



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 15, 2016

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

OR2016-27717

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# 637935.

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 purchase orders, and any related information, pertaining to a specified contract during a specified time period, excluding purchase orders pertaining to the requestor.¹ You claim some of the submitted information is excepted from disclosure under sections 552.130 and 552.136 of the Government Code. You also state you notified Adobe Equipment

¹You state the cooperative sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating 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 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). You also state you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the cooperative received the required deposit on September 23, 2016. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

Houston; Alvin Equipment Co.; Anderson Machinery Co.; Associated Supply Co., d/b/a ASCO (“ASCO”); Bane Machinery, Inc. (“Bane”); Bandit of Texas, LLC (“Bandit”); Bobcat Company; Briggs Equipment Co. (“Briggs”); Central Texas Equipment; Closner Equipment Company, Inc.; Cooper Equipment Company; Crafcot Texas, Inc.; Darr Equipment Co.; Doggett Machinery Services (“Doggett”); Duraco, Inc.; EKA, Inc.; Godwin Pumps of America; H&V Equipment, Inc.; H.D. Industries, Inc.; John Deere Construction and Forestry (“John Deere”); Kinloch Equipment and Supply, Inc.; Kirby-Smith Machinery (“Kirby”); Kubota Tractor Corporation (“Kubota”); Landmark Equipment, Inc.; Mustang Cat; Nueces Power Equipment; Powerscreen Texas, Inc.; R.B. Everett and Co. (“Everett”); RDO Equipment Company (“RDO”); ROMCO Equipment Company, LP (“ROMCO”); Vermeer Equipment of Texas – Louisiana Inc.; Waukesha Pearce Industries, Inc.; and Wirtgen America, Inc. (“Wirtgen”) 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 ASCO, Bane, Bandit, Briggs, Doggett, John Deere, Kirby, Kubota, Everett, RDO, ROMCO, and Wirtgen. We have considered the submitted arguments and reviewed the submitted information.

Initially, Kubota argues some of its submitted information is not responsive to the request for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the cooperative has submitted information for our review, we find the cooperative has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information. Additionally, you state some of the submitted information, which you have marked, is not responsive to the present request. This ruling does not address the public availability of the non-responsive information, and the cooperative need not release it in response to this request.

Next, we note Bandit and Kirby object 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 the cooperative has submitted for our review.² *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we understand John Deere asserts its information was supplied with the expectation of confidentiality. Information is not confidential under the Act simply because the party that

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

An interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from any of the remaining third parties. Thus, 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(a)-(b); 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 cooperative may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. ASCO, Bane, Briggs, Doggett, John Deere, Kirby, RDO, ROMCO, and Wirtgen each state they have competitors. ASCO states release of its information would give its competitors a competitive advantage by being able to knowingly undercut ASCO’s pricing in future bidding situations. Bane states release of its information would jeopardize its future bidding process by revealing its pricing information and thus giving its competitors an advantage. Briggs states release of its information would provide a competitive advantage to competitors by allowing them to accurately estimate and undercut Briggs’ future bids. Doggett states release of its information would reveal detailed pricing and discounting information to a competitor and hurt Doggett’s existing business with current and prospective cooperative members. John Deere states release of its information at issue would allow competitors access to its pricing and discount information and allow them to undercut John Deere’s prices, thus negatively impacting John Deere’s business. Kirby states release of its information at issue would allow competitors to underbid Kirby in future bidding situations. RDO states release of its information at issue would reveal its pricing structures,

thus disadvantaging RDO in future bidding transactions. ROMCO states release of its information would give its competitors an unfair advantage by revealing its pricing information and its non-price competition. Wirtgen states release of its information at issue would cause competitive harm to its business by identifying possible customers and details about those customers and informing competitors how to undercut Wirtgen's pricing. After review of the information at issue and consideration of the arguments, we find ASCO, Bane, Briggs, Doggett, John Deere, Kirby, RDO, ROMCO, and Wirtgen have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the cooperative may withhold ASCO's submitted information, Bane's submitted information, Doggett's submitted information, RDO's submitted information, ROMCO's submitted information, and the information we have marked and indicated under section 552.104(a) of the Government Code.³

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* Open Records Decision No. 552 (1990). 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

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

secret factors.⁴ 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).

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 (1990).

Everett claims portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, however, we conclude Everett has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find Everett has not demonstrated the necessary factors to establish a trade secret claim for its information at issue. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of Everett’s information at issue may be withheld under section 552.110(a).

⁴The 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).

Everett argues some of its information consists of commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. We note Everett was a winning bidder in this instance. 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 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3); Open Records Decision No. 541 at 8 (1990). Upon review, we find Everett has not established any of its information at issue constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. Accordingly, none of Everett's information at issue may be withheld under section 552.110(b) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the cooperative must withhold the motor vehicle record information you have marked in the remaining information under section 552.130 of the Government Code.

We 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 cooperative may withhold ASCO's submitted information, Bane's submitted information, Doggett's submitted information, RDO's submitted information, ROMCO's submitted information, and the information we have marked and indicated under section 552.104(a) of the Government Code. The cooperative must withhold the motor vehicle record information you have marked in the remaining information under section 552.130 of the Government Code. The cooperative must release the remaining responsive information; 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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 637935

Enc. Submitted documents

c: Requestor
(w/o enclosures)

33 Third Parties
(w/o enclosures)