



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 26, 2008

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2008-13233

Dear Mr. Smith:

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# 323196.

The Texas Health and Human Services Commission (the "commission") received two requests for copies of the vendor responses to RFI number 529-08-0201, titled "Technology for Fraud Detection and Deterrence." You inform us the commission is releasing a majority of the requested information. Although you take no position as to the disclosure of the submitted information, you state the information may implicate the proprietary interests of third parties. You also state, and provide documentation showing, you have notified Detica Federal Inc. ("Detica"), InfoZen, Inc. ("InfoZen"), Thomson Reuters ("Thomson"), and TransUnion ("TransUnion") of the requests and of their opportunity to submit comments 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) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). Representatives from Thomson and InfoZen have submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.²

¹Although the first requestor, EDS, excludes its own response from its request for information, you have verbally informed us EDS did not submit a response to the specified RFI. The second requestor, InfoZen, also excludes from its request its own response to the specified RFI.

²We note InfoZen has submitted additional information that it seeks to have withheld from disclosure. This decision is applicable only to the information submitted to this office by the commission. See Gov't Code § 552.301(e)(1)(D).

Initially, we note 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 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, Detica and TransUnion have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of these companies, and the commission may not withhold any portion of the submitted information 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). We will, however, address Thomson's and InfoZen's arguments against disclosure of their information.

Thomson asserts its information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. See Open Records Decision Nos. 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), 522 (1989) (discretionary exceptions in general). As the commission does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Thomson's proposal. See ORD 592 (governmental body may waive section 552.104). Thus, the commission may not withhold any of Thomson's information on that basis.

Thomson and InfoZen both assert portions of their information are excepted from disclosure under section 552.110 of the Government Code, which 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." Gov't Code § 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 ORD 552 at 2. 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. RESTATEMENT OF TORTS § 757 cmt. b (1939). The 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; and
- (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). 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. ORD 552 at 5-6. 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).

Having considered Thomson's and InfoZen's arguments, we conclude Thomson has established a *prima facie* case that some of its information constitutes trade secrets. Therefore, the commission must withhold the information we have marked pursuant to

section 552.110(a) of the Government Code. However, Thomson and InfoZen have each failed to demonstrate that any of the remaining information at issue constitutes a trade secret.³ See ORD 552 at 5-6. Accordingly, the commission may not withhold any of the remaining information under section 552.110(a).

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

Among other things, Thomson argues the release of the voluntarily provided RFI submissions could discourage private parties from providing proprietary information needed by State of Texas (the “state”) officials, and would thus harm future procurement efforts by the state. This argument relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act (“FOIA”) to third-party information held by a federal agency, as announced in *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). See also *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of Gov’t Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain proposals from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will only consider each third party’s own interests in the information at issue.

Upon review, we find Thomson and InfoZen have made only conclusory allegations that release of their remaining information would result in substantial damage to each company’s competitive position. Thus, these companies have not demonstrated substantial competitive injury would likely result from the release of any of their remaining information. See *id.* (for

³We note the mere fact information contains a trademark does not make the information confidential.

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 commission may not withhold any of the remaining information under section 552.110(b). As Thomson makes no other arguments against disclosure of its information, Thomson's remaining information must be released.

InfoZen also argues portions of its information cannot be disclosed publicly without prior written permission of the U.S. Department of Health and Human Services ("HHS") or the U.S. Department of Homeland Security ("DHS"). InfoZen asserts some of its information is not subject to release based on a contract with HHS under the Federal Acquisition Regulations. InfoZen did not, however, cite to any specific provision of these regulations. Our research shows HHS follows the federal Privacy Act of 1974 (the "Privacy Act") and FOIA. *See* 48 C.F.R. § 324.000, 45 C.F.R. § 5.1; *see also* 48 C.F.R. § 24.102 (requiring contractor for an agency to apply the requirements of Privacy Act and FOIA). In Attorney General Opinion MW-95 (1979), this office determined FOIA does not apply to records held by a state agency or its political subdivision. Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the state is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. *See* Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). Therefore, none of InfoZen's information that the commission maintains may be withheld under FOIA. Furthermore, the Privacy Act does not apply to this information.

