



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2009

Ms. Linda S. Wiegman
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2009-03541

Dear Ms. Wiegman:

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# 337570.

The Texas Department of State Health Services (the "department") received two requests for information pertaining to a specified request for proposal for survey data collection services. You state the department has released some of the requested information to the requestors. You state that the department will withhold social security numbers from the submitted information pursuant to section 552.147(b) of the Government Code.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also state that the submitted information implicates the proprietary interests of Clearwater Research Inc. ("Clearwater"). You state, and provide documentation showing, that you notified Clearwater of this request for information and of its right to submit arguments to this office as to why the information should not be released. *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 Clearwater. We have considered the submitted arguments and reviewed the submitted information.

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Initially, we must address the department'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. *See* Gov't Code § 552.301(a), (b). You state that the department received the first request for information on December 17, 2008. However, you did not request a ruling from this office until January 9, 2009. Thus, the department 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 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 id.* § 552.302; *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). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because your claims under sections 552.101 and 552.110 and the third party interests can provide compelling reasons to withhold information, we will address whether the submitted information is excepted from disclosure 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 the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.²

The department and Clearwater both contend 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

²As our ruling is dispositive, we need not address your argument under constitutional privacy for this information.

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.³ *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).

³The 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).

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).

Clearwater asserts that specified information contained in its proposal constitutes trade secrets under section 552.110(a). Based on our review of Clearwater’s arguments and the submitted information, we find that Clearwater 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 Clearwater 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).

Clearwater also asserts that its client lists, qualifications and roles of its employees, internal practices and methodologies, work plans and practices for the RFP at issue, and underlying cost basis including salaries for the RFP constitute commercial or financial information that, if released, would cause it substantial competitive harm. Upon review, we determine that Clearwater 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 Clearwater’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 Clearwater in this instance, is generally not excepted under

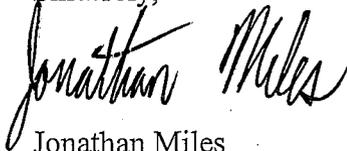
section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & 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). We also note that Clearwater has published the identities of some of its customers on its website. Thus, Clearwater failed to demonstrate that release of the identities of these customers would cause it substantial competitive harm. Accordingly, the department may not withhold any portion of the remaining information under section 552.110(b).

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

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.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 335750

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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