



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 13, 2009

Mr. Gary Grief  
Deputy Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR2009-07790A

Dear Mr. Grief:

This office issued Open Records Letter No. 2009-07790 (2009) on June 8, 2009. We have examined this ruling and determined that Open Records Letter No. 2009-07790 is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2009-07790. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

The Texas Lottery Commission (the "commission") received a request for all proposals, excluding financials, HUB subcontracting information, disqualified proposals, and background packets, submitted in response to the Lottery Risk Review and Compliance Monitoring Services RFP (362-9-9000), as well as the report and recommendations for the award of the contract.<sup>1</sup> You state that you are releasing some of the responsive information to the requestor. While you raise section 552.110 of the Government Code as a possible exception to disclosure, you take no position with respect to the applicability of this exception. Instead, you indicate release of the submitted information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, you have notified Grant Thornton LLP ("Grant Thornton"), Zerimar Consulting, and Macdonald Page & Co. LLC of the request and of their opportunity to submit comments to this office as to why this information should not be released pursuant to section 552.305(d)

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<sup>1</sup>We note that the commission asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

of the Government Code. See Gov't Code § 552.305(d); Open Records Decision No. 542 (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). Pursuant to section 552.305(d), Grant Thornton has submitted comments to this office objecting to the release of its information. We have considered the submitted arguments and reviewed the submitted information.

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 information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only Grant Thornton has submitted to this office reasons explaining why its information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in the submitted proposals. 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). Therefore, the commission may not withhold any portion of the submitted information on the basis of any proprietary interest that the remaining third parties may have in this information.

Grant Thornton asserts that some of the submitted information is excepted from disclosure 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Grant Thornton argues that the names and personally identifying information of Grant Thornton personnel or other named individuals is excepted under common-law privacy. Upon review, however, we find that no portion of Grant Thornton's information is protected by common-law privacy and it may not be withheld under section 552.101 on that basis.

Grant Thornton also asserts that its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. *Id.* § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 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. 1957); *see also* Open Records Decision No. 552 at 2 (1990). 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>2</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[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

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<sup>2</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).

result from release of the information at issue. *Id.* § 552.110(b); *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Grant Thornton claims section 552.110(a) for portions of its information. Having considered Grant Thornton's arguments, we conclude Grant Thornton has established a *prima facie* case that its customer lists, which we have marked, constitute trade secret information. Therefore, the commission must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, we conclude that Grant Thornton has failed to demonstrate any portion of its remaining information constitutes a trade secret. 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). Accordingly, the commission may not withhold the remaining information under section 552.110(a).

Grant Thornton also argues section 552.110(b) for some of its remaining information, claiming that portions of its report constitute commercial information that, if released, would cause substantial competitive harm to the company. After reviewing Grant Thornton's arguments and submitted report, we find Grant Thornton has established that release of some of its methodology and processes would cause it substantial competitive injury. Therefore, the commission must withhold this information, which we have marked, under section 552.110(b). We find, however, Grant Thornton has provided no specific factual or evidentiary showing that release of the remaining information it seeks to withhold would cause the company substantial competitive injury. Therefore, the commission may not withhold any of the remaining information under section 552.110(b).

Grant Thornton claims its proposal contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 provides in relevant part the following:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals,  
contained in a response to similar invitations soliciting offers

or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . . [.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses at issue were provided to the commission by Grant Thornton in response to a request for bids or proposals. Thus, none of the e-mail addresses in the information at issue are excepted under section 552.137.

Finally, we note that some of the submitted information appears to be 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 the information we have marked under section 552.110 of the Government Code. The remaining submitted information must be released, but only 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.

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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/rl

Ref: ID# 354143

Enc. Submitted documents

c: Requestor  
(w/o enclosures)