



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2004

Ms. Dawn Breazeale
The Upper Rio Grande Workforce Development Board
221 North Kansas, Suite 1000
El Paso, Texas 79901

OR2004-8332

Dear Ms. Breazeale:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210088.

The Upper Rio Grande Workforce Development Board (the "board") received a request for a proposal submitted to the board by ACS State and Local Solutions, Inc. ("ACS"). The board takes no position with regard to the public availability of the requested information. You believe, however, that this request for information implicates the proprietary interests of ACS under section 552.110 of the Government Code. You have submitted the requested information. You also notified ACS of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from attorneys for ACS. We also received comments from the requestor.² We have considered all the submitted arguments and have reviewed the submitted information.

Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential

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

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

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). If the governmental body takes no position on the applicability of the trade secrets aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.³ *See Open Records Decision No. 552 at 5 (1990).* We cannot conclude, however, that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret, and the necessary

³The 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).*

factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

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).

ACS asserts that specified portions of the submitted information qualify as trade secrets under section 552.110(a). ACS also argues that this same information is excepted from disclosure under section 552.110(b). Under section 552.110(a), we find that ACS has presented a *prima facie* claim that some of the information at issue qualifies as a trade secret. We have received no arguments that rebut ACS's trade secret claim as a matter of law. Under section 552.110(b), we find that ACS has sufficiently shown that the release of other information encompassed by the company's arguments would be likely to cause ACS substantial competitive harm. We therefore conclude that the information that we have marked as being protected by section 552.110 must be withheld from the requestor. We otherwise find that ACS has not shown that any of the remaining information at issue under section 552.110 qualifies as a trade secret under section 552.110(a). We also find that ACS has not made the showing required by section 552.110(b) that the release of any of the remaining information at issue would be likely to cause ACS any substantial competitive harm. We therefore conclude that none of the remaining information at issue is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 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).

ACS also raises section 552.101 of the Government Code in conjunction with the common-law right to privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The common-law right to privacy encompasses certain types of personal financial information. This office has determined that although financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open

Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state employees' personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

ACS argues that information relating to the salaries of its employees is protected by common-law privacy under section 552.101. We note, however, that the information in question does not reveal the identities of any of the individuals to whom the salaries in question are paid. We therefore conclude that the board may not withhold any of the salary information at issue under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses information that is made confidential by statute. Federal tax returns and tax return information are confidential under section 6103 of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a); *see also id.* § 6104(b)(1)-(2) (defining "return" and "return information"). Section 6104 of title 26 provides in part:

(b) Inspection of annual information returns. – The information required to be furnished by section [] 6033 . . . shall be made available to the public at such times and in such places as the Secretary may prescribe. *Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527) which is required to furnish such information. . . .*

...

(d) Public inspection of certain annual returns[.]

(1) In general. – In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501(a) or an organization exempt from taxation under section 527(a) –

(A) a copy of –

(i) the annual return filed under section 6033 . . . by such organizations,

...

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization . . . and

(B) upon request of an individual made at such principal office . . . a copy of such annual return . . . shall be provided to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

...

(3) Exceptions from disclosure requirement. –

(A) Nondisclosure of contributors, etc. – In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, *paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization. . . .*

26 U.S.C. § 6104 (emphasis added). The remaining documents include a federal tax Form 990 that contains the names of contributors. Assuming that none of these contributors is a private foundation or political organization that is excluded from the scope of subsections (b) and (d) of section 6104, we conclude that the names of contributors that we have marked in the Form 990 must be withheld from disclosure under section 552.101 of the Government Code in conjunction with sections 6103 and 6104 of title 26 of the United States Code. *See also Stanbury Law Firm, P.A. v. Internal Revenue Service*, 221 F.3d 1059 (8th Cir. 2000).

We next note that section 552.136 is applicable to a small portion of the remaining information. This exception provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. We have marked the information that the board must withhold under section 552.136.

Lastly, we note that some of the remaining information is subject to 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 copyright law, however, and is not required to furnish copies of copyrighted materials. *Id.* A member of the public who wishes to make copies of copyrighted materials 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, the board must withhold the marked information that is excepted from disclosure under sections 552.101, 552.110, and 552.136 of the Government Code. The rest of the submitted information must be released. In releasing copyrighted information, the board must comply with copyright law.

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

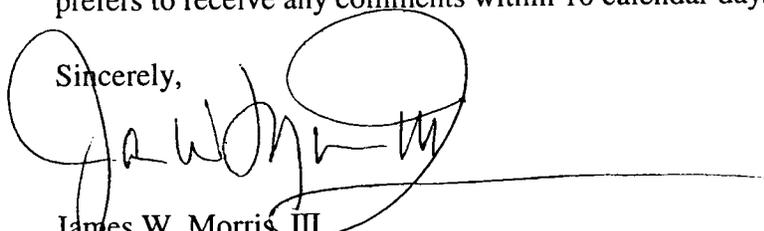
should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



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Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 210088

Enc: Submitted documents

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