



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 21, 2019

Ms. Laura Donnelly
Paralegal
Fort Bend Independent School District
16431 Lexington Boulevard
Sugar Land, Texas 77479

OR2019-23221

Dear Ms. Donnelly:

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# 781717 (Ref. No. 22563).

The Fort Bend Independent School District (the "district") received a request for all proposals submitted to a specified request for qualifications. 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 DBR Engineering Consultants, Inc. ("DBR"); Engineering Air Balance Co., Inc. ("EAB"); GreeNexus Consulting, Inc. ("GreeNexus"); LEAF Engineers ("LEAF"); Odyssey Engineering ("Odyssey"); TAB Technologies ("TAB"); and Wrightson, Johnson, Haddon & Williams, Inc. ("WJHW"). Accordingly, you state, and provide documentation showing, you notified these interested 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 EAB, LEAF, Odyssey, TAB, and WJHW. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note WJHW asserts some of the submitted information is not responsive to the present request for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request for information to information the

governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the district has submitted the information at issue for our review, we find the district has made a good-faith effort to relate the present request to information within its possession or control and submit information to this office that is responsive to the request.

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 DBR or GreeNexus. Thus, we have no basis to conclude either DBR or GreeNexus 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 district may not withhold any of the submitted information on the basis of any proprietary interest either DBR or GreeNexus may have in the information.

Section 552.104(a) of the Government Code exempts 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. EAB and TAB state they have competitors. In addition, EAB and TAB state release of their information at issue would give an unfair advantage to their competitors. After review of the information at issue and consideration of the arguments, we find EAB and TAB have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information we have indicated under section 552.104(a) of the Government Code.¹

LEAF and Odyssey claim portions of their information are confidential under section 552.110 of the Government Code, which 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. Gov't Code § 552.110. 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 2. 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

¹ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 that section 552.110(a) is applicable unless it has been shown that 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 (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).

² The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

LEAF and Odyssey claim portions of their information constitute trade secrets under section 552.110(a) of the Government Code. We understand the engineering drawings at issue were used by LEAF in the school at issue. LEAF states it owns the engineering drawings at issue. Upon review of LEAF's arguments and the submitted information, we find LEAF has demonstrated the engineering drawings at issue constitute a trade secret. Accordingly, the city must withhold this information, which we have indicated, under section 552.110(a) of the Government Code. *See Taco Cabana Int'l v. Two Pesos, Inc.*, 932 F.2d 1113, 1123-25 (5th Cir. 1991), *aff'd*, 505 U.S. 763 (1992); *see also Ecolaire Inc. v. Crissman*, 542 F. Supp. 196, 206 (E.D. Pa.1982) (drawings, blueprints and lists constitute trade secrets because such information could be obtained, through other than improper means, only with difficulty and delay); *American Precision Vibrator Co. v. Nat'l Air Vibrator Co.*, 764 S.W.2d 274, 278 (Tex. App.—Houston [1st Dist.] 1988, no writ) (blueprints, drawings, and customer lists constitute trade secrets). Further, we find Odyssey has established a *prima facie* case that some of its information constitutes trade secret information. Therefore, the information at issue, which we have marked, must generally be withheld under section 552.110(a) of the Government Code. However, to the extent any of the customer information Odyssey seeks to withhold has been published on the company's website, such information is not confidential under section 552.110(a). Further, we conclude LEAF and Odyssey have failed to establish a *prima facie* case that any portion of the remaining information at issue meets the definition of a trade secret. We further find LEAF and Odyssey have not demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. *See* ORD 402. Therefore, the district may not withhold any of LEAF's or Odyssey's remaining information at issue under section 552.110(a).

LEAF and Odyssey further argue portions of their remaining information consist of commercial or financial information, the release of which would cause substantial competitive harm. Upon review, we find LEAF and Odyssey have demonstrated some of their information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the district must withhold this information, which we have marked and indicated, under section 552.110(b) of the Government Code. However, we find LEAF and Odyssey have not established any of the remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the district may not withhold any of the remaining information at issue on this basis.

Section 552.136 of the Government Code states “[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.”³ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of this exception. Thus, the district must

³ The 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).

withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may be subject to copyright law. 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 may withhold the information we have indicated under section 552.104(a) of the Government Code. The district must withhold the information we have marked and indicated under section 552.110(a) of the Government Code; however, to the extent any of the customer information Odyssey seeks to withhold has been published on the company's website, such information is not confidential under section 552.110(a). The district must withhold the information we have marked and indicated under section 552.110(b) of the Government Code. The district must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The district must release the remaining information; however, any information protected by 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/jxd

Ref: ID# 781717

Enc. Submitted documents

c: Requestor
(w/o enclosures)

7 Third Parties
(w/o enclosures)