



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2009

Mr. Robert K. Nordhaus
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2009-02832

Dear Mr. Nordhaus:

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# 336342 (ORR 08-1226).

The City of San Antonio (the "city") received a request for the "Response to RFP filed by Assured Towing in response to the current [city] RFP put out this year for towing services." You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. Furthermore, although you take no position with respect to the remaining submitted information, you state this information may contain proprietary information subject to exception under the Act. Accordingly, you state, and have provided documentation showing, you notified Assured Towing ("Assured") of the city's receipt of the request for information and of its right to submit arguments to this office as to why its information should not be released to the requestor. *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). We have received comments from Assured. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(D). The city received the request for information on October 10, 2008, but did not request a ruling from this office or submit the information at issue until December 17, 2008. Thus, the city failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); 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). Section 552.101 of the Government Code and Assured's third party interests can provide compelling reasons to overcome this presumption; therefore, we will consider whether the submitted information is excepted under the Act.

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 section encompasses information protected by other statutes. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. §§ 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). We have marked the tax return information that the city must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Assured contends that portions of the remaining 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.¹ *Id.* 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 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 (1990). 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

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] 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).

substantial competitive injury would likely result from release of the information at issue. *See id.*; *see also* Open Records Decision No. 661 (1999).

Assured asserts that specified information contained in its proposal constitutes trade secrets under section 552.110(a). Based on our review of Assured's arguments and the submitted information, we find that Assured has not established a *prima facie* case that any of the information it seeks to withhold constitutes trade secrets that are excepted from disclosure under section 552.110(a) of the Government Code. 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, 306 at 3. Therefore, we determine that Assured has failed to demonstrate that any portion of the remaining submitted 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).

Assured also asserts that some of the remaining submitted information constitutes commercial or financial information that, if released, would cause it substantial competitive harm. Upon review, we determine that Assured 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). Upon review of Assured's remaining arguments, we find it has provided conclusory arguments that release of its remaining information would result in substantial competitive harm. *See* Open Records Decision Nos. 661 (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), 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 is too speculative), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note the pricing information of a winning bidder, such as Assured in this instance, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the city may not withhold any portion of the remaining information under section 552.110(b).

Assured claims its insurance policy numbers are excepted under section 552.136 of the Government Code, which states that “[n]otwithstanding any other provision of this chapter, 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. An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* The city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note that the remaining information contains information that is subject to section 552.130 of the Government Code.² Section 552.130 of the Government Code exempts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state. *See id.* § 552.130 (a)(2). The city must withhold the Texas motor vehicle record information we have marked under section 552.130 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 city must withhold the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, the proprietary information we have marked under section 552.110(b) of the Government Code, the Texas motor vehicle record information we have marked under section 552.130 of the Government Code, and 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 information 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 information or any other circumstances.

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).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely

A handwritten signature in black ink that reads "Jonathan Miles". The signature is written in a cursive style with a large initial "J".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 336342

Enc. Submitted documents

c: Requestor
(w/o enclosures)