



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2014

Ms. Haley Turner
Counsel for China Spring Independent School District
Walsh, Anderson, Gallegos, Green and Treviño, P.C.
505 East Huntland Drive, Suite 600
Austin, Texas 78752

OR2014-01732

Dear Ms. Turner:

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# 512335.

The China Spring Independent School District (the "district"), which you represent, received a request for responses submitted for Request for Proposals Number 05-1301 for Construction Manager at Risk, excluding financial information.¹ Although you take no position as to whether the remaining requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state you notified Balfour Beatty Construction; Barsh Company; Drymalla Construction Company, Inc.; Gallagher Construction Company, L.P. ("Gallagher"); John W. Erwin General Contractor, Inc.; Mazanec Construction ("Mazanec"); MW Builders, Inc.; Northstar Builders, Inc.; Pearson Construction, Inc.; Pete Durant & Associates, Inc.; Vanguard Contractors, LP; and W.B. Kibler Construction Company, Ltd. ("WBK") of the request for information 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); *see also* Open

¹You indicate the district sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

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 the Act in certain circumstances). We have received comments from Gallagher, Mazanec, and WBK. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the requestor has excluded from his request financial information pertaining to the bidding companies. Thus, this type of information is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release any such information. As such, we need not address the third parties' arguments against disclosure of this non-responsive information.

Next, we note 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). You state some of the third parties have consented to release of their information, which the district will release to the requestor. As of the date of this letter, we have not received comments from 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 responsive 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 district may not withhold any of the responsive information on the basis of any proprietary interest the remaining third parties may have in it.

Gallagher argues its information is marked "confidential" and supplied with the expectation of confidentiality. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to 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). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Mezanec argues some of its information fits the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the Texas Uniform Trade Secrets Act (the "TUTSA") as added by the Eighty-third Texas Legislature. 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. This section encompasses information made confidential by other statutes. Section 134A.002(6) provides:

(6) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)’s definition of trade secret expressly applies to chapter 134A only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6); *see also id.* § 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act); Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the district may not withhold any of Mazanec’s information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of Texas Civil Practice and Remedies Code.

Gallagher, Mezanec, and WBK claim some of their information is excepted under section 552.110 of the Government Code, which 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) protects trade secrets 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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 claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable 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) protects "[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 exception to disclosure 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. *Id.*; *see also* ORD 661 at 5-6 (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).

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

Upon review, we find Gallagher and WBK have established a *prima facie* case that their customer information constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information at issue is not publicly available on Gallagher's or WBK's websites, the district must withhold the customer information at issue under section 552.110(a). However, we conclude Gallagher, Mazanec, and WBK have failed to establish a *prima facie* case that their remaining responsive information meets the definition of a trade secret. Moreover, we find Gallagher, Mazanec, and WBK have not demonstrated the necessary factors to establish a trade secret claim for their remaining responsive information. *See* ORD 402. Therefore, none of Gallagher's, Mazanec's, or WBK's remaining responsive information may be withheld under section 552.110(a).

Gallagher, Mazanec, and WBK argue portions of their remaining information consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Gallagher and WBK have established that some of their submitted information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Accordingly, the district must withhold the information we have marked under section 552.110(b) of the Government Code. However, upon review, we find Gallagher, Mazanec, and WBK have not established any of the remaining responsive information constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. *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 costs, 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, the district may not withhold any of the remaining responsive information under section 552.110(b).

We note portions of the remaining responsive information are subject to section 552.136 of the Government Code.³ Section 552.136 states, in part, "Notwithstanding any other provision of this chapter, 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." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device number for the purposes of

³The 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).

section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, the district must withhold the insurance policy numbers we have marked under section 552.136.⁴

In summary, to the extent the customer information at issue is not publicly available on Gallagher's or WBK's websites, the district must withhold the customer information of Gallagher and WBK under section 552.110(a) of the Government Code. The district must withhold the information we have marked under section 552.110(b) of the Government Code and the insurance policy numbers we have marked under section 552.136 of the Government Code. The district must release the remaining responsive information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 512335

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the information described in section 552.136(b). Gov't Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor).

Mr. Brad W. Gaswirth
Counsel for Gallagher Construction Company, L.P.
Canterbury, Gooch, Surratt, Shapiro, Stein & Gaswirth P.C.
5005 LBJ Freeway, Suite 1000
Dallas, Texas 75244
(w/o enclosures)

Mr. Matthew M. Waterman
Counsel for W.B. Kibler Construction Company, Ltd.
Slates Harwell
1700 Pacific Suite 3800
Dallas, Texas 75201
(w/o enclosures)

Ms. Julia B. Jurgensen
Counsel for Mazanec Construction
Beard, Kultgen, Brophy, Bostwick, Dickson & Squires L.L.P.
P.O. Box 21117
Waco, Texas 76702-1117
(w/o enclosures)

Mr. Wayne Davis
Baird/Williams Construction Ltd.
P.O. Box 917
Temple, Texas 76503
(w/o enclosures)

Mr. Steven Levy
Balfour Beatty Construction
3100 McKinnon Street
Dallas, Texas 75201
(w/o enclosures)

Mr. Rick Brophy
Counsel for Barsh Company
220 South Fourth Street
Waco, Texas 76701
(w/o enclosures)

Mr. Andy McSwain
Counsel for CWA Construction, Inc.
Fulbright Winniford
P.O. Box 445
Waco, Texas 76703
(w/o enclosures)

Mr. Russell R. Klaus
Drymalla Construction Company, Inc.
608 Harbert Street
Columbus, Texas 78934
(w/o enclosures)

Mr. Tom Rehak
Vanguard Contractors, L.P.
820 North 31st Street
Temple, Texas 76504
(w/o enclosures)

Mr. John Bennett
John W. Erwin General Contractor, Inc.
313 South 13th Street
Waco, Texas 76701
(w/o enclosures)

Mr. R. Jason Evelyn
MW Builders, Inc.
1701 North General Bruce Drive
Temple, Texas 76502
(w/o enclosures)

Mr. Jason Crutcher
Northstar Builders Group
270 North Denton Tap Road, Suite 250
Coppell, Texas 75019
(w/o enclosures)

Mr. J. Scott Pearson
Pearson Construction Inc.
P.O. Box 7506
Waco, Texas 76714
(w/o enclosures)

Mr. Darrell Durant
Pete Durant & Associates, Inc.
2040 Golden Triangle Drive
Fort Worth, Texas 76177
(w/o enclosures)

Mr. Ron Hamm and Mr. Randy Landers
Speed Feb-Crete Corporation
1150 East Kennedale Corporation
Kennedale, Texas 76060
(w/o enclosures)