



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2007

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney's Office
1019 Congress 15th Floor
Houston, Texas 77002

OR2007-04830

Dear Mr. Swope:

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# 276972.

The Harris County Purchasing Agent (the "county") received a request for proposals submitted by ACS; Allied Imaging Group LLC ("Allied"); Hart InterCivic ("Hart"); Joseph J. Marotti Co., Inc. ("Marotti"); and Landata Technologies ("Landata"). You inform us that the county has no responsive information relating to either Hart or Landata.¹ You state that information relating to ACS is being released. You also indicate that information relating to Allied and Marotti will be released. You claim that other responsive information relating to Allied and Marotti is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also believe that this request for information implicates the proprietary interests of Allied and Marotti. You notified Allied and Marotti of this request for information and of their right to submit arguments to this office as to why their information should not be released. Both Allied and Marotti object to the release of the

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

submitted information, but raise no exceptions to disclosure under the Act.² We have considered all of the submitted arguments and have reviewed the submitted information.

You also inform us that most of the submitted information is the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2007-03980 (2007) and 2007-04355 (2007). You do not indicate that there has been any change in the law, facts, and circumstances on which the previous rulings are based. We therefore conclude that the county must continue to rely on Open Records Letter Nos. 2007-03980 and 2007-04355 with respect to the submitted information that is the subject of the previous rulings. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

With respect to the remaining information, we address Marotti's objections to disclosure.³ Marotti states that the company specifically requested in writing that portions of its proposal not be publicly disclosed. Information is not confidential under the Act, however, simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the rest of Maroth's information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, we consider the county's claims. Section 552.110 of the Government Code 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 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.” Gov't Code § 552.110(a)-(b).

²You have forwarded to this office correspondence from Allied and Marotti requesting that the submitted information not be released. We will treat that correspondence as the third parties' responses under section 552.305 of the Government Code. *See* 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).

³Because the previous rulings encompass all of the submitted information that relates to Allied, we need not address Allied's objections to disclosure.

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 a governmental body takes no position on the application 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.⁴ *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude 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 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* Open Records Decision No. 661 at 5-6 (1999) (business

⁴The 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).

enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Although the county raises section 552.110, it has not demonstrated that either section 552.110(a) or section 552.110(b) is applicable to any of the remaining information. Likewise, Marotti's comments do not provide this office with any basis to conclude that Marotti has any protected proprietary interest in the remaining information. Therefore, the county may not withhold any of the remaining information under section 552.110 of the Government Code.

Lastly, we address the county's arguments under section 552.101 of the Government Code.⁵ The county contends that some of the remaining information may be trademark-protected and thus excepted from disclosure under section 552.101. Section 1127 of title 15 of the United States Code provides that a trademark consists of

any word, name, symbol, or device, or any combination thereof . . . used by a person, or . . . which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C. § 1127. Thus, a trademark pertains to the public use of information by a business enterprise to distinguish its goods or services from those of its competitors. The mere fact that information contains a trademark does not make the information confidential. Furthermore, the county does not specify any particular provision of law, nor are we aware of any law, that makes any of the remaining information confidential. Accordingly, even if any of the remaining information is trademarked, it may not be withheld from disclosure under section 552.101. *See generally* Open Records Decision Nos. 478 (1987), 465 (1987) (statute must explicitly require confidentiality; confidentiality will not be inferred).

The county also asserts that some of the remaining information may be excepted from disclosure under section 552.101 of the Government Code on the basis of federal copyright law. Copyright law does not make information confidential for the purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies,

⁵Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

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: (1) the county must continue to rely on Open Records Letter Nos. 2007-03980 and 2007-04355 with respect to the submitted information that is the subject of the previous rulings; and (2) the rest of the submitted information is not excepted from disclosure and must be released. Any information that is protected by copyright must be released in accordance 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, 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jb

Ref: ID# 276972

Enc: Submitted documents

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