



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2004

Mr. William T. Buida
Deputy General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2004-5506

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204661.

The Texas Department of Human Services (the "department") received a request for the following: (1) copies of any and all proposals submitted in response to Agency Requisition Number 000001 related to pharmacy data entry; (2) any and all correspondence between the department and bidders that occurred before and after April 7, 2004; and (3) copies of the final scores awarded to the bidders, and any scoring materials used or prepared by the department employees who reviewed the bids and/or determined which bidder would be awarded the contract. You claim that a portion of the requested information is excepted from disclosure under section 552.139 of the Government Code. You also indicate that release of the requested information may implicate the proprietary interests of a third party. Accordingly, you provide documentation showing that the department notified the interested third party, The Litaker Group ("Litaker"), of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act ("Act") in certain circumstances). We received arguments from Litaker. We have also received comments on behalf of the requestor. *See* Gov't Code § 552.304. We have considered all the exceptions claimed and reviewed the submitted information.

Initially, you state that the submitted information contains an “electronic mail message that identifies the passwords or access codes for certain persons into the department’s secured data entry system[,]” and you contend that this information is excepted from disclosure under section 552.139 of the Government Code. You state that the “passwords give access to the secured system” and release of this information would “allow any person to gain access to the system to enter false data or access medical administration data about persons in the system.” In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in Open Records Decision No. 581 and our review of the information at issue, we determine that the information we have marked has no significance other than its use as a tool for the maintenance, manipulation, or protection of public information; therefore it does not constitute public information under section 552.002 of the Government Code. Accordingly, this information is not subject to the Act and need not be released. Based on this finding, we do not reach the department’s or Litaker’s claim under section 552.139.

Next, Litaker asserts that specified portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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). 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we will accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for the 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). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure “[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 No. 661 at 5-6 (1999).

Litaker asserts that specified portions of its proposal constitute trade secrets under section 552.110(a). Having considered these arguments, we conclude that Litaker has presented a *prima facie* case that parts of its proposal constitute trade secrets under section 552.110(a). Accordingly, we have marked portions of the submitted information relating to Litaker under section 552.110(a). Litaker also argues that information not encompassed by its section 552.110(a) claim is excepted from disclosure under section 552.110(b). We conclude that Litaker has not made the demonstration required by section 552.110(b) that public disclosure of any of this additional information would likely cause Litaker any substantial competitive harm. We therefore find that none of the additional information at issue is excepted from disclosure under section 552.110(b). *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)

¹ 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).

(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 note, however, that a portion of the remaining submitted information pertaining to Litaker is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, 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. *See* Open Records Decision No. 550 (1990).

In summary, the computer usernames and passwords we have marked are not public information and therefore, not subject to the Act. The department must withhold the information we have marked in the submitted documents pertaining to Litaker pursuant to section 552.110(a) of the Government Code. The remainder of the submitted information must be released to the requestor. However, in doing so, the department must comply with the applicable copyright law with respect to those portions of the remaining submitted documents at issue that are copyrighted.

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

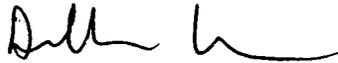
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 204661

Enc. Submitted documents

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