



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2004

Mr. Steve Aragón
General Counsel
Texas Health and Human Services Commission
P. O. Box 13247
Austin, Texas 78711

OR2004-7554

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208496.

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to two Requests for Proposals. You state that the commission intends to provide the requestor with some of the requested information. You also state that the commission is releasing and withholding some of the requested information pursuant to a previous determination that we issued to the commission in Open Records Letter No. 2004-4139 (2004). *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 at 6-9 (2001) (delineating instances in which attorney general decision constitutes previous determination under Gov't Code § 552.301). You claim that some of the remaining requested information is excepted from disclosure pursuant to section 552.104 of the Government Code. Although the commission defers to interested third parties who may have a proprietary interest to raise arguments for withholding the remaining requested information, you state that this particular information may be subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the commission notified the interested third parties, International Biometric Group ("IBG") and MTG Management Consultants, LLP ("MTG"), of the commission's receipt of the request and of each company's right to submit arguments to us as to why any portion of the rest of the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *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 (the "Act") in certain circumstances). We have considered the arguments submitted by the commission and IBG and have reviewed the submitted information, which includes representative sample documents.¹

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, MTG has not submitted comments to us explaining why any portion of the submitted information relating to MTG should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate MTG's proprietary interests. *See, e.g.*, Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the commission may not withhold any portion of the submitted information on the basis of any proprietary interest that MTG may have in the information.

Next, we note that both MTG's and IBG's bid proposals contain social security numbers that may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.² The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that were obtained or are 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* Open Records Decision No. 622 (1994). The commission has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the commission, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the commission should ensure that they were not obtained and

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

are not maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

You claim that some of the submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive situations, typically in the context of competitive bidding. *See* Open Records Decision No. 592 (1991). A governmental body seeking to withhold information from disclosure pursuant to section 552.104 must demonstrate some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 generally does not except information relating to competitive bidding after a contract has been awarded and executed. *See* Open Records Decision No. 541 (1990). However, this office has determined that in some circumstances, section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id* at 5.

In this case, you advise that the contracts at issue have been awarded and executed. You indicate, however, that the bidding process for these types of contracts will be ongoing. Furthermore, you assert that the release of the bid proposals at issue "would jeopardize the [c]ommission's bargaining position in the solicitation process the [c]ommission anticipates conducting next year" by allowing bidders to "incorporate various aspects of the [] proposals into their own in order to win the extended contract." Based on your representations and our review of the submitted information at issue, we find that the commission has adequately demonstrated in this instance that the release of this particular information would harm the interests of the commission. *See* Open Records Decision No. 592 (1991). Accordingly, we conclude that the commission may withhold the information at issue pursuant to section 552.104 of the Government Code.

IBG contends that portions of the remaining submitted information are excepted from disclosure pursuant to 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. *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). 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 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). 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.³ 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. *See id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

³ 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).

After carefully reviewing IBG's arguments and the submitted information at issue, we find that IBG has failed to establish a *prima facie* case that any portion of its bid proposal information constitutes trade secrets for purposes of section 552.110(a). Accordingly, we conclude that the commission may not withhold any portion of the submitted information at issue under section 552.110(a) of the Government Code. However, we also find that IBG has adequately demonstrated that the release of a portion of the submitted information at issue would cause IBG substantial competitive harm for purposes of section 552.110(b). Accordingly, we also conclude that the commission must withhold the information that we have marked pursuant to section 552.110(b) of the Government Code.⁴ Because IBG has failed to adequately demonstrate that the release of any other portion of the submitted information at issue would cause it substantial competitive harm for purposes of section 552.110(b), we conclude that the commission may not withhold any other portion of the submitted information at issue under section 552.110(b) of the Government Code. *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 also note that portions of MTG's bid proposal information are excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides that "[n]otwithstanding any other provision of this chapter, 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." Gov't Code § 552.136. The commission must withhold the information that we have marked pursuant to section 552.136 of the Government Code.

Finally, we note that portions of both IBG's and MTG's bid proposal information are 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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, social security numbers that are contained within IBG's and MTG's bid proposal information may be confidential under federal law. The commission may withhold

⁴ We note that this particular marked information is duplicative of the information contained on the submitted CD-ROMs that must also be withheld pursuant to section 552.110(b).

the information that it seeks to withhold under section 552.104 of the Government Code pursuant to that exception to disclosure. The commission must withhold the information that we have marked in IBG's bid proposal information pursuant to section 552.110(b) of the Government Code. The commission must withhold the information that we have marked in MTG's bid proposal information pursuant to section 552.136 of the Government Code. The commission must release the remaining submitted information to the requestor; however, in doing so, the commission must comply with the applicable copyright law for the portions of IBG's and MTG's bid proposal information 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).

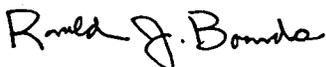
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 208496

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