Lastly, InfoZen asserts some of its information is confidential, classified information that may not be released without DHS' permission. Again, InfoZen does not cite to any laws to support this assertion. However, this office is aware that on November 25, 2002, the President signed the Homeland Security Act ("HSA"). The HSA created the DHS and transferred the Transportation Security Administration ("TSA"), a new agency created in the Department of Transportation the previous year to oversee the security of air travel, to DHS. *See* 6 U.S.C. §§ 111, 203.

In connection with the transfer of TSA to DHS, the HSA also transferred TSA's authority concerning sensitive security information ("SSI") under section 40119 of title 49 of the United States Code to section 114(s) of title 49 of the United States Code, and amended section 40119 to vest similar SSI authority in the Secretary of the Department of Transportation.⁴ Section 114(s)(1) of title 49 states:

Notwithstanding [FOIA] the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying

⁴This ruling does not construe the parallel federal statutes and regulations which apply to the Department of Transportation.

out security under authority of the Aviation and Transportation Security Act
if the Under Secretary decides that disclosing the information would

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or
financial information; or

(C) be detrimental to the security of transportation.

49 U.S.C. § 114(s)(1). This provision requires the TSA's Under Secretary to "prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act." *Id.* It authorizes the Under Secretary to prescribe regulations that prohibit disclosure of information requested not only under the FOIA, but also under other disclosure statutes. *Cf. Public Citizen, Inc. v. Fed. Aviation Admin.*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized FAA Administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under the FOIA). Thus, the Under Secretary is authorized by section 114(s)(1) to prescribe regulations that prohibit disclosure of information requested under chapter 552 of the Government Code.

Pursuant to the mandate and authority of section 114(s)(1) of title 49, TSA published new interim final regulations pertaining to civil aviation security, which are found in title 49 of the Code of Federal Regulations and which took effect June 17, 2004. *See* 69 Fed. Reg. 28066. Section 1520.1(a) of these regulations provides that the regulations govern the disclosure of records and information that TSA has determined to be SSI as defined in section 1520.5 of title 49 of the Code of Federal Regulations. 49 C.F.R. § 1520.1(a). Section 1520.5 defines SSI to include information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would be detrimental to the security of transportation. *Id.* § 1520.5(a)(3). Further, section 1520.5 lists sixteen categories of information that constitute SSI, including "[s]pecific details of aviation or maritime transportation security measures, both operational and technical, whether applied by the Federal government or another person." *Id.* § 1520.5(b)(8). Section 1520.9 provides that those covered by the regulation, which, among others, includes airport and aircraft operators, their employees, contractors, and agents, *see Id.* § 1520.7(a), must "[t]ake reasonable steps to safeguard SSI . . . from unauthorized disclosure[]" and *must* "[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS." *Id.* § 1520.9(a).

Further, we note section 5.7 of title 6 of the Code of Federal Regulations provides that "in processing a request for information that is classified under [any executive order], the originating component shall review the information to determine whether it should remain classified." 6 C.F.R. § 5.7; *see also* 6 C.F.R. § 5.1 (defining "component" to mean each separate bureau, office, board, division, commission, service, or administration of DHS).

InfoZen asserts portions of its information pertain to a contract with DHS/TSA that is classified at the "secret" level. From our review of the information at issue, we believe the information may be subject to the above-described statutory and regulatory scheme. Thus, we conclude the decision to release or withhold the information at issue is not for this office, the commission, or InfoZen to make, but rather is a decision for the Under Secretary as head of the TSA or DHS. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *see also Louisiana-Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). Consequently, we conclude the commission may not release the information at issue at this time, and instead must refer this information to TSA or DHS to make a determination concerning disclosure.

Finally, we note some of the remaining submitted information is 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 commission must withhold Thomson's information we have marked under section 552.110 of the Government Code. The remaining submitted information must be released, except (1) the commission may not release any of the submitted information relating to InfoZen's contract with DHS/TSA at this time under the Act, and instead must allow the TSA and DHS to make a determination concerning disclosure, and (2) any information 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,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 323196

Enc. Submitted documents

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