



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2019

Mr. Augustin Rivera, Jr.
General Counsel
Del Mar College
101 Baldwin Blvd.
Corpus Christi, Texas 78404-3897

OR2019-05071

Dear Mr. Rivera:

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# 751882.

Del Mar College (the "college") received a request for information related to a specified contract during a defined period of time. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Explorance, Inc. ("Explorance"). Accordingly, you state, and provide documentation showing, you notified the interested third party of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released.¹ *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 considered the submitted arguments and reviewed the submitted information.

¹We note the college failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will address Explorance's arguments against disclosure, notwithstanding the college's violation of section 552.301 in requesting this decision.

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. Explorance states it has competitors. In addition, Explorance states the information at issue, if released, would give a competitor an advantage in submitting future competitive bids and seeks to withhold the terms of a contract. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find Explorance has established the release of the information it seeks to withhold would give advantage to a competitor or bidder. Thus, we conclude the college may withhold the information we have marked under section 552.104(a) of the Government Code.²

Explorance states some of its remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person 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

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

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.³ 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 Open Records Decision No. 552 at 5 (1990)*. 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, 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*

³The 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)*.

No. 661 at 5 (1991) (to prevent disclosure of commercial or financial information, party must show specific factual evidence, not conclusory or generalized allegations, that release of the requested information would cause that party substantial competitive harm).

Explorance states some of its remaining information consists of commercial and financial information, the release of which would cause it substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Explorance has demonstrated the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the college must withhold the information we have marked under section 552.110(b) of the Government Code.⁴

Section 552.136(b) 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.”⁵ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the college must withhold the bank account numbers and bank routing numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may 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 college may withhold the information we have marked under section 552.104(a) of the Government Code. The college must withhold the information we have marked under section 552.110(b) of the Government Code. The college must withhold the bank account numbers and bank routing numbers in the remaining information under section 552.136 of the Government Code. The college must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

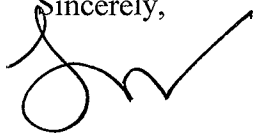
⁴As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

⁵The 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).

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,

A handwritten signature in black ink, appearing to read 'Jahna Ward', with a large circular flourish at the beginning and a checkmark-like stroke at the end.

Jahna Ward
Assistant Attorney General
Open Records Division

JW/mo

Ref: ID# 751882

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)