



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2007

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2007-05113

Dear Mr. Meitler:

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#277468.

The Texas Education Agency (the "agency") received three requests for information pertaining to a TEA Requisition Number 701-07-020. You state that some of the responsive information to one of the requests will be released to the requestor. You claim that a portion of the submitted information is excepted from disclosure under section 552.136 of the Government Code. Although you take no position with respect to the remaining information, you claim that the submitted information may contain proprietary information subject to exception under the Act. You state, and provide documentation showing, that you notified the interested third parties of the agency's receipt of the request for information and of each company's right to submit arguments to this office as to why the requested information should not be released to the requestor.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

¹The interested third parties are 4 Consulting, Inc. ("4 Consulting"), Acro Service Corporation ("Acro"), Cooper Consulting Company ("Cooper"), ESP Solutions Group ("ESP"), McLane Advanced Technologies, LLC. ("McLane"), The Harbour Group ("THG"), and Sierra Systems, Inc. ("Sierra").

Initially, we note, and you acknowledge, that some of the submitted information is not responsive to the present request, which seeks information regarding a specified requisition number. You have submitted documents which do not pertain to the requested requisition number. These documents, which we have marked, are thus not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the agency is not required to release that information in response to the request.

Next, 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, 4 Consulting, Acro, Cooper, ESP, McLane, and THG have not submitted arguments to this office explaining why the requested information should not be released. Therefore, these companies have failed to provide us with any basis to conclude that they have a protected proprietary interest in any of the submitted information, and none of the information may be withheld on that basis. *See* 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).

The agency seeks to withhold a portion of the submitted information under section 552.136 of the Government Code. Section 552.136 of the Government Code states 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. Accordingly, the agency must withhold the insurance policy numbers it has marked under section 552.136 of the Government Code.

Sierra seeks to withhold portions of its information under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 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); *see also Huffines*, 314 S.W.2d at 776. 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.² 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 must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. 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) 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). 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).

²The following are the six factors that the Restatement gives 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 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 reviewing the information at issue and the submitted arguments, we conclude that Sierra has failed to establish that any of its information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Accordingly, none of the submitted information may be withheld under section 552.110(a). Sierra, however, has demonstrated that some of the information at issue, which we have marked, constitutes commercial or financial information, the release of which would cause Sierra substantial competitive harm. *See* Open Records Decision No. 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 release of particular information at issue). Accordingly, the agency must withhold the information we have marked under section 552.110(b) of the Government Code. However, no portion of the remaining information constitutes commercial or financial information the release of which would cause Sierra competitive harm. Accordingly, no portion of the remaining information may be withheld under section 552.110(b) of the Government Code.

We note that portions of the submitted information may be 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 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 agency must withhold the information it has marked under section 552.136 of the Government Code. The agency must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released, but any information that is protected by copyright must be released in accordance with applicable copyright law.³

Finally, you ask this office to issue the agency a previous determination authorizing it to withhold insurance policy numbers under the Act. After due consideration, we have decided to grant your request. Therefore, this letter ruling shall serve as a previous determination under section 552.301(a) that the agency must withhold insurance policy numbers under section 552.136 of the Government Code. *See* Open Records Decision No. 673 (2001). Moreover, so long as the elements of law, fact and circumstances do not change so as to no

³We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

longer support the findings set forth above, the agency need not ask for a decision from this office again with respect to this type of information requested of the agency under the Act. *Id.* We note, however, that if the insurance policy number at issue pertains to an individual, the number must be released to that individual or that individual's authorized representative. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information that is protected by laws intended to protect person's privacy). Moreover, the agency may not withhold a deceased person's insurance policy number under section 552.136. *Cf.* Attorney General Opinion H-917 (1976) (common-law privacy under Gov't Code §§ 552.101 and 552.102 lapses on person's death); Open Records Decision Nos. 536 (1989) (Gov't Code § 552.119 does not except peace officer's photograph after officer's death), 524 (1989) (Gov't Code § 552.114 does not except student records after student's death). Finally, the agency may not withhold insurance policy numbers in instances when a requestor has a statutory right of access to the information at issue. *See* Open Records Decision Nos. 623 at 3 (1994) (exceptions in the Act generally inapplicable to information that statutes expressly make public), 613 at 4 (1993) (exceptions in the Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

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).

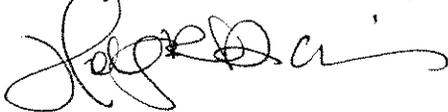
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,



Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/eeg

Ref: ID# 277468

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