



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 12, 2014

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OR2014-07986

Dear Ms. Scott:

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# 522211.

The Irving Independent School District (the "district"), which you represent, received two requests for the following categories of information pertaining to each of two specified requests for qualifications ("RFQ"): (1) the proposal grading sheet, tabulation, and scoring analysis, and (2) the submitted proposals including qualifications, all required supporting documentation, and HUB subcontracting plans. We understand you have released some of the responsive information. Although you take no position with respect to the remaining information, you state its release may implicate the proprietary interests of certain third parties, namely: MDI General Contractors ("MDI"), Gallagher Construction Company, L.P. d/b/a Gallagher Construction Services ("Gallagher"), Adolfson & Peterson Construction ("APC"), W.B. Kibler Construction Company, Ltd. ("Kibler"), 3i Construction, L.L.C. ("3i"), C.F. Jordan Construction, L.L.C. ("Jordan"), Balfour Beatty Construction ("Balfour"), Barlett Cocke General Contractors ("Barlette"), Big Sky Construction ("Big Sky"), Cadence McShane Construction Co., L.L.C. ("CMC"), Joeris General Contractors, Ltd. ("Joeris"), Mart Inc. General Contractors ("Mart"), Northstar Builders ("Northstar"), and Pogue Construction ("Pogue"). Accordingly, you state and provide documentation showing, you have notified these third parties of the requests 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 (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 the circumstances). We have received comments from APC, Kibler, and Jordan, MDI, Gallagher, and 3i. We have considered the submitted arguments and reviewed the submitted information.<sup>1</sup>

Initially, we note MDI, Gallagher, and 3i seek only to withhold information the district has not submitted to this office for review. Kibler and APC also seek to withhold some information that was not submitted to this office for review.<sup>2</sup> This ruling does not address information that was not submitted by the district and is limited to the information submitted as responsive by the district. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Thus, as MDI, Gallagher, and 3i do not seek to withhold any portion of the submitted information, we will not address their arguments. We also will not address Kibler's and APC's arguments as to the information not submitted by the district.

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 Balfour, Barlett, Big Sky, CMC, Joeris, Mart, Northstar, or Pogue explaining why their information should not be released. Therefore, we have no basis to conclude any of these third parties 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 district may not withhold the submitted information on the basis of any proprietary interest these third parties may have in it. However, we will address the arguments submitted by APC, Jordan, and Kibler.

APC and Kibler assert portions of their information consist of private financial information. Section 552.101 of the Government Code exempts from disclosure "information considered

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<sup>1</sup>We note the district did not submit the information required by section 552.301(b) of the Government Code within the ten-business-day deadline and therefore failed to comply with the requirements of section 552.301(b). *See id.* § 552.301(b). Nonetheless, because third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301, we will address the third-party arguments against disclosure of the requested information. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977).

<sup>2</sup>The district did not submit Kibler's Estimated Comparison Study. Further, the district only submitted APC's "Binding & Insurance" and "Financial Statement" for our review.

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. Common-law privacy protects information if it (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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev’d* on other grounds, 796 S.W.2d 692 (Tex. 1990). Upon review, we find APC and Kibler have failed to demonstrate the information at issue is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the district may not withhold any of the information at issue under section 552.101 in conjunction with common-law privacy.

APC, Jordan, and Kibler each raise section 552.110 of the Government Code for portions of the submitted 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) 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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>3</sup> 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 the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

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* Open Records Decision No. 661 at 5 (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).

APC and Kibler each argue portions of the submitted information constitute trade secrets under section 552.110(a). Upon review, we find Kibler has established a *prima facie* case its customer information constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent Kibler’s customer information is not publicly available on the company’s website, the district must withhold it under section 552.110(a). However, APC and Kibler each have failed to establish a *prima facie* case any of the remaining information at issue meets the definition of a trade secret, nor have APC and Kibler demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade

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<sup>3</sup>The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

secret and necessary factors have been demonstrated to establish trade secret claim). Accordingly, none of the remaining information at issue may be withheld under section 552.110(a) of the Government Code.

APC, Jordan, and Kibler each raise section 552.110(b) of the Government Code, which protects certain commercial information, the release of which would cause substantial competitive harm. We find APC, Jordan, and Kibler have failed to demonstrate the release of any of the information at issue would result in substantial harm to its competitive position. *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, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the district may not withhold any of the information at issue under section 552.110(b) of the Government Code.

Jordan also raises section 552.104 of the Government Code for its information. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *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). As the district does not argue section 552.104 is applicable, we will not consider Jordan’s claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Finally, APC and Kibler claim their insurance policy numbers are excepted from public disclosure under section 552.136 of the Government Code. Section 552.136 provides, “[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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See Open Records Decision No. 684* at 9 (2009). Upon review, we conclude the district must withhold APC’s and Kibler’s insurance policy numbers under section 552.136 of the Government Code.

In summary, to the extent Kibler’s customer information is not publicly available on the company’s website, the district must withhold it under section 552.110(a). The district also must withhold APC’s and Kibler’s insurance policy numbers under section 552.136 of the Government Code. The district must release the remaining submitted 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](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,



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CLS/tch

Ref: ID# 522211

Enc. Submitted documents

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