ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2007

Ms. Mary Ann Slavin
Assistant General Counsel
Texas Dept of State Health Services
1100 West 49th Street
Austin, Texas 78756-3199

OR2007-15843

Dear Ms. Slavin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 296521.

The Texas Department of State Health Services (the "department") received a request for copies of the proposals and any other written materials submitted in response to the RFP for the advertising and marketing services contract for phase I and II as well as the evaluations for that procurement. You state that all public information has been or will be made available to the requestor. You claim that portions of the requested information are excepted from disclosure under section 552.101. In addition, you assert on behalf of certain third parties that portions of the information may be excepted from disclosure under section 552.110 of the Government Code. While you state that the department takes no position whether the information is excepted from disclosure under section 552.110, you state that release of the requested information may implicate the proprietary interest of third parties. Pursuant to section 552.305 of the Government Code, you are required to notify interested third parties of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d). You state that you have notified the third parties whose information is at issue of the request and of their right to submit arguments to this office. *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). The third parties you notified include FitzFlik Graphic Artz Co., LLC (FitzFlik"), Tuerff-Davis EnviroMedia, Inc., Think Street, Interlex, ESD & Associates ("ESD"), and TKO Advertising, Inc. We have considered the exceptions you claim, the third party arguments, and reviewed the submitted information.

We first address the department's failure to comply with the Act's procedural requirements. *See* Gov't Code § 552.301. You acknowledge that the department has not complied with the time periods prescribed by section 552.301 of the Government Code in requesting a decision from this office. *See id.* When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Because section 552.101 as well as a third party's proprietary interests can each provide a compelling reason to overcome the presumption of openness, we will address the submitted arguments against disclosure of the requested information.

Some of the notified interested third parties have not submitted arguments to this office. 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Tuerff-Davis EnviroMedia, Inc.,Think Street, Interlex, and TKO Advertising, Inc. have not submitted to this office any reasons explaining why their information should not be released. Thus, we thus have no basis for concluding that any portion of the submitted information constitutes the proprietary information of those companies, and none of it may be withheld on that basis. *See id.* § 552.110; 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). We next address the department's section 552.101 argument and the arguments of FitzFlik and ESD.

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 exception encompasses information that other statutes make confidential. You assert tax returns and return information provided by certain individuals and corporations are confidential based on section 6103(a) of title 26 of the United States Code. In addition, ESD asserts that its tax return information is deemed confidential under section 6103(a). Section 6103(a) makes federal tax return information confidential.

26 U.S.C. § 6103(a). The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *Id.* § 6103(b)(2). Therefore, we agree that the department must withhold the submitted tax return information under section 552.101 in conjunction with section 6103(a). We have marked the documents accordingly.

FitzFlik raises sections 552.101 and 552.102 for certain portions of its information. As stated above, section 552.101 excepts from disclosure information deemed confidential by law. 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). The test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. *See Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). We find that FitzFlik has not established that any of the information for which it raises section 552.102 is from a personnel file or is private. Furthermore, FitzFlik has not explained what law deems confidential any portion of its information. We therefore deny FitzFlik's claims under these exceptions.

FitzFlik raises section 552.104 of the Government Code for portions of its information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). However, section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the department may not withhold FitzFlik's information based on section 552.104.

Both FitzFlik and ESD raise section 552.110 for portions of their information. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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

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.), *cert. denied*, 358 U.S. 898 (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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).[1] 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).

Having considered the arguments and reviewed the information at issue, we find that FitzFlik and ESD have not shown that any of their information meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim. Thus, none of the information at issue may be withheld pursuant to section 552.110(a).

Section 552.110(b) protects "[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). This exception to disclosure requires a specific factual or evidentiary showing,

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[1]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (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).

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

After reviewing the arguments and the submitted information, we find that FitzFlik and ESD have made only conclusory allegations that release of their information would result in substantial competitive harm and have not provided a specific factual or evidentiary showing for their claim.[2] *See* Open Records Decision No. 661 (1999) (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, we conclude that none of the information at issue may be withheld on the basis of section 552.110(b).

We note that the information includes private financial information. Section 552.101 also excepts from disclosure information deemed private under the common law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation.* In *Industrial Foundation,* the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. This office has generally found that personal financial information not relating to a financial transaction between an individual and a governmental body is protected by common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). After reviewing the submitted documents, we find that the ownership percentage information we have marked is confidential pursuant to the owners' common law right to privacy. Thus, the department must withhold this information under section 552.101 in conjunction with common law privacy.

Finally, we note that the submitted information includes social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. The department may withhold the social security numbers in the submitted information under section 552.147.[3]

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[2]We note that the department did not submit to this office portions of the information for which ESD raises section 552.110. We cannot determine the applicability of an exception to disclosure to information that is not submitted to this office for review. *See* Gov't Code §552.301(e)(1)(D).

[3]We note that 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.

In summary, the department must withhold the marked tax return information and marked private information under section 552.101. The department may withhold the social security number of a living person under section 552.147. The department must release the remaining information to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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.