



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2014

Mr. K. Scott Oliver
Corporate Counsel
San Antonio Water System
P.O. Box 2499
San Antonio, Texas 78298-2449

OR2014-21703

Dear Mr. Oliver:

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# 545143.

The San Antonio Water System (the "system") received two requests from two different requestors for a copy of all submitted proposals to the system for a specified project.¹ Although you take 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 Shannon-Monk, Inc. ("Shannon-Monk"); Lambda Construction I, Ltd. ("Lambda"); Payton Construction, Inc. ("Payton"); BRB Contractors, Inc. ("BRB"); Alamo 1 Environmental dba Alamo 1 ("Alamo"); and Pepper-Lawson Waterworks, LLC ("Pepper-Lawson"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights 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

¹We note the system sought and received clarification of the requests. See Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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). You inform us Shannon-Monk, Lambda, and Payton do not object to the release of their information and that you have released it. We have received comments from BRB, Alamo, and Pepper-Lawson objecting to release of their information. We have considered the submitted arguments and reviewed the submitted information.

BRB claims portions of its information are excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). However, section 552.102 applies to information in the personnel file of a governmental employee. *See id.* None of BRB's information consists of information in the personnel file of a governmental employee. Therefore, we find section 552.102 of the Government Code is not applicable, and the system may not withhold any of BRB's information on that basis.

Alamo and BRB raise section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Accordingly, we will not consider the third parties' claim under this section. In this instance, the system does not raise section 552.104 as an exception to disclosure. Therefore, the system may not withhold any of the submitted information under section 552.104 of the Government Code.

BRB raises section 552.117 of the Government Code for some of its information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a); Open Records Decision No. 622 (1994). We find BRB has failed to demonstrate how any of its information is subject to section 552.117(a)(1). Accordingly, the system may not withhold any of the submitted information under section 552.117(a)(1) of the Government Code.

Section 552.110 of the Government Code 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). 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. 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 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. *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 Record Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Pepper-Lawson argues portions of its information constitute trade secrets under section 552.110(a). Upon review, we find Pepper-Lawson has established that the customer information we marked constitutes a trade secret. Therefore, to the extent the customer information at issue is not publicly available on Pepper-Lawson's website, the system must

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).

withhold the customer information we marked. We further find Pepper-Lawson has established some of the remaining portions of its information, which we marked, constitute trade secret information. Accordingly, the system must withhold this information under section 552.110(a). However, Pepper-Lawson has failed to demonstrate how any of the remaining information it seeks to withhold meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for the information. *See* Open Records Decision No. 319 at 3 (1982) (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). Thus, none of Pepper-Lawson's remaining information may be withheld under section 552.110(a) of the Government Code.

Alamo, BRB, and Pepper-Lawson argue portions of their information are excepted under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, 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, release of requested information would cause that party substantial competitive harm).

Alamo, BRB, and Pepper-Lawson contend their information is commercial or financial information, the release of which would cause the companies substantial competitive harm. Upon review, we find Alamo has demonstrated its customer information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, to the extent Alamo's customer information is not publicly available on its website, the system must withhold Alamo's customer information under section 552.110(b). Additionally, we find Alamo has established the information we marked consists of commercial or financial information, the release of which would cause Alamo substantial competitive harm. Therefore, the system must withhold Alamo's information which we marked under section 552.110(b) of the Government Code. However, we find the third parties at issue have not demonstrated the release of the remaining information at issue would cause them substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See* ORD 661. Accordingly, the system may not withhold any of the remaining information at issue under section 552.110(b).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ See Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the system must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code 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, the system must withhold the insurance policy numbers we marked under section 552.136 of the Government Code. However, we find Alamo has failed to demonstrate how section 552.136 is applicable to any of its remaining information. Accordingly, the system may not withhold any of the remaining information under section 552.136.

Alamo raises section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). We note subsection 552.137(c) provides subsection 552.137(a) does not apply to an e-mail address provided to a governmental body by a vendor who seeks a contractual relationship with the governmental body or to an email address contained in a response to a request for bids or proposals. *Id.* § 552.137(c)(2)-(3). We also note section 552.137 is not applicable to an internet website address. Upon review, we find Alamo has failed to demonstrate how any of the information at issue is subject to section 552.137. Thus, the system may not withhold any of the information at issue under section 552.137 of the Government Code.

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).

Alamo also asserts that some of its remaining information is excepted under section 552.147 of the Government Code, which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147(a). We note the application of section 552.147 is limited to social security numbers. Alamo has failed to demonstrate that the information it seeks to withhold is a social security number, and the system may not withhold it under section 552.147.

In summary, to the extent Pepper-Lawson’s customer information is not publicly available on its website, the system must withhold Pepper-Lawson’s customer information we marked under section 552.110(a) of the Government Code. The system must withhold the remaining portions of Pepper-Lawson’s information we marked under section 552.110(a) of the Government Code. To the extent Alamo’s customer information is not publicly available on its website, the system must withhold Alamo’s customer information under section 552.110(b) of the Government Code. The system must withhold the remaining portions of Alamo’s information we marked under section 552.110(b) of the Government Code. The system must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must withhold the insurance policy numbers we marked under section 552.136 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.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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/dls

Ref: ID# 545143

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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