



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 28, 2010

Ms. Kristen Pauling Doyle  
General Counsel  
Cancer Prevention and Research Institute of Texas  
P.O. Box 12097  
Austin, Texas 78711

OR2010-11332

Dear Ms. Doyle:

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# 388650.

The Cancer Prevention & Research Institute of Texas (the "institute") received a request for all proposals submitted in response to RFP No. 542-10-0072. You state some information will be released to the requestor. Although you take no position on the public availability of the submitted information, you state that the information at issue may implicate the interests of third parties. Accordingly, you state, and submit documentation showing, that you notified Edelman, TateAustinHahn ("Hahn"), Ross Communications, Inc. ("Ross"), Staats Falkbenerg & Partners, Inc. ("Staats"), Weber Shandwick, and Vollmer Public Relations, Inc. of the request for information and 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) (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 received comments from Hahn, Ross, and Staats. We have considered the submitted arguments and reviewed 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) of the Government Code 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 only received comments from Hahn, Ross, and Staats. Thus, we have no basis for concluding any portion of the submitted information constitutes the proprietary information of the remaining third parties whose information is at issue. *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 institute may not withhold any portion of the submitted information on the basis of any proprietary interests that the remaining third parties may have in this information.

Staats raises section 552.101 of the Government Code for a social security number included in its submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. Staats asserts that the submitted social security number should be withheld pursuant to section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), which make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). However, Staats has cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes the institute to obtain or maintain a social security number. Consequently, Staats has failed to demonstrate the applicability of section 405 of title 42 of the United States Code to the social security number in question, and it may not be withheld under section 552.101 of the Government Code on that basis. However, we note that 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.

Ross and Staats also assert that portions of their information are excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the institute, not the proprietary interests of private parties such as Ross and Staats. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the institute does not raise section 552.104 as an exception to disclosure. Therefore, the institute may not withhold any of Ross or Staats's respective information under section 552.104 of the Government Code.

Hahn, Ross, and Staats also assert that portions of their information are excepted under section 552.110 of the Government Code. Section 552.110 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. Gov't Code

§ 552.110(a), (b). Section 552.110(a) protects the proprietary 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 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 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; *see* 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 exception is made, and no argument is submitted that rebuts the claim as a matter of law. ORD 552. 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).

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* ORD 661.

Hahn and Ross argue that portions of their information constitute protected trade secrets. Upon review, we find that Hahn and Ross respectively have established *prima facie* cases that some of Hahn’s graphics, and Ross’s customer information, which we have marked, constitute trade secrets. Accordingly, the institute must withhold the information we have marked pursuant to section 552.110(a). Although Ross also argues its pricing information should be withheld as a trade secret, pricing information pertaining to 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. Thus, none of Ross’s pricing information may be withheld under section 552.110(a). In addition, Ross has failed to demonstrate that any portion of its remaining information at issue constitutes a trade secret. Thus, no portion of Ross’s remaining information may be withheld under section 552.110(a) of the Government Code.

Ross and Staats seeks to withhold portions of their information under section 552.110(b). Upon review, we conclude Ross and Staats have established that the release of their respective pricing information would cause the companies substantial competitive injury; therefore, the institute must withhold this information, which we have marked, under section 552.110(b). However, we find that Staats has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov’t Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We, therefore, conclude that the institute may not withhold any of Staats’s remaining information under section 552.110(b) of the Government Code.

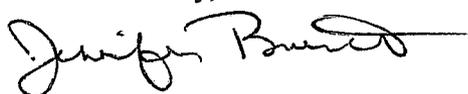
Finally, we note that portions of the submitted information appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow 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 institute must withhold the information we have marked under section 552.110 of the Government Code. The institute must release the remaining information, but any information that is protected by copyright may only be released in accordance with copyright law.<sup>1</sup>

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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

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<sup>1</sup>We note that 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.

Ref: ID# 388650

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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