



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2008

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2008-15207

Dear Mr. Ramirez:

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# 326974.

The Lower Colorado River Authority (the "LCRA") received a request for the proposal analysis/data for a specified request for proposals, a copy of the top three proposals inclusive of the awarded vendor's proposal and exclusive of the requestor's proposal, and "any other data or comments that would be helpful in our review and analysis of [the requestor's] work product." Although you take no position as to whether the submitted information is excepted from disclosure, you indicate that the submitted information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing that you notified the interested parties, Employee Network, Inc. ("ENI"), WorkLife Innovations ("WorkLife"), Alliance Work Partners ("Alliance"), and MHN Services ("MHN") 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 § 552.305(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 (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 arguments from ENI and WorkLife. We have reviewed the information you submitted and considered the submitted arguments.

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, Alliance

and MHN have failed to submit to this office any reasons explaining why the requested information should not be released. Therefore, Alliance and MHN 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 their 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.

WorkLife and ENI contend that portions of the requested information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary 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. See Gov't Code § 552.110(a), (b).

The Texas Supreme Court has adopted the definition of a 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. 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. *Id.*¹ This office has held that if

¹The 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]

a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we will accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for the exception and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 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) of the Government Code 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). This exception to disclosure 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 id.*; *see also* Open Records Decision No. 661 (1999).

WorkLife and ENI each assert that specified information contained in their submitted proposals constitute trade secrets under section 552.110(a). Based on our review of the companies' arguments and the submitted information, we find that both WorkLife and ENI have established a *prima facie* case that some of the information each seeks to withhold constitutes trade secrets that are excepted from disclosure under section 552.110(a) of the Government Code. Accordingly, we have marked the information pertaining to WorkLife and ENI that the LCRA must withhold pursuant to section 552.110(a). A portion of the remaining information that ENI seeks to withhold consists of general information about the company and its employees. This office has ruled in several formal decisions that information relating to a company's organization and the qualifications and experience of its employees is not protected by section 552.110(a). *See, e.g.*, Open Records Decision Nos. 319 (1982); 306 (1982). We also note that pricing information is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. B (1939); *see Hyde Corp.*, 314 S.W.2d at 776, *see also* Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Therefore, we determine that WorkLife and ENI have failed to demonstrate that any portion of their remaining information constitutes a trade secret for purposes of section 552.110(a). Accordingly, no portion of the remaining submitted information may be withheld pursuant to section 552.110(a).

WorkLife and ENI assert that some of their remaining submitted information constitutes commercial or financial information that, if released, would cause substantial competitive

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).

harm. Upon review, we determine that ENI has demonstrated, based on a specific or factual evidentiary showing, that the release of some of its information would result in substantial competitive harm. Accordingly, we have marked the information that must be withheld under section 552.110(b). However, as to WorkLife and ENI's remaining information at issue, we determine that they have failed to make such a showing. Thus, no part of their remaining information may be withheld on this basis.

We note that the submitted information contains 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."² 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 submitted information that must be withheld under section 552.136 of the Government Code.

We also 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 must also 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, the LCRA must withhold the information we have marked in WorkLife's and ENI's proposals under sections 552.110(a) of the Government Code. The LCRA must also withhold the information we have marked under section 552.110(b) in ENI's proposal. The LCRA must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released. However, 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

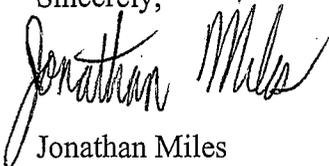
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 326974

Enc. Submitted documents

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