



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

July 10, 2003

Ms. Mary Ann Slavin  
Assistant General Counsel  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR2003-4780

Dear Ms. Slavin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184062.

The Texas Department of Health (the "department") received two written requests for records encompassing fourteen proposals submitted to the department in connection with an RFP for electronic birth registration. You indicate that some of the responsive information will be released to the requestor. You have submitted to this office as responsive to the requests eight proposals, or portions thereof; you do not contend that any portion of the submitted proposals is excepted from required disclosure; rather, you have sought a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public.

Initially, we note that information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the Act's exceptions to disclosure, it must be released, notwithstanding any agreement between the department and the parties submitting the proposals specifying otherwise.

In accordance with section 552.305(d), the department notified representatives of the fourteen interested parties of the records request and of their right to submit arguments to this office as to why the requested information should not be released to the public. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990). 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). This office has timely received arguments from representatives of Genesis Systems Incorporated ("Genesis"), Guidelight Business Solutions ("Guidelight"), and ManTech that information contained in those companies' respective proposals is excepted from required public disclosure. Because we have not received comments from any of the other companies that submitted proposals to the department, this office has no basis for concluding that those companies have a privacy or proprietary interest in this information. Consequently, the department must release those proposals to the requestor in their entirety, except as discussed later in this ruling.

ManTech contends that portions of its proposal are excepted from required public disclosure pursuant to section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder."<sup>1</sup> Section 552.104 was not intended to protect business entities that are in competition in the private sector. The primary purpose of section 552.104 is to protect the government's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. Because the department does not contend that section 552.104 is applicable in this instance, none of the information contained in ManTech's proposal is excepted from public disclosure under section 552.104.

Genesis, Guidelight, and ManTech each contend that portions of their respective proposals are excepted from required public disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects both "trade secret" information and "commercial or financial" information. *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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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.<sup>2</sup> *See id.* This office has held that

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<sup>1</sup>Although ManTech also contends that portions of its proposal are excepted from public disclosure pursuant to section 552.101 of the Government Code, it has provided this office with no arguments regarding this exception, nor are we aware of any provision that makes ManTech's information confidential by law pursuant to section 552.101. *See* Gov't Code § 552.101. Consequently, we do not address the applicability of section 552.101.

<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others 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).

we must accept a person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. See Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999); see also *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 639 at 4 (1996) (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).

After considering the submissions of Genesis, Guidelight, and ManTech, we conclude that neither Guidelight nor ManTech have demonstrated the applicability of section 552.110(a) or (b) to any portion of those companies' proposals; consequently, no portion of those companies' proposals may be withheld pursuant to section 552.110. On the other hand, Genesis has established the applicability of section 552.110(a) only to that company's customer list. We further conclude Genesis has established the applicability of section 552.110(b) to certain other portions of its proposal, and we have marked that proposal accordingly. However, the department must release the remaining information contained in the Genesis proposal, as well as the Guidelight and ManTech proposals in their entirety, except as discussed below.

Some of the submitted proposals contain e-mail addresses that the department is required to withhold from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address *of a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

The information we have marked constitutes private e-mail addresses. Accordingly, section 552.137 of the Government Code requires the department to withhold the types of e-mail addresses that we have marked unless the department receives an affirmative consent to release from the person to whom an e-mail address belongs. We note that section 552.137 does not apply to a public employee's governmental e-mail address or a business' general e-mail or web page address.

Finally, we note that some of the submitted material is protected by copyright. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials unless one of the Act's exceptions to required public disclosure applies to the information. Attorney General Opinion JM-672 at 2-3 (1987). Also, the requestors may make copies of copyrighted materials unassisted by the state. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2.

In summary, the department must withhold the information in the Genesis proposal that we have marked as coming within the protection of section 552.110. The department must also withhold the types of e-mail addresses we have marked pursuant to section 552.137. The remaining information must be released to the requestor, but the department may not make copies of any copyrighted materials.

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).

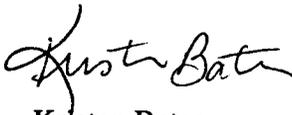
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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/RWP/sdk

Ref: ID# 184062

Enc: Submitted documents

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