific positions are identified" elsewhere in the submitted proposal. We note the remaining companies also have submitted salary information of their employees who are identified in their proposals. Upon review, we find that the salary information pertaining to private employees, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the university must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining submitted 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](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 458420

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Kevin Byrd  
Bartlett Cocke General Contractors  
2550 South IH-35, Suite 100  
Austin, Texas 78704  
(w/o enclosures)

Mr. John Avila, Jr.  
Byrne | 3i Construction Services  
3100 West 7th Street, Suite 200  
Fort Worth, Texas 76107  
(w/o enclosures)

Mr. Corbett Nichter  
CF Jordan Construction, L.L.C.  
9801 Westheimer, Suite 320  
Houston, Texas 77042  
(w/o enclosures)

Drymalla Construction Company, Inc.  
c/o Mr. Thomas W. Myers  
Andrews Myers  
3900 Essex Lane, Suite 800  
Houston, Texas 77027  
(w/o enclosures)

Mr. Gary Joeris  
Joeris General Contractors  
P.O. Box 790086  
San Antonio, Texas 78279  
(w/o enclosures)

Mr. Jason Beiter  
Kiewit Building Group  
Building III, Suite 125  
901 South Mopac Expressway  
Austin, Texas 78746  
(w/o enclosures)

Mr. Ed Mazanec, III  
Mazanec Construction Co., Inc.  
P.O. Box 154400  
Waco, Texas 76705  
(w/o enclosures)

Mr. Tad Lewis  
McCarthy Building Companies, Inc.  
8 Greenway Plaza, Suite 1010  
Houston, Texas 77046  
(w/o enclosures)

Mr. Jason Lawson  
Pepper-Lawson Construction  
4555 Katy-Hockley Cut-Off Road  
Katy, Texas 77493  
(w/o enclosures)

Mr. Ronnie Howe, Jr.  
Skanska USA Building, Inc.  
1776 Yorktown Street, Suite 690  
Houston, Texas 77056  
(w/o enclosures)

Mr. Michael Emmons  
SpawGlass Construction Corp.  
13800 West Road  
Houston, Texas 77041  
(w/o enclosures)

Mr. Steve Peterson  
Tellepsen Builders, L.P.  
777 Benmar Drive, Suite 400  
Houston, Texas 77060  
(w/o enclosures)

Ms. Jennifer Omar  
JE Dunn Construction  
3500 South Gessner, Suite 200  
Houston, Texas 77063  
(w/o enclosures)

Mr. John Carlson  
Sundt Construction, Inc.  
911 Central Parkway North, Suite 375  
San Antonio, Texas 78232  
(w/o enclosures)

Mr. J. Thomas Vaughn  
JT Vaughn Construction  
10355 Westpark Drive  
Houston, Texas 77042  
(w/o enclosures)