



September 30, 2002

Ms. Alice Caruso  
Assistant Disclosure Officer  
Information Release  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street  
Austin, Texas 78778-0001

OR2002-5493

Dear Ms. Caruso:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 169756.

The Texas Workforce Commission (the “commission”) received three requests for information related to a particular request for proposal. The first request seeks information regarding scoring, as well as the proposals for the four bidders that went to the presentation stage and the top two presentation proposals. The second request seeks the “Fleishman Hillard proposal.” The third request seeks “responses to bid # 2002-4772, Marketing Services for Labor Exchange System and Network Branding Initiative from Fleishman-Hilliard [sic], Christian-Hubble, Burson-Marsteller, The Clockwork Group, Cutting Edge, Gilbreath Communications, R.J. Kolar, Quest Business Agency, Tocquigny, and Warren Creative.” You advise that you have released some of the requested information. Pursuant to section 552.305 of the Government Code, the commission notified third parties Burston-Marsteller, Christian-Hubble, The Clockwork Group, Cutting Edge Communications, Fleishman-Hilliard, Gilbreath Communications, Quest Business Agency, RJ Kolar, Tocquigny, and Warren Creative of the request because their proprietary interests may be implicated by the requests for information.<sup>1</sup> As of the date of this ruling, this office has

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<sup>1</sup>See Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

received responses from Christian-Hubble, RJ Kolar ("Kolar"), and Quest Business Agency ("Quest") objecting to the release of their information.

This office has not received responses from Burston-Marsteller, The Clockwork Group, Cutting Edge Communications, Fleishman-Hillard, Gilbreath Communications, Tocquigny, and Warren Creative. Thus, these parties have provided us no basis to conclude that the submitted information pertaining to them is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, except as noted below, the proposal information of these parties must be released to the requestor. We have considered the arguments of Christian-Hubble, Kolar, and Quest, and have reviewed the information you submitted.

We note that Quest argues that its information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Quest has not directed our attention to any law, nor are we aware of any law, under which any of the submitted information is deemed to be confidential. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the submitted information pertaining to Quest may be withheld from disclosure under section 552.101 of the Government Code.

Christian-Hubble, Kolar, and Quest all argue that their proposal information is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) commercial 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. *See* Gov't Code § 552.110(a), (b).

The Texas Supreme Court has adopted the definition of a "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 a single or ephemeral event 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> *See Open Records Decision No. 552 at 5 (1990).*

Under section 552.110(b), the private entity must provide a specific factual or evidentiary showing, and not conclusory or generalized allegations, that substantial competitive injury likely would result from the release of the information at issue. *See Open Records Decision No. 661 at 5-6 (1999)* (addressing required showing); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). After reviewing Christian-Hubble’s and Quest’s briefs to this office, we conclude that neither party has demonstrated the applicability of section 552.110(a) or (b) to any portion of their proposal information. With regard to Kolar’s arguments, we first note that while Kolar claims that Appendix A1 of its proposal information is excepted from disclosure, the commission has not submitted Kolar’s Appendix A1. Thus, this ruling only addresses the information pertaining to Kolar that was submitted by the commission. Based on Kolar’s arguments and our review of the submitted information, we conclude that Kolar has established that some of the information it seeks to have withheld, which we have marked, must be withheld under section 552.110(b)

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<sup>2</sup> 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).*

as commercial or financial information the disclosure of which would cause substantial competitive harm. Kolar has not demonstrated that any of its remaining information is excepted as either commercial or financial information under section 552.110(b), or trade secret information under section 552.110(a).

We note that social security numbers contained within the submitted documents may be confidential under section 552.101 and federal law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, you should ensure that they were not obtained or are not maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

Furthermore, the submitted documents contain e-mail addresses that must be withheld under section 552.137 of the Government Code. Section 552.137 requires the commission to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. *See* Gov't Code § 552.137(a), (b). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, we have marked the types of e-mail addresses that must be withheld under section 552.137.<sup>3</sup>

In summary, the commission must withhold the information in the Kolar proposal that we have marked under section 552.110(b). Social security numbers contained in the submitted information may be confidential under section 552.101 and the federal Social Security Act. The commission must withhold the types of e-mail addresses we have marked under section 552.137. The remaining submitted information must be released.

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<sup>3</sup> We note that section 552.137 does not apply to a general e-mail address of a business or to a government employee's work e-mail address.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 169756

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