



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2013

Ms. Valerie Simpson
Assistant General Counsel
Office of General Counsel
Houston Community College
3100 Main Street
Houston, Texas 77002

OR2013-09328

Dear Ms. Simpson:

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# 489173.

Houston Community College (the "college") received a request for the proposal submitted by AlliedBarton Security Services, L.L.C. ("AlliedBarton") in response to RFP No. 12-16. Although you state the college takes no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of AlliedBarton. Accordingly, you notified AlliedBarton of the request for information and of the company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received comments from AlliedBarton. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the college's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e), within fifteen business days of receipt of the request the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that

would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the college received the request for information on February 19, 2013. Thus, we find the college's ten-business-day deadline was March 5, 2013, and fifteen-business-day deadline was March 12, 2013. However, the college did not request a ruling from this office until March 27, 2013, and did not submit the requested proposal until May 17, 2013. *See id.* § 552.308(a) (deadline under Act is met if document bears post office mark indicating time within deadline period). Consequently, we find the college failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Because third-party interests are at stake in this instance, we will consider whether the information at issue must be withheld under the Act.

AlliedBarton asserts some of its information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, AlliedBarton has not directed our attention to any law under which any of this information is considered to be confidential for purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the college may not withhold any portion of AlliedBarton's proposal under section 552.101 of the Government Code.

AlliedBarton also asserts its information is excepted under section 552.104 of the Government Code. However, this section only protects the interests of a governmental body. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). Because section 552.104 does not protect the interests of a third party, and the college does not claim this section applies to the submitted information, the college may not withhold any portion of the submitted information under section 552.104 of the Government Code.

AlliedBarton raises section 552.110 of the Government Code for some of its information. 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) of the Government Code 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 Open Records Decision No. 552 at 2 (1990). Section 757 provides 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. 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 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).

¹The 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).

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). This section 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).

AlliedBarton seeks to withhold some of its submitted information under section 552.110(a). Upon review we find AlliedBarton has established some of its customer information constitutes trade secrets. Therefore, the college must withhold this information, which we have marked, under section 552.110(a). We note, however, AlliedBarton has made its remaining customer information publicly available on its website. Because AlliedBarton has published this information, it has failed to demonstrate this information is a trade secret. Further, we find AlliedBarton has not demonstrated how any of its remaining information, including its pricing information and information that was tailored to this particular proposal, meets the definition of a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (trade secret “is not simply information as to single or ephemeral events in the conduct of the business”); 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 3 (information relating to organization and personnel, professional references, market studies, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the college may not withhold any of AlliedBarton’s remaining information under section 552.110(a).

AlliedBarton also seeks to withhold some of its remaining submitted information under section 552.110(b). Upon review, we find AlliedBarton has established the release of some of its information would cause the company substantial competitive harm. Thus, the college must withhold the information we have marked under section 552.110(b). However, we find AlliedBarton has made only conclusory allegations that release of its remaining information at issue would result in substantial competitive injury. *See generally* Open Records Decision Nos. 661, 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, 175 at 4 (1977) (resumes cannot be said to fall within any exception to Act). Furthermore, we note the pricing information of a winning bidder, such as AlliedBarton 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 cost of doing business with government). Accordingly, the college may not withhold any of AlliedBarton’s remaining information under section 552.110(b).

In summary, the college must withhold the information we have marked under section 552.110 of the Government Code. The remaining 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 489173

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Fern McGovern
AlliedBarton Security Services LLC
Eight Tower Bridge
161 Washington Street, Suite 600
Conshohocken, Pennsylvania 19428
(w/o enclosures)