



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 26, 2010

Mr. Robert L. Blumenfeld  
Mendel Blumenfeld, L.L.P.  
For El Paso Mental Health and Retardation  
5809 Acacia Circle  
El Paso, Texas 79912

OR2010-07679

Dear Mr. Blumenfeld:

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# 381152.

El Paso Mental Health and Mental Retardation ("MHMR"), which you represent, received a request for "all bids submitted for janitorial service" to MHMR.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state the submitted documents may contain proprietary information of third parties subject to exception under the Act.<sup>2</sup> Accordingly, you have notified these interested third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have

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<sup>1</sup>We assume that the request does not include the requestor's proposal.

<sup>2</sup>The interested third parties are Western Janitorial Service, Inc.; S.J. Services; PSH Professional Cleaning Services, Inc.; Best Sun City; and National Janitor Service & Supply Co.

received comments from Western Janitorial Services, Inc. ("Western").<sup>3</sup> We have considered the submitted arguments and reviewed the submitted information.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, in some situations, section 552.104 will operate to protect from disclosure bid information that is submitted by successful bidders. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).

You acknowledge the responsive information relates to an executed contract. You have made a general assertion that portions of the submitted information "continue to be exempt from disclosure under [section 552.104]" after the procurement process is complete. However, we conclude the information at issue does not reflect MHMR is engaging in any particular competitive bidding situation and you have not sufficiently explained the applicability of section 552.104 to the information you seek to withhold under this exception. *See* Open Records Decision No. 509 at 5 (1998) (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 was entirely too speculative to withhold information under predecessor statute). Consequently, MHMR may not withhold any of the responsive information under section 552.104 of the Government Code.

Although MHMR raises section 552.110 of the Government Code for the submitted information, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. 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, we have received comments only from Western explaining why portions of the company's information should not be released. Therefore, we have no basis to conclude any of the

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<sup>3</sup>Western raises sections 552.101, 552.102, 552.110, 552.117, and 552.137 of the Government Code as exceptions to disclosure of its information. Although Western also claims section 552.205 of the Government Code, we note that this section is not an exception to disclosure under the Act. Rather, section 552.205 prescribes the methods by which a governmental body shall inform the public of basic rights and responsibilities under the Act. We further note that Western does not object to the release of its proposed price.

remaining companies have protected proprietary interests in their submitted information. *See id.* § 552.110; 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. Accordingly, MHMR may not withhold these companies' proposals on the basis of any proprietary interest they may have in them.

Western claims that its information is subject to 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." Gov't Code § 552.101. However, Western has not directed our attention to any law, nor are we aware of any law, that makes the information at issue confidential. *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, MHMR may not withhold any of Western's information under section 552.101 of the Government Code.

Western raises section 552.102(a) of the Government Code for its submitted information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In this instance, the information at issue is related to a private entity, Western. Therefore, MHMR may not withhold any portion of Western's proposal under section 552.102(a) of the Government Code.

Western also raises section 552.117 of the Government Code as an exception to disclosure. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code §§ 552.117(a)(1), .024.* Section 552.117 protects information relating to public officials and employees, not a private entity such as Western. Thus, MHMR may not withhold any portion of Western's proposal under section 552.117 of the Government Code.

Western claims that its information is confidential under section 552.128 of the Government Code. Section 552.128 is applicable to "[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]" Gov't Code § 552.128(a). However, Western does not indicate it submitted its proposal in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

*Id.* § 552.128(c). In this instance, Western submitted its proposal to MHMR in connection with a specific proposed contractual relationship with MHMR. We therefore conclude that MHMR may not withhold any portion of Western's proposal under section 552.128 of the Government Code.

Western also asserts section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note, however, that Western's information does not contain any e-mail addresses. Thus, section 552.137 is inapplicable.

Western claims that its financial information, customer lists, bid format, and the "overall completed proposal" are excepted from public 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. Gov't Code § 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 a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.<sup>4</sup> Open Records Decision No. 402 (1983).

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 information at issue. Gov't Code § 552.110(b).

Having considered Western's arguments and reviewed the information at issue, we agree that Western's customer information, which we have marked, constitutes trade secret information under section 552.110(a). However, Western has failed to demonstrate that any portion of its remaining information constitutes a trade secret. Thus, the remaining information may not be withheld under section 552.110(a) of the Government Code.

We additionally find that Western has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause 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), 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

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<sup>4</sup>The Restatement of Torts lists the following six factors 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).

section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). We therefore conclude that MHMR may not withhold any of Western's remaining information under section 552.110(b). See Gov't Code § 552.110(a)-(b); see also Open Records Decision Nos. 509 at 5 (1988) (because bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative).

We note a portion of the remaining information is subject to section 552.101 of the Government Code. This section 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 that MHMR must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

We next note the submitted information includes insurance policy numbers. Section 552.136 of the Government Code provides 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."<sup>5</sup> Gov't Code § 552.136. This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, MHMR must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>6</sup>

In summary, MHMR must withhold the customer information we have marked under section 552.110(a) of the Government Code, the personal financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released to the requestor.

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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>6</sup>We 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 insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 381152

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Jerry Bacon  
President  
Western Janitorial Service, Inc.  
2124 Montana Avenue  
El Paso, Texas 79903  
(w/o enclosures)

Mr. Gabriel Sotelo  
President  
S.J. Services  
P.O. Box 220553  
El Paso, Texas 79913  
(w/o enclosures)

Ms. Graciela V. Hernandez  
President  
PSH Professional Cleaning Services, Inc.  
P.O. Box 372022  
El Paso, Texas 79937  
(w/o enclosures)

Mr. Andy Mendoza  
Best Sun City  
7616 Corozal Drive  
El Paso, Texas 79915  
(w/o enclosures)

Mr. Robert Munoz  
National Janitor Service & Supply Co.  
P.O. Box 11572  
El Paso, Texas 79999-1572  
(w/o enclosures)