



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2010

Mr. Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941

OR2010-10682

Dear Mr. Pender:

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# 387033.

The Texas Department of Housing and Community Affairs (the "department") received a request for proposals submitted by two companies in response to the Alamo Area Council of Governments' ("AACOG") RFP 2010-001.¹ You state you have released some information to the requestor. While you take no position with respect to the public availability of the submitted information, you state that the request may implicate the proprietary interests of Bratton Construction ("Bratton") and Glenn's A/C Service & Consulting, Inc. ("Glenn's"). Accordingly, you notified Bratton and Glenn's of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in certain circumstances). We have received arguments from Bratton. We have considered the submitted arguments and reviewed the submitted information.

¹You inform us that the department contacted the requestor who clarified his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Initially, we note you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See id.* § 552.147. However, you do not assert, nor does our review indicate, that you have been otherwise authorized to withhold the employer identification numbers and customer information you have redacted without seeking a ruling from this office. *See Gov't Code* § 552.301(a); Open Records Decision No. 673 (2000). In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the department should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption that the redacted information is public. *See Gov't Code* § 552.302.

Next, you acknowledge, and we agree, the department failed to request a ruling or submit the responsive information within the statutory time periods prescribed by sections 552.301(b) and 552.301(e) of the Government Code. *See id.* § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). We note some of the submitted information may be excepted from disclosure under sections 552.101, 552.130, and 552.136 of the Government Code.² Because these sections and third party interests can provide compelling reasons to withhold information, we will consider whether or not the submitted information is excepted under the Act.

We note 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, this office has only received

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

comments from Bratton. Glenn's has not submitted comments explaining why its proposal should not be released. Therefore, we have no basis to conclude Glenn's has a protected proprietary interest in the 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, the department may not withhold any portion of the submitted information based upon the proprietary interests of Glenn's.

Next, we address Bratton's arguments against release of its proposal. Bratton raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the department does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Bratton's proposal. *See* ORD 592 (governmental body may waive section 552.104). Accordingly, none of Bratton's proposal may be withheld under section 552.104.

Bratton also raises section 552.110 of the Government Code for portions of its proposal. 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* ORD 552 at 2. Section 757 provides 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.³ 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Bratton contends its letter of transmittal, company profile, pricing, materials information, work experience, financial and technical resources, insurance information, certification information, and its own request to be added to AACOG's bidder list qualify as trade secret information under section 552.110(a). We note pricing information pertaining to a particular proposal 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

³The 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).

cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3. Although Bratton states this information is closely guarded by its company and contends disclosure of this information would allow competitors to tailor their bids, we find Bratton has failed to demonstrate any portion of its proposal meets the definition of a trade secret. Therefore, the department may not withhold any portion of Bratton's proposal under section 552.110(a).

Bratton also claims the above listed portions of its proposal are excepted from disclosure under section 552.110(b). Upon review of Bratton's arguments and the information at issue, we find Bratton has failed to provide specific factual evidence demonstrating that release of any of its information would result in substantial competitive harm to the company. *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), 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 is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder, such as Bratton, 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 reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the department may not withhold any portion of Bratton's proposal pursuant to section 552.110(b).

We note portions of the submitted proposals are subject to sections 552.101, 552.130, and 552.136 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. Section 552.101 of the Government Code encompasses information protected by chapter 411 of the Government Code, which makes criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center confidential. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* § 411.083. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See id.* Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities

specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with Government Code chapter 411, subchapter F. We have marked information the department must withhold pursuant to section 552.101 in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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). This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523(1989), 373 (1983). The submitted information contains the ownership percentages of individual partners of a partnership. We therefore conclude the department must withhold the partners' personal financial information, which we have marked, under section 552.101 in conjunction with common-law privacy.

Next, we note the submitted information also contains Texas motor vehicle record information. Section 552.130 of the Government Code provides "[i]nformation is excepted from [required public disclosure] if the information relates to . . . a motor vehicle operator's or driver's license issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We note section 552.130 does not apply to out-of-state driver's license information. We have marked Texas motor vehicle record information within the submitted documents. Accordingly, the department must withhold the information we have marked under section 552.130.

The submitted proposals also contain 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." *Id.* § 552.136. This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the department must withhold the insurance policy numbers we have marked under section 552.136.

We note portions of the submitted proposals are 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 department must withhold the information we have marked under section 552.101 in conjunction with chapter 411 of the Government Code, and the partners' personal financial information we have marked under section 552.101 in conjunction with common-law privacy. The department also must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code and the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴ The remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.⁵

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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/tp

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: copies of Texas driver's licenses under section 552.130 of the Government Code, and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁵We note the information being released contains social security numbers. As previously noted, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code §552.147.

Ref: ID# 387033

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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