



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2008

Ms. Mari M. McGowan
Abernathy Roeder Boyd & Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2008-11612

Dear Ms. McGowan:

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# 319621.

The McKinney Independent School District (the "district"), which you represent, received two requests for information relating to a request for proposals for custodial services. You state that some of the requested information will be released. You also state that some of the requested information is the subject of a previous open records letter ruling. You claim that some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Although you take no position on the public availability of the rest of the submitted information, you believe that the information may implicate the proprietary interests of Aramark; Diversified Maintenance Systems, Inc. ("Diversified"); GCA Services Group, Inc. ("GCA"); Oriental Building Services, Inc. ("Oriental"); SSC Service Solutions ("SSC"); and United Building Maintenance, Inc. ("United"). You notified the interested parties of their right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from SSC. We have considered all of the submitted arguments and reviewed the information you submitted.

¹See 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).

You also inform us that the district requested clarification of part 5 of the first request for information.² You state that the district had not received a response as of the date of its request for this decision. Accordingly, the district has no obligation at this time to release any information that might be responsive to part 5 of the first request. But if the district receives clarification and wishes to withhold any of the information encompassed by the clarified request, then you must request another decision. *See* Gov't Code §§ 552.006, .301(a), .302.

We note that some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2008-11049 (2008). You do not indicate that there has been any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that you must dispose of the submitted information that is encompassed by Open Records Letter No. 2008-11049 in accordance with that decision. *See id.* § 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)). To the extent that it is not encompassed by Open Records Letter No. 2008-11049, we will determine whether the submitted information may be withheld from the requestors.

We next note that the district did not fully comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) requires the governmental body to request a decision and claim its exceptions to disclosure no later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) provides that the governmental body must submit to this office, no later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the claimed exceptions apply to the information at issue; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

Although the district seeks to withhold some of the submitted information under section 552.107(1) of the Government Code, the district failed to claim that exception within

²*See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

the ten-business-period prescribed by section 552.301(b).³ The district also failed to submit GCA's responsive information within the fifteen-business-day period prescribed by section 552.301(e).⁴ Section 552.107(1) is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 11 (2002) (governmental body may waive attorney-client privilege under Gov't Code § 552.107(1) or TEX. R. EVID. 503), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Consequently, the district's claim under section 552.107(1) is not a compelling reason for non-disclosure under section 552.302 of the Government Code. *See* ORD 676 at 12 (attorney-client privilege under Gov't Code § 552.107(1) or TEX. R. EVID. 503 constitutes compelling reason for non-disclosure under Gov't Code § 552.302 only if release of information would harm third party). In failing to comply with section 552.301(b), the district has waived section 552.107(1) and may not withhold any of the submitted information under that exception. However, the interests of a third party can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Therefore, we will consider whether any of GCA's information must be withheld on that basis.

An interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Diversified, GCA, Oriental, or United. Likewise, although Aramark notified the district of Aramark's general objection to the release of its information, this office has received no correspondence from Aramark. Therefore, because Aramark, Diversified, GCA, Oriental, and United have not demonstrated that any of the submitted information is proprietary for the purposes of the Act, the district may not withhold any of the information on the basis of any interest that any of those parties may claim. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the arguments that we received from SSC under section 552.110 of the Government Code. Section 552.110 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).

³You inform us that the district received the request for the information that it seeks to withhold under section 552.107(1) on June 2, 2008; therefore, the district's ten-business-day deadline for that information was June 16. The district claimed section 552.107(1) in a letter submitted to this office on June 23.

⁴The district's fifteen-business-day deadline was June 23, 2008. GCA's information was submitted on August 11.

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 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.⁵ *See* ORD 552 at 5. 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

⁵The 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).

SSC contends that portions of its proposal contain either trade secrets that are protected by section 552.110(a) or commercial or financial information that must be withheld under section 552.110(b). Having considered SSC's arguments and reviewed the information at issue, we have marked customer and pricing information that the district must withhold under section 552.110(b). We note that although SSC's documents also contain the names of other customers, those customers also are identified on SSC's Internet website. We are unable to conclude either that customer information published on SSC's website is a trade secret of the company or that the release of such information under the Act would cause SSC substantial competitive harm. We also find that SSC has neither demonstrated that any of the remaining information at issue constitutes a trade secret under section 552.110(a) nor made the factual or evidentiary showing required by section 552.110(b) that release of the information would cause SSC substantial competitive harm. We therefore conclude that the district may not withhold any of the remaining information relating to SSC under section 552.110. *See* Gov't Code § 552.110(a)-(b); ORD 552 at 5, 661 at 5-6; *see also* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

We note that section 552.136 of the Government Code is applicable to some of the remaining information.⁶ Section 552.136(b) states that "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). We have marked account and insurance policy numbers that the district must withhold under section 552.136.

Lastly, we note that some of the submitted information appears to be protected by copyright. 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 also 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, 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 district must dispose of the submitted information that is encompassed by Open Records Letter No. 2008-11049 in accordance with that decision; and (2) the

⁶Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

district must withhold the information that we have marked under sections 552.110 and 552.136 of the Government Code. The rest of the submitted information 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 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). If the governmental body does not file suit over 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).

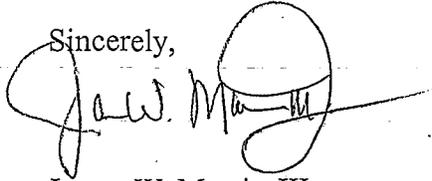
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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.

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,



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Assistant Attorney General
Open Records Division

JWM/jh

Ref: ID# 319621

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