



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2004

Ms. Anne M. Constantine
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OR2004-1357

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196694.

The Dallas-Fort Worth International Airport Board (the "board") received a request for the finalist proposals submitted in response to the board's request for proposals for the airport's thirtieth anniversary gala. The board takes no position with regard to the public availability of the requested information. You believe, however, that the request for this information implicates the proprietary interests of the private parties that submitted the proposals. You have submitted the requested information, along with a letter in which Hyatt Hotels Corporation ("Hyatt") advises the board that Hyatt does not authorize the disclosure of its proposal. You also inform us that the other two entities that submitted proposals, Sherri Cook & Associates ("Sherri Cook") and Ultimate Ventures, Inc. ("Ultimate Ventures"), have objected to the release of portions of their proposals. You have notified Hyatt, Sherri Cook, and Ultimate Ventures of the board's receipt of this request for information and of their right to submit arguments to this office as to why the information should not be released.¹ We also received correspondence from Hyatt. We have considered all of the submitted arguments and have reviewed the submitted information.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Initially, we note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 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 decision, this office has received no correspondence from either Sherri Cook or Ultimate Ventures. Thus, neither Sherri Cook nor Ultimate Ventures has demonstrated that any of the submitted information is proprietary for purposes of section 552.110 of the Government Code. *See Gov't Code* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address Hyatt's arguments under section 552.110. This section 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); *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.² *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) 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. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Hyatt has submitted a brief asserting claims under both aspects of section 552.110. Having considered these arguments, we conclude that Hyatt has demonstrated that the submitted information concerning Hyatt's other customers constitutes a trade secret under section 552.110(a). We have received no arguments that rebut Hyatt's claim as a matter of law. We therefore conclude that the board must withhold the portions of Hyatt's proposal that we have marked under section 552.110. We otherwise conclude that Hyatt has not demonstrated that any of the remaining information in its proposal qualifies as a trade secret under section 552.110(a). We likewise conclude that Hyatt has not shown, for purposes of section 552.110(b), that the release of any of the remaining information in the company's proposal would be likely to cause Hyatt any substantial competitive harm. Therefore, none of the remaining information in the Hyatt proposal is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

We next note that the Sherri Cook proposal contains a social security number that the board may be required to withhold under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law,

²The 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).

either constitutional, statutory, or by judicial decision.” This exception encompasses information that another statute makes confidential. A social security number is confidential under 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number contained in the submitted proposal is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the board to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security number in question here was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov’t Code §§ 552.007, .352. Therefore, before releasing the social security number that we have marked, the board should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

Lastly, we note that one of the documents that relate to Sherri Cook and all of the documents that relate to Ultimate Ventures are protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with the copyright law, however, and is not required to furnish copies of copyrighted materials. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she 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. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the board must withhold the marked portions of the Hyatt proposal under section 552.110 of the Government Code; and (2) the board may be required to withhold the social security number in the Sherri Cook proposal under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The board must release the rest of the submitted information. In doing so, the board must comply with copyright law with respect to the information that is protected by copyright.

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).

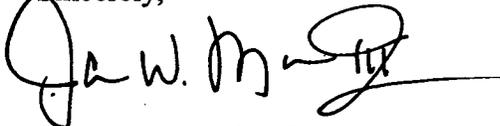
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 196694

Enc: Submitted documents

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