



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 20, 2008

Mr. Robert D. Blumenfeld  
Mendel Blumenfeld, L.L.P.  
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OR2008-14317

Dear Mr. Blumenfeld:

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# 325122.

The El Paso Mental Health and Mental Retardation Center (the "center") received a request for the proposals sent in response to a specific request for proposals issued by the center. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state that the center notified Three C's Contractors, Inc. ("Three C's"), Currey Adkins ("Currey"), Sonsia Managed Services ("Sonsia"), and Dyonyx L.P. ("Dyonyx") of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.301(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 applicability of exception to disclosure in certain circumstances). We have received and considered comments from Three C's and Dyonyx. We have considered the submitted arguments and reviewed the submitted information.

Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). The center claims that it received the request for information on July 29, 2008. However, the submitted e-mails reflect that the request was received by the center on July 16, 2008. Because you have not explained why the e-mail dated July 16, 2008 is not a valid request, we find that the center received the request on that date. Accordingly, the center was required to submit a request for a ruling by July 30, 2008. The center, however, did not submit its request for a decision until August 11, 2008. Consequently, we find that the center failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential under other law. Open Records Decision No. 150 (1977). You raised sections 552.104 and 552.110 of the Government Code. Section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). In failing to comply with section 552.301, the center waived its claim under section 552.104. However, because third party interests are at stake, we will address the arguments that the information is proprietary.

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, Currey and Sonsia have not submitted to this office any reasons explaining why their proposals should not be released. Thus, these third parties have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the center may

not withhold any portion of the information pertaining to Currey and Sonsia on the basis of any proprietary interests that these third parties may have in the information.

We now turn to the arguments submitted by Three C's and Dyonyx against the disclosure of their proposals. Three C's asserts that its proposal is confidential under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by statutes. Three C's has not referred us to, nor are we aware of, any law that would make its proposal confidential under section 552.101. Therefore, Three C's proposal may not be withheld under section 552.101 of the Government Code.

Three C's also asserts that its proposal is excepted under 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 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 No. 592 (1991). As the center has waived its claim under section 552.104, this exception is not applicable to the submitted information.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information the release of which would cause a third party substantial competitive harm. *See* Gov't Code § 552.110. Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See 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.<sup>1</sup> RESTATEMENT OF TORTS § 757 cmt. b. 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).

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." 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 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Three C's claims that its pricing information and customer lists contained in its proposal should be withheld under section 552.110(b). Dyonyx claims that its costs should be withheld under section 552.110(b). We find that release of the pricing information we have marked on pages 6-7 and the "Vendor References" on page 7 of the Three C's proposal and Tables 4 and 5, which we have marked, on page 33 of the Dyonyx proposal would cause the companies substantial competitive harm. Accordingly, this information must be withheld under section 552.110(b). Three C's also asserts that certain product information contained in its proposal is a trade secret under section 552.110(a)(1). Three C's has not, however, provided any arguments that this information meets the definition of a trade secret nor has it established any of the necessary factors. Accordingly, Three C's may not withhold the product information under section 552.110(a). *See* ORD 552 at 5. Three C's also claims that release of the product information would substantially harm its commercial or financial

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<sup>1</sup>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; (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).

interests. However, the company has only given general assertions under section 552.110(b) as to how it would suffer commercial or financial harm if the product information was released. *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). Dyonyx claims that release of its scope of services would cause competitive harm to its interests. However, Dyonyx, too, only makes a conclusory assertion and does not provide specific arguments establishing how release would cause substantial competitive harm. *Id.* Moreover, the center does not provide any arguments explaining how release of the information Three C's and Dyonyx seek to withhold would cause those companies competitive harm. Accordingly, none of the remaining information Three C's and Dyonyx seek to withhold is excepted under section 552.110.

Finally, we note that the submitted proposals contain insurance policy numbers. 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”). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. We have marked the insurance policy numbers in the proposals that must be withheld under section 552.136.

In summary, the pricing information we have marked on pages 6-7 and the “Vendor References” on page 7 of the Three C's proposal and Tables 4 and 5 on page 33 of the Dyonyx proposal must be withheld under section 552.110(b). The marked insurance policy numbers must be withheld under section 552.136. The remaining information must be released.

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,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/eeg

Ref: ID# 325122

Enc. Submitted documents

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