



February 9, 2015

Ms. Andrea Sheehan
Assistant General Counsel
Texas Association of School Boards
P.O. Box 400
Austin, Texas 78767-0400

OR2015-02430

Dear Ms. Sheehan:

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# 552961.

The Texas Association of School Boards, Inc., custodian of records for the Texas Local Government Purchasing Cooperative d/b/a BuyBoard (the "cooperative") received a request for all proposals and the scoring sheet for all bidders that were awarded contracts for Proposal Invitation 464-14. You state you have released or will release some of the requested information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.136 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of several third parties. Accordingly, you state you notified Alpha Building Corporation; Dura Pier Facilities Services Ltd. ("Facilities"); E Contractors USA, L.L.C.; Jamail & Smith Construction, L.P.; Panhandle Steel Buildings, Inc. ("PSB"); Restoration Specialists, L.L.C.; SDB, Inc. ("SDB"); and the Trevino Group ("Trevino") of the request for information and of the companies' right to submit arguments to this office as to why the information at issue 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 the Act in certain circumstances). We have received comments from Facilities, PSB, SDB, and Trevino. 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 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 any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the cooperative may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we note SDB objects to disclosure of information the cooperative has not submitted to this office for review. This ruling does not address information that was not submitted by the cooperative and is limited to the information submitted as responsive by the cooperative. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Facilities argues portions of its submitted information are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. We note, however, that section 552.104 only protects the interests of a governmental body and does not protect the interests of a third party; therefore, we will not consider Facilities' claim under section 552.104. *See* Open Records Decision No. 592 at 9 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive bidding situation, and not interests of private parties submitting information to government).

Facilities, SDB, and Trevino argue 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.¹ 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. 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* ORD 661 at 5.

Facilities, SDB, and Trevino argue portions of their submitted information are commercial or financial information, the release of which would cause substantial competitive harm. Upon review, we find Facilities, SDB, and Trevino have demonstrated their customer information constitutes commercial or financial information, the release of which would

¹The 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).

cause substantial competitive injury. Accordingly, the cooperative must withhold the customer information of Facilities, SDB, and Trevino, to the extent it is not publicly available on the companies' websites, under section 552.110(b) of the Government Code. However, we note the pricing information of a winning bidder is generally not excepted under section 552.110(b), and 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). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Facilities, SDB, and Trevino were each awarded a contract for the information at issue. Accordingly, the cooperative may not withhold any of the companies' remaining submitted information under section 552.110(b) of the Government Code.

Facilities, SDB, and Trevino also argue portions of their remaining submitted information constitute trade secrets under section 552.110(a). Upon review, we find Facilities, SDB, and Trevino have failed to establish a *prima facie* case their information meets the definition of a trade secret and these third parties have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 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); ORD 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). Further, we note pricing information pertaining to a particular proposal or 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." *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Accordingly, none of the submitted information may be withheld under section 552.110(a) of the Government Code.

Section 552.136 of the Government Code states that "[n]otwithstanding 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. This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the cooperative must withhold the insurance policy numbers and account numbers you have marked under section 552.136 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.*

§ 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which 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 681-82. 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 have marked in Facilities' information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the cooperative must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.²

Facilities also generally raises section 552.101 of the Government Code for portions of its remaining submitted information. However, Facilities has not pointed to any confidentiality provision, nor are we aware of any, that would make this 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, the cooperative may not withhold any of Facilities' remaining submitted information under section 552.101 of the Government Code.

In summary, the cooperative must withhold the customer information of Facilities, SDB, and Trevino, to the extent it is not publicly available on the companies' websites, under section 552.110(b) of the Government Code. The cooperative must withhold the information you have marked under section 552.136 of the Government Code. The cooperative must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The cooperative 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, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

²As our ruling is dispositive, we need not address the remaining argument against disclosure of the information at issue.

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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Open Records Division

ATA/akg

Ref: ID# 552961

Enc. Submitted documents

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