



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2010

Mr. Ronald J. Bounds
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
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OR2010-04298

Dear Mr. Bounds:

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# 373866.

The City of Corpus Christi (the "city") received a request for all bids for wrecker service for specified city vehicles that were solicited from area towing companies for the years 2000 to 2009. You state some of the responsive information will be made available to the requestor. Although you take no position regarding the public availability of the submitted information, you state its release may implicate the rights of the third parties whose information has been requested. Accordingly, you state, and provide documentation showing, that you have notified Sanford's Wrecker Service; Amey's Wrecker Service; Statewide Wrecker Service ("Statewide"); Brat Corporation d/b/a Autotown Towing; WDH Enterprises, Inc., d/b/a Erika's Wrecker, H & H Towing, and Holly Auto Sales; and Mr. David R. Resendez and Mr. Raymond Schaalman, Inc., d/b/a Apollo Towing/Easy Rider Wrecker Service ("Apollo") of their right to submit arguments to this office as to why their submitted 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 Statewide and Apollo. We have reviewed the submitted arguments and the submitted information.

Initially, 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) 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, we have not received correspondence from the remaining third parties explaining why their information should not be released. Thus, we have no basis for concluding that any portion of the submitted information pertaining to these companies constitutes proprietary information, and the city may not withhold any portion of their information on that basis. *Cf.* 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.

Next, we address the arguments of the third parties who submitted comments. Statewide and Apollo assert that some or all of their proposals are confidential under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ Gov't Code § 552.101. Specifically, Statewide contends that its tax return information is confidential under section 552.101. Section 552.101 encompasses section 6103(a) of title 26 of the United States Code, which renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find the city must withhold the 1040 form we have marked in Statewide's information, as well as the 1120S form we have marked in the remaining information, pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of

¹We note that Statewide asserts it does not object to the release of the bid tabulations taken from its submitted bid sheets.

the United States Code.² As we are able to make this determination, we do not address Statewide's other argument against disclosure of its tax return information.

Section 552.101 also 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 established. *Id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We have marked personal financial information pertaining to Apollo's employees that the city must withhold under section 552.101 of the Government Code in conjunction with common-law privacy. None of the remaining information pertaining to Apollo is intimate or embarrassing, however, and it may not be withheld on the basis of common-law privacy. Further, Apollo does not inform us of any specific law, nor are we aware of a specific law, that makes any portion of its remaining information confidential under section 552.101. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold any portion of Apollo's remaining information under section 552.101 of the Government Code.

Statewide and Apollo also raise section 552.110 of the Government Code for portions of their submitted information. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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

²The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). 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. *See* Open Records Decision No. 402 (1983). We note that pricing information pertaining to a particular contract 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 Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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 result from release of the information at issue. *See id.*; ORD 661 at 5-6.

We understand Apollo to contend that the release of its information would discourage vendors such as Apollo from conducting business with governmental entities, thus impairing the competitive position of Texas agencies on future projects. In advancing this argument, Apollo appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks*. *See also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) of the Government Code by Seventy-sixth Legislature). Thus, the ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Apollo’s interests in its information.

Upon review, we find that Statewide has established that a portion of its information, which we have marked, is a protected trade secret. Accordingly, the city must withhold this information under section 552.110(a) of the Government Code. However, Statewide has not demonstrated that any of the remaining information it seeks to withhold, and Apollo has not demonstrated that any of the information it seeks to withhold, constitutes a trade secret, nor demonstrated the necessary factors to establish a trade secret claim. *See* ORD 552 at 5-6. Thus, the city may not withhold any of the remaining information pertaining to Statewide and Apollo under section 552.110(a) of the Government Code. We further find that Apollo has established that the release of some of its pricing information, which we have marked, would cause its company substantial competitive harm. Therefore, the city must withhold the marked information under section 552.110(b) of the Government Code. However, we note

that the pricing information of a winning bidder, such as Apollo with respect to some of the bids at issue, 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 reason that disclosure of prices charged government is a cost of doing business with government). Therefore, the city may not withhold Apollo's pricing information on contracts for which it was the winning bidder. Further, we find that Statewide and Apollo have not made the specific factual and evidentiary showing required by section 552.110(b) that release of the remaining information they seek to withhold would cause their companies substantial competitive harm. *See* ORD 661. Therefore, the city may not withhold any portion of the remaining information pertaining to Statewide and Apollo under section 552.110(b) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1), (2). Statewide contends, and we agree, that a portion of its information is confidential under section 552.130. Accordingly, we have marked motor vehicle record information in the submitted documents pertaining to Statewide, as well as in the information pertaining to the other third parties, that is subject to section 552.130.³ We note, however, that section 552.130 does not encompass motor vehicle record information of other states. It is unclear if some of the submitted motor vehicle record information was issued by a Texas agency. Therefore, to the extent the information we have marked was issued by an agency of this state, the city must withhold this information pursuant to section 552.130 of the Government Code.⁴ The city may not withhold any information that does not pertain to motor vehicle record information issued by an agency of the State of Texas under section 552.130.

Statewide raises section 552.147 of the Government Code for the social security numbers in its submitted proposal. We note that section 552.147(b) authorizes a governmental body to redact a social security number of a living person from public release without requesting a decision from our office. *Id.* § 552.147(b). Thus, the city may withhold this information under section 552.147.

³The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the city must withhold the 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 and the doctrine of common-law privacy. The city must withhold the information we have marked under sections 552.110(a) and (b) of the Government Code. The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code, to the extent the information was issued by a Texas agency. The city may withhold social security numbers in the submitted information under section 552.147. 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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/cc

Ref: ID# 373866

Enc. Submitted documents

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