



February 19, 2015

Ms. Cynthia Rincón
General Counsel
Fort Bend Independent School District
16431 Lexington Boulevard
Sugar Land, Texas 77479

OR2015-03334

Dear Ms. Rincón:

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# 554008 (Fort Bend ISD ORR# 14-15-460).

The Fort Bend Independent School District (the "district") received a request for the awarded contract and winning proposal related to a specified request for proposals ("RFP"), all proposals submitted in response to the RFP, and the bid tabulations or scoring sheets for the RFP submissions. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the information may implicate the proprietary interests of Bank of America ("BOA"), Frost Bank ("Frost"), JP Morgan Chase Bank ("JP Morgan"), Prosperity Bank ("Prosperity"), and Wells Fargo ("Wells Fargo"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right 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 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 Frost, Prosperity, and Wells Fargo. We have reviewed the submitted arguments and 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 BOA or JP Morgan explaining why the submitted information should not be released. Therefore, we have no basis to conclude that BOA or JP Morgan have protected proprietary interests 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 district may not withhold any of the submitted information on the basis of any proprietary interests BOA or JP Morgan may have in the information.

Frost 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." Gov't Code § 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 Frost's claims 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.

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). 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 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. 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 (1980), 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 (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).

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

Frost, Prosperity, and Wells Fargo argue portions of their information consist of commercial and financial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Prosperity and Wells Fargo have demonstrated portions of their information constitute commercial or financial information, the release of which could cause substantial competitive injury. Accordingly, the district must withhold the information we have marked under section 552.110(b) of the Government Code. Furthermore, we conclude Wells Fargo has demonstrated that the company's client information consists of commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Thus, the district must withhold Wells Fargo's client information, under section 552.110(b); however, to the extent the client information is publicly available on the company's website, the district may not withhold such information under section 552.110(b). However, we find Frost, Prosperity and Wells Fargo have not demonstrated how the release of their remaining information would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 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). We note the RFP at issue, and the resulting contract, were awarded to Prosperity. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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 344-345 (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). Therefore, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Frost, Prosperity, and Wells Fargo also assert their remaining information constitutes trade secrets under section 552.110(a) of the Government Code. To the extent Wells Fargo's client information is publicly available on the company's website and not excepted from disclosure under section 552.110(b), the district may not withhold such information under section 552.110(a). Upon review, we conclude Frost, Prosperity, and Wells Fargo have failed to establish a *prima facie* case that any of their remaining information meets the definition of a trade secret, nor have the companies demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b; 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). Accordingly, the

district may not withhold any of the remaining information under section 552.110(a) of the Government Code.

We note the remaining information contains information subject to section 552.136 of the Government Code, which 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.”² 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 (2009). Upon review, the district must withhold the routing and insurance policy numbers we have marked under section 552.136 of the Government Code.

We also note some of the remaining information appears to be 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.

In summary, the district must withhold the information we have marked and Wells Fargo’s client information under section 552.110(b) of the Government Code; however, to the extent the client information is publicly available on the company’s website, the district may not withhold such information under section 552.110(b). The district must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released; however, any information subject to copyright may only 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Rustam Abedinzadeh
Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 554008

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Carlene Plummer
Bank of America, N.A.
700 Louisiana Street, Eighth Floor
Houston, Texas 77002
(w/o enclosures)

Mr. Robert Bernal
Vice President/Public Funds Concurrence
Frost
P.O. Box 1600
San Antonio, Texas 78296-1600
w/o enclosures

Ms. Joanna Caudillo
JP Morgan Chase Bank, N.A.
712 Main Street, Ninth Floor
Houston, Texas 77002
(w/o enclosures)

Ms. Krystal Shipman
Assistant Vice President/Legal
Prosperity Bank
80 Sugar Creek Center Boulevard
Sugar Land, Texas 77478
(w/o enclosures)

Mr. Orlando Saenz
Relationship Manager/Government Banking
Wells Fargo Bank, N.A.
MAC T5074-01B
142 Gulf Freeway, Suite 110
Houston, Texas 77034
(w/o enclosures)