



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2013

Ms. Elaina Polsen
Director of Communications
Clear Creek Independent School District
2425 East Main Street
League City, Texas 77573

OR2013-19323

Dear Ms. Polsen:

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# 503071 (CCISD ID Nos.100368 and 100380).

The Clear Creek Independent School District (the "district") received two requests for information pertaining to the district's request for qualifications for construction job number 2013.413. You state you have released some information to the first requestor and inform us the first requestor has withdrawn her request for the remaining information she requested. Although you take no position on whether the submitted information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Balfour Beatty Construction; Brae Burn Construction Company ("Brae Burn"); Comex; DivisionOne Construction; Drymalla Construction Company, Inc. ("Drymalla"); Durotech, Inc. ("Durotech"); Gamma Construction Company ("Gamma"); Gilbane Building Company; ICI Construction, Inc. ("ICI"); Jamail & Smith Construction, LP; Morganti Texas, Inc. ("Morganti"); Pepper-Lawson Construction, LP; Purcell Construction, Inc.; Pyramid Constructors, LLP; SpawGlass; Tellepsen Builders, LP ("Tellepsen"); and Turner Construction Company. Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Morganti stating

it does not object to release of its information. We have also received comments from Brae Burn, Drymalla, Durotech, Gamma, ICI, and Tellepsen. We have considered the submitted arguments 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 to 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 letter, we have only received correspondence from Brae Burn, Drymalla, Durotech, Gamma, ICI, Morganti, and Tellepsen. Thus, the remaining third parties have not demonstrated they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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 district may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information. We will, however, consider the submitted arguments against disclosure.

Gamma 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. We note, however, Gamma has not pointed to any law, nor are we aware of any, that would make any of its information confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, none of Gamma's information may be withheld under section 552.101 of the Government Code.

ICI asserts its information should be protected from disclosure under section 552.101 of the Government Code in conjunction with the holding in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The holding in *National Parks* pertains to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency. The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 770. 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 *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 section 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 ICI's interest in the submitted information.

Gamma, Durotech, and Tellepsen raise section 552.104 of the Government Code. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991), 522 (1989) (discretionary exceptions in general). In this instance, the district does not raise section 552.104 as an exception to disclosure. Therefore, the district may not withhold any of the information at issue pursuant to section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

Brae Burn, Drymalla, Durotech, Gamma, ICI, and Tellepsen each claim section 552.110 of the Government Code for portions of the submitted 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. *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* 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.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 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). We note pricing information pertaining to a particular 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." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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* ORD 661 at 5-6.

After reviewing the submitted arguments and the information at issue, we conclude ICI has demonstrated that portions of its information constitute trade secrets for purposes of section 552.110(a). Accordingly, the district must withhold the information we have marked under section 552.110(a). However, we find Brae Burn, Drymalla, Durotech, Gamma, ICI, and Tellepsen have failed to establish any of the remaining information at issue meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for the remaining information. *See* Restatement of Torts § 757 cmt. b; ORDs 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 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Thus, the district may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

¹The following are the six factors 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).

Brae Burn, Drymalla, Durotech, Gamma, ICI, and Tellepsen assert portions of the remaining information are excepted from disclosure under section 552.110(b). After reviewing the submitted arguments and the information at issue, we conclude Brae Burn, Durotech, Gamma, ICI, and Tellepsen have established release of portions of the remaining information would cause them substantial competitive harm. Accordingly, the district must withhold the information we have marked in the remaining information under section 552.110(b). However, we find Brae Burn, Drymalla, Durotech, Gamma, ICI, and Tellepsen have failed to provide specific factual evidence demonstrating release of any of the remaining information would result in substantial competitive harm to the companies. *See* 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. Furthermore, we note the pricing information of winning bidders, such as Drymalla and Durotech, are generally not excepted from disclosure 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 344-45 (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 district may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

Section 552.136(b) of the Government Code states 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.”² Gov't Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Therefore, the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, we note some of the materials at issue are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person 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.

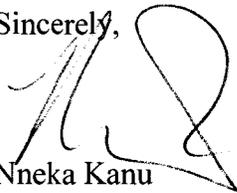
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the district must withhold the information we have marked under section 552.110 of the Government Code. The district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information only may 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 503071

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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