



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 30, 2005

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P. O. Box 13247  
Austin, Texas 78711

OR2005-08887

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 233299.

The Texas Health and Human Services Commission (the "commission") received a request for (1) the names of the companies that submitted bids to the commission in response to RFP No. 529-03-298 for Disease Management Services; (2) copies of the "Technical and Financial Proposal" for each bidder; and (3) scoring results. You state that the commission will release some of the requested information but believe that release of the submitted proposals may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, that you notified AirLogix, Inc. ("AirLogix"), Pfizer Health Solutions ("Pfizer"), and LifeMasters Supported SelfCare, Inc. ("LifeMasters"), third parties whose proprietary interests may be implicated, of the request for information and of each company's right to submit arguments to this office as to why the information should not be released. *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 in certain circumstances). We have received correspondence from AirLogix and Life Matters; we have considered their arguments and reviewed the submitted information.

Initially, we note that 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 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, Pfizer has not submitted comments to this office in response to the commission's notice. Thus, Pfizer has not demonstrated that any of the submitted information related to Pfizer is proprietary for purposes of the Act. *See* Gov't Code § 552.110; *see also, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the commission may not withhold any of the submitted information on the basis of any proprietary interest that Pfizer may have in the information.

Next, we address LifeMasters' contention that its proposal is protected under 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." However, we note that section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). Moreover, the commission informs us that this information was the subject of a previous request for information, in response to which this office issued Open Records Letter Number 2004-3054 (2004). At that time, the commission sought to withhold this information under section 552.104 to protect its competitive position in a bidding process that was still pending. In regards to the current situation, the commission informs us that the "bid selection process has concluded since the time that [this] office issued OR2004-3054, and the Commission has [since] executed a contract[.]" Generally, section 552.104 does not except proposals from public disclosure after bidding is complete. As such, we conclude that none of the information at issue may be withheld under section 552.104.

Next, LifeMasters and AirLogix claim that their proposals are excepted from public disclosure under section 552.110 of the Government Code. 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). 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 party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.<sup>1</sup> *See* Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

Section 552.110(b) 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.” 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 requested information. *See* 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).

After reviewing LifeMasters’ and AirLogix’s arguments and each company’s proposal, we find that both companies have demonstrated that their pricing and some of their customer

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<sup>1</sup>The 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).

information is protected under section 552.110(b). The commission must withhold this information, which we have marked in LifeMasters' and AirLogix's proposals, pursuant to section 552.110(b). However, we note that LifeMasters' and AirLogix's proposals also include information regarding customers that acted as professional references in the bidding process; we find that neither company has established that this customer information is protected for purposes of section 552.110. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We also find that neither LifeMasters nor AirLogix has established by specific factual evidence that any of the remaining information in their proposals is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"); Open Records Decision Nos. 661 (1999), 319 at 3 (1982). As such, none of the remaining information in LifeMasters' or AirLogix's proposals may be withheld under section 552.110.

LifeMasters also asserts that some of the remaining information in its proposal related to the company's personnel is protected under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). This office has found that section 552.102 only applies to information in the personnel file of an employee of a governmental body. Since the information LifeMasters seeks to withhold is not in the personnel file of any employee of a governmental body, we determine that section 552.102 is inapplicable to this information, and it may not be withheld on this basis.

We also understand LifeMasters to claim that this personnel information is protected based on the doctrine of common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has frequently stated that a mere expectation of privacy on the part of the individual who provides information to a governmental body does not permit that information to be withheld under section 552.101. *See* Open Records Decision Nos. 479 at 1 (1987) (information is not confidential simply because the party that submitted the information anticipated or requested

confidentiality), 180 at 2 (1977) (information is not excepted from disclosure solely because the individual furnished it with the expectation that access to it would be restricted), 169 at 6 (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution). This office has also stated on several occasions that certain information regarding individuals, including such information as their home addresses and telephone numbers, is generally not protected by common-law privacy under section 552.101. *See* Open Records Decision Nos. 554 at 3 (1990) (disclosure of a person's home address and telephone number is not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers do not qualify as "intimate aspects of human affairs"). Accordingly, we conclude that none of the remaining information in LifeMasters' proposal may be withheld under section 552.101 in conjunction with common-law privacy.

As a final point, however, we note that some of the remaining information in the submitted proposals is subject to copyright law. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. 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 copyrighted materials, 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 commission must withhold the information we have marked in AirLogix's and LifeMasters' proposals pursuant to section 552.110(b) of the Government Code. The commission must release the remaining submitted information; however, in releasing information that is protected by copyright, the commission 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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General  
Open Records Division

RBR/krl

Ref: ID# 233299

Enc. Submitted documents

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