ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2010

Mr. Mark Adams
Office of the General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2010-03151

Dear Mr. Adams:

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# 371678.

The Office of the Governor (the "governor") received a request for three specified Texas Enterprise Zone Program applications. You claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code.[1] You also state the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified Deloitte L.L.P. ("Deloitte"); Ryan, Inc. ("Ryan"); and Tyson Prepared Foods, Inc. ("Tyson") of the request and of each company's right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *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 under Act in certain circumstances). We have received comments from Deloitte, Ryan, and Tyson. We have considered the submitted arguments and reviewed the submitted information.

[1] We note that the governor also raises section 552.131 of the Government Code. However, you have not provided this office with arguments applying that exception to the submitted information. Therefore, we assume you no longer assert this exception. *See* Gov't Code §§ 552.301(e), .302.

The governor and Deloitte raise section 552.104 of the Government Code. Because section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties, we will not consider Deloitte's claims under section 552.104. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2, 463, 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

In this case, we find you have not established that the governor has specific marketplace interests with respect to completed Texas Enterprise Zone Program applications. We therefore find the information at issue is not excepted under section 552.104 on that basis. Furthermore, we note that at the time the governor received the present request, the third parties at issue had already been designated as Texas Enterprise Projects. Thus, we find that there was not a competitive situation pertinent to the records at issue occurring at the time of the request, and we determine that the governor may not withhold any of the information at issue under section 552.104 of the Government Code.

Deloitte, Ryan, and Tyson each raise section 552.110 of the Government Code for portions of their information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 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. 1958); *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.[2] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 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." Gov't Code § 552.110(b). 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 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Ryan asserts portions of its information constitute trade secrets. After reviewing Ryan's arguments and the information at issue, we conclude Ryan has failed to establish that any of its information meets the definition of a trade secret, nor has it demonstrated the necessary

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[2] 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).

factors to establish a trade secret claim for any of its information. Thus, the governor may not withhold any portion of the submitted information under section 552.110(a) of the Government Code.

Deloitte, Ryan, and Tyson each argue that release of portions of their information would cause the company substantial competitive harm. Upon review of the arguments and information at issue, we find that Deloitte, Ryan, and Tyson have each established that portions of their information, which we have marked, constitute commercial or financial information, the release of which would cause their companies substantial competitive injury. However, Deloitte, Ryan, and Tyson have provided no specific factual or evidentiary showing that the release of their remaining information would result in substantial competitive injury to their companies. *See* Open Records Decision Nos. 661, 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 (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). Accordingly, the governor must withhold only the information we have marked under section 552.110(b) of the Government Code.[3]

Ryan and Tyson assert that portions of their remaining information may not be disclosed because the information at issue is confidential under section 552.101 of the Government Code. 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. While Ryan and Tyson generally assert portions of their remaining information are confidential by law, they have not directed our attention to any confidentiality provision, nor are we aware of any, that would make the information at issue confidential under section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the governor may not withhold any portion of Ryan's information or Tyson's information under section 552.101 of the Government Code.

Deloitte also raises section 552.137 of the Government Code, which provides in part:

> (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.
>
> ...

[3] As our ruling on the information at issue is dispositive, we need not address the remaining arguments against release of this information.

> (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[.]

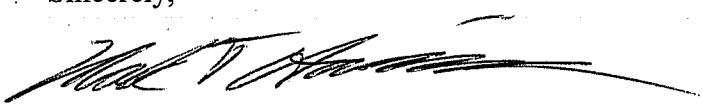
Gov't Code § 552.137(a), (c). Deloitte argues its employees' e-mail addresses within the information at issue are excepted under section 552.137 and asserts that "[t]he [a]pplication is not related to a contract with the [g]overnor but is instead an application for approval of a statutory enterprise project designation." We disagree, and conclude that the e-mail addresses at issue are subject to section 552.137(c). We therefore find that the e-mail addresses Deloitte marked in its information are not excepted from disclosure under section 552.137(a) and may not be withheld on that basis.

In summary, the governor must withhold 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, toll free, at (888) 672-6787.

Sincerely,



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MTH/rl

Ref: ID# 371678

Enc. Submitted documents

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