



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 31, 2010

Ms. Cary Grace  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2010-13268

Dear Ms. Grace:

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# 391928.

The City of Austin (the "city") received a request for the proposals submitted in response to the city's request for proposals regarding a Materials Recovery Facility. You inform us some of the requested information has been provided to the requestor. Although you state the city takes no position with respect to the public availability of the submitted bid proposal information, you state its release may implicate the proprietary interests of several third parties. Accordingly, you state, and provide documentation showing, the city notified Allied Waste Services of Austin ("Allied"); Balcones Resources, Inc. ("Balcones"); FCR, LLC ("FCR"); Greenstar Mid-America, LLC ("Greenstar"); Hudson Baylor Corporation ("HBC"); IESI Corporation ("IESI"); and Waste Management, Inc. ("WMI") of the request and of each company's right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from Balcones, Greenstar, and IESI. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge the city failed to submit some of the responsive information within the statutory time period prescribed by section 552.301(e) of the Government Code. *See Gov't Code* § 552.301(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 information at issue 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). Because third party interests can provide compelling reasons to withhold information, we will consider whether or not the untimely submitted information is excepted from disclosure under the Act. Furthermore, we will consider the submitted arguments against disclosure for the timely submitted information.

Next, Balcones, Greenstar, and IESI seek to withhold information in their proposals the city has not submitted for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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 Allied, FCR, HBC, or WMI explaining why their submitted information should not be released. Therefore, we have no basis to conclude Allied, FCR, HBC, and WMI have protected proprietary interests in their 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. Consequently, the city may not withhold any of Allied's, FCR's, HBC's, or WMI's submitted information on the basis of any proprietary interests they may have in the information.

We note WMI's information 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.<sup>1</sup>

Gov't Code § 552.136. We conclude the insurance policy numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the city must withhold the marked insurance policy numbers in WMI's submitted information under section 552.136 of the Government Code.<sup>2</sup>

Balcones, Greenstar, and IESI claim some or all of their submitted bid proposal information is excepted from disclosure under section 552.110 of the Government Code. This section 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." *Id.* § 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

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>2</sup>We note this office 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.

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.<sup>3</sup> Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); ORD 661 at 5-6.

Balcones and Greenstar claim portions of their information, and IESI claims all of its information, constitute trade secrets under section 552.110(a). Upon review, we find Balcones has established its machinery arrangement drawings, Greenstar has established its safety manual, and IESI has established its customer information constitute trade secrets. Therefore, the city must withhold this information, which we have marked, under section 552.110(a) of the Government Code.<sup>4</sup> We find, however, IESI has not demonstrated how its financial statements and cost proposal meet the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the city may

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<sup>3</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).

<sup>4</sup>As our ruling is dispositive for this information, we need not address Balcones's and Greenstar's additional arguments against disclosure for this information.

not withhold IESI's financial statements or cost proposal under section 552.110(a) of the Government Code.

Balcones and IESI also claim their remaining information constitutes commercial information that, if released, would cause each company substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find Balcones has established release of its financial statements and company financial history information, and IESI has established release of its financial statements and pricing information, would cause the companies substantial competitive injury. Therefore, the city must withhold this information, which we have marked, under section 552.110(b).<sup>5</sup> We find, however, Balcones and IESI have made only general conclusory assertions that release of their remaining information would cause them substantial competitive injury, and have provided no specific factual or evidentiary showing to support such assertions. *See generally* Open Records Decision Nos. 661, 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), 319 at 3. Therefore, the city may not withhold any of Balcones's or IESI's remaining information under section 552.110(b) of the Government Code.

IESI argues its remaining information is confidential under section 552.101 of the Government Code in conjunction with section 31.05 of the Penal 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 encompasses section 31.05, which provides in pertinent part:

(b) A person commits an offense if, without the owner's effective consent, he knowingly:

- (1) steals a trade secret;
- (2) makes a copy of an article representing a trade secret; or
- (3) communicates or transmits a trade secret.

(c) An offense under this section is a felony of the third degree.

Penal Code § 31.05(b), (c). We have already determined IESI's remaining information does not constitute a trade secret. We also note section 31.05 does not expressly make information confidential. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied

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<sup>5</sup>As our ruling is dispositive for this information, we need not address Balcones's and IESI's remaining arguments against disclosure for portions of this information.

from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the city may not withhold any portion of IESI's remaining information pursuant to section 31.05 of the Penal Code.

IESI asserts its remaining information is confidential under both common-law and constitutional privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy 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 personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We note, however, common-law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). IESI has failed to demonstrate how any of part of its remaining information constitutes an individual's highly intimate or embarrassing information. Therefore, none of IESI's remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find IESI has failed to demonstrate how any of its remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Thus, no portion of IESI's remaining information may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, the city must withhold the marked insurance policy numbers under section 552.136 of the Government Code; the marked machinery arrangement drawings, safety manual, and customer information under section 552.110(a) of the Government Code; and the marked financial statements, company financial history information, and pricing

information under section 552.110(b) of the Government Code. The remaining information must be released.<sup>6</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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/tp

Ref: ID# 391928

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>6</sup>We note the remaining information includes a social security number. 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.

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