



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 2, 2010

Ms. YuShan Chang  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001

OR2010-09826

Dear Ms. Chang:

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# 385040.

The City of Houston (the "city") received a request for the staffing services bid proposals submitted in 2008 by LoganBritton, Inc. ("LoganBritton"), ObjectWin Technology, Inc. ("ObjectWin"), A-1 Personnel of Houston, Inc. ("A-1"), Elite Personnel Consultants, Inc. ("Elite"), and ExecuTeam Staffing, L.P. ("ExecuTeam"). Although you take no position as to the public availability of the submitted bid proposals, you state their release may implicate the proprietary interests of LoganBritton, ObjectWin, A-1, Elite, and ExecuTeam. Thus, pursuant to section 552.305 of the Government Code, you notified those five companies of the request and of the companies' right to submit arguments to this office as to why their information should not be released. 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 in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an

interested third party may submit comments stating why information should or should not be released).

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from A-1 explaining why any portion of its submitted proposal should not be released. Therefore, we have no basis to conclude A-1 has protected proprietary interests in its 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 (1990). Consequently, the city may not withhold A-1's proposal on the basis of any proprietary interest that company may have in the information.

First, although ExecuTeam raises section 552.104 of the Government Code for portions of the company's submitted proposal, this section only protects the interests of a governmental body. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). Section 552.104 does not protect the interests of third parties, and therefore we will not consider ExecuTeam's claim under this section.

LoganBritton, ObjectWin, and ExecuTeam each raise section 552.110 of the Government Code for portions of their proposals. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by 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).

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>1</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. *See* Open Records Decision No. 661 at 5-6 (1999) (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).

Both ExecuTeam and LoganBritton argue the information identifying the companies' clients should be withheld under section 552.110(a). We have marked the references in the proposals for ExecuTeam and LoganBritton that the city must withhold under section 552.110(a) of the Government Code. However, these companies have made the remaining

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<sup>1</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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

listed references publicly available on their respective websites, and have failed to demonstrate how information that has been published on a website could also be a trade secret. *See* ORD 402. ExecuTeam additionally claims section twelve of its proposals reveal proprietary processes the company uses to transition its customers from another staffing company. ObjectWin states sections E, F, and G of its proposal contain processes it has developed to solve its client's problems. Having reviewed these companies' arguments, we have marked the portions of these sections that reveal the proprietary methods and processes of ExecuTeam and ObjectWin. Because these companies have shown how this marked information meets the definition of a trade secret and is protectable as such, the city must withhold the information we marked under section 552.110(a). Although LoganBritton also claims its proposal contains proprietary methods and procedures, LoganBritton states the remaining information in its proposal was specifically compiled to build and win this particular bid. Additionally, the remaining portions of section twelve of ExecuTeam's proposals and the remaining portions of sections E, F, and G of ObjectWin's proposal reflect they are procedures that were specifically tailored for this particular bid. Such information developed for a particular solicitation or 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." *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. LoganBritton, ExecuTeam, and ObjectWin each claim the information in their proposals regarding the companies' staffing, organization, experience, and general qualifications should be withheld as trade secrets. However, section 552.110 is generally not applicable to these types of information. *See* Restatement of Torts § 757 cmt. b.; ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Thus, we conclude LoganBritton, ExecuTeam, and ObjectWin have not established any of the remaining information in the companies' proposals meets the definition of a trade secret, and the city may not withhold any of the remaining information on that basis.

LoganBritton, ExecuTeam, and ObjectWin also raise section 552.110(b). However, these companies do not specifically explain how competitive harm would result from release of the remaining information, which consists of financial statements, clients found on the companies' websites, and information that has been tailored for this particular proposal. *See* Open Records Decision No. 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). Thus, we find none of these companies have made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORD Nos. 661 at 5-6, 509 at 5.

Next, we turn to the arguments by Elite that its tax information should be withheld. Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”<sup>2</sup> Gov’t Code § 552.101. This section encompasses information protected by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders “tax return information” confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). “Tax return information” is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). 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). Elite claims its employer identification number (“EIN”) must be withheld. However, this office has determined EINs do not fall under the definition of “tax return information,” and Elite does not direct this office to any statute that otherwise makes EINs confidential. Thus, the submitted EINs may not be withheld under section 552.101 of the Government Code. However, we have marked the corporate tax return information in the submitted proposals, which the city must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.<sup>3</sup>

Section 552.136 states 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.” Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we conclude the bank account numbers and insurance policy numbers we have marked must be withheld under section 552.136 of the Government Code.<sup>4</sup>

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

<sup>3</sup>As our ruling on these documents is dispositive, we need not address Elite’s argument under section 552.147 of the Government Code.

<sup>4</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 bank account numbers and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Finally, we note the remaining information contains documents 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 materials that are subject to copyright protection 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 city must withhold the information we marked under section 552.110(a) of the Government Code. The city must also withhold the tax return information we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the bank account and insurance policy numbers we marked under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information must be released 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, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General  
Open Records Division

RSD/eeg

Ref: ID# 385040

Enc. Submitted documents

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