



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 25, 2010

Mr. David Daugherty  
Assistant County Attorney  
Harris County  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002

OR2010-16121

Dear Mr. Daugherty:

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# 397831 (C.A. File: 10GEN1637).

The Harris County Purchasing Agent (the "county") received a request for the proposal submitted to the HIV Grants Division by Bering Omega Community Services ("Bering Omega"). Although you take no position with respect to the public availability of the submitted proposal, you indicate its release may implicate the proprietary interests of Bering Omega. Accordingly, you notified Bering Omega of the request and of its right to submit arguments to this office as to why its proposal 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 Bering Omega.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted proposal.

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<sup>1</sup>Bering Omega seeks to protect portions of its proposal under sections 552.102, 552.104, and 552.110 of the Government Code. Although Bering Omega also raises section 552.101 of the Government Code, the company has provided no arguments explaining how section 552.101 is applicable to the submitted proposal. Therefore, we presume Bering Omega no longer asserts this exception to disclosure. Gov't Code §§ 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested), .302.

Bering Omega argues information revealing staff salaries, job descriptions, employees' resumes, and the telephone numbers and addresses of members of its board of trustees are excepted under section 552.102(a) of the Government Code. Although Bering Omega raises section 552.102(a), this section only applies to information in the personnel files of governmental employees, as opposed to private employees. *Id.* § 552.102(a). As such, section 552.102(a) is not applicable in this instance. Consequently, the county may not withhold any portion of the submitted proposal under section 552.102(a).

Bering Omega also asserts information revealing staff salaries, the cost rates for its services, key staff positions, information about its services and quality of care, the number of clients to be served, job descriptions, licensure information, its organizational chart, and its collaborative agreements are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the county does not raise section 552.104, this section is not applicable to the requested information. *See* ORD 592 (section 552.104 may be waived by governmental body). Therefore, the county may not withhold any of the submitted proposal under section 552.104.

Bering Omega also asserts information revealing staff salaries, job descriptions, and its organizational chart are confidential under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110.

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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). 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.<sup>2</sup> 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 the exception is made and no argument is submitted 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. Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code 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. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Bering Omega asserts section 552.110(a) protects information revealing the salaries it pays, job descriptions, and its organizational chart. Upon review, we find Bering Omega failed to establish how any portion of its proposal meets the definition of a trade secret, nor has Bering Omega demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, and qualifications and experience are not ordinarily excepted from disclosure

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<sup>2</sup>The following are the six factors the Restatement gives 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).

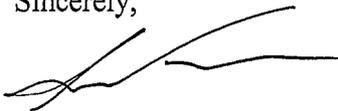
under statutory predecessor to section 552.110). Consequently, the county may not withhold any portion of the submitted proposal under section 552.110(a).

We understand Bering Omega to also assert section 552.110(b) protects information revealing the salaries it pays, job descriptions, and its organizational chart. Upon review, we find Bering Omega failed to provide specific factual evidence demonstrating that release of any portion of its proposal would result in substantial competitive harm to its interests. *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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications and experience are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, we determine the county may not withhold any portion of the submitted proposