



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2010

Ms. Michelle Rangel
Assistant County Attorney
William B. Travis Building
301 Jackson Street, Suite 728
Richmond, Texas 77469

OR2010-12626

Dear Ms. Rangel:

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# 390930.

Fort Bend County (the "county") received a request for the following information pertaining to request for proposals number 10-094: all the submitted responses, notes made by the reviewers of the submitted bids, and the bid tabulation used in determining the successful vendor. Although the county takes no position with respect to the public availability of the submitted information, you indicate the release of this information may implicate the proprietary interests of the following third parties: American Screening Corp.; FedEx Business Solutions, LLC; Global Drug Testing Labs; Tarrant County Association for the Blind d/b/a Lighthouse for the Blind of Fort Worth; One Source Toxicology Lab, Inc. ("One Source"), MEDTOX Laboratories, Inc.; and Phamatech, Inc ("Phamatech"). Accordingly, you state, and provide documentation showing, the county notified these third parties of the county's receipt of the request for information and of their right to submit arguments to this office as to why their information should not be released to the requestor. *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 considered comments submitted by Phamatech and reviewed the submitted proposals.

Initially, we note that you have not submitted for our review any information responsive to the request for notes made by the reviewers of the submitted bids, and the bid tabulation used

in determining the successful vendor. To the extent information regarding this portion of the request existed on the date the county received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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 Phamatech explaining why its proposal should not be released. Therefore, we have no basis to conclude any of the remaining notified companies has protected proprietary interests in their proposals. *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 county may not withhold these companies' proposals on the basis of any proprietary interest they may have in them.

Phamatech claims its pricing information, company policy concerning shipping costs, format of its chain of custody form, and certain information concerning its laboratory capacity are confidential under section 552.101 of the Government Code. 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. However, Phamatech has not directed our attention to any law, nor are we aware of any such law, that makes this information confidential. *See, e.g.,* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality). Accordingly, the county may not withhold this information under section 552.101.

Phamatech also claims portions of its proposal are trade secrets under section 552.110 of the Government Code. 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* ORD 552 at 5. 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.¹ Open Records Decision No. 402 (1983).

Phamatech claims its pricing information, company policy concerning shipping costs, format of its chain of custody form, certain information concerning its laboratory capacity, customer information, screen analysis time, product marketing, quality control issues, recommendations it has received, and resumes of its employees are trade secrets under section 552.110(a). We note Phamatech has made the names of some of the customers it seeks to withhold publicly available on its website. Because Phamatech has published this information, it has failed to demonstrate how this information is a trade secret. We find, however, the remaining customer information, which we have marked, constitutes trade secrets and must be withheld under section 552.110(a). We further find Phamatech has not demonstrated how the remaining information at issue meets the definition of a trade secret.

¹The 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).

Consequently, the county may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

We note One Source's proposal contains insurance policy numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means 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:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Thus, the insurance policy numbers we marked in One Source's proposal must be withheld under section 552.136.²

In summary, the county must withhold the information we marked in Phamatech's proposal under section 552.110(a) of the Government Code. The county must withhold the insurance policy numbers we marked in One Source's proposal under section 552.136. 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

²We 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 an insurance policy number, under section 552.136, without the necessity of requesting an attorney general decision.

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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/em

Ref: ID# 390930

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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