ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2005

Ms. Lisa D. Belli
Open Records Coordinator
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744-3291

OR2005-09799

Dear Ms. Belli:

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# 235350.

The Texas Parks and Wildlife Department (the "department") received two requests for copies of the top three Employee Assistance Program service proposals that were submitted to the department. The department states that it has provided one of the proposals at issue. Although the department takes no position with respect to the remaining two proposals, it states that they may implicate the proprietary interests of Alliance Work Partners and MHNet. Accordingly, the department has notified Alliance Work Partners and MHNet of the requests and of their right to submit arguments to this office as to why the requested 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 both Alliance Work Partners and MHNet and have reviewed their arguments and the submitted information.

Alliance Work Partners raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that other law makes confidential. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987)

(statutory confidentiality). However, Alliance Work Partners has not directed our attention to any law, nor are we aware of any law, under which any portion of its proposal is confidential for purposes of section 552.101. Thus, Alliance Work Partners has not demonstrated that section 552.101 is applicable to any portion of its proposal.

Next, MHNet asserts that its Reference List and Client List are excepted under section 552.104 of the Government Code. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104.

We note, however, that section 552.104 only protects the interests of a governmental body and is not designed to protect the interests of third parties that submit information to a governmental body. *See* Open Records Decision No. 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). As the department has not argued that the release of any portion of the information at issue would harm its interests in a particular competitive situation under section 552.104, none of it may be withheld on that basis.

Section 552.110 of the Government Code 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 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.[1] *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) 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* 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).

MHNet argues that section 552.110(a) applies to its Utilization Management Report. Alliance Work Partners also argues that portions of its information are protected as a trade secret and commercial or financial information. After reviewing MHNet's arguments and the submitted proposal, we find that MHNet has not established by specific factual evidence that the Utilization Management Report it seeks to withhold in its proposal qualify as trade secret information under section 552.110(a). Upon review of Alliance Work Partners' arguments and its submitted proposal, we also find that Alliance Work Partners has failed to show that any of the submitted information that it seeks to withhold is protected as trade secret information under section 552.110(a). *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"). We note that the information Alliance Work Partners seeks to withhold under section 552.110(b) includes a customer list. We find that release of the customer list would cause substantial competitive harm and have marked the information that the department must withhold under section 552.110(b). We find that Alliance Work Partners has not made the showing required by section 552.110(b) that the release of any of its remaining information would be likely to cause the company any substantial competitive harm. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from

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[1]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).

release of particular information at issue), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We therefore conclude that none of the remaining information Alliance Work Partners seeks to withhold is excepted from disclosure under section 552.110.

Finally, we note that the proposals at issue contain information protected by copyright. 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 department must withhold the information we have marked in the submitted proposals pursuant to section 552.110 of the Government Code. The remaining submitted information must be released in accordance with applicable copyright laws.

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, 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 10 calendar days of the date of this ruling.

Sincerely,

James Forrest
Assistant Attorney General
Open Records Division

JF/jpa

Ref: ID# 235350

Enc. Submitted documents

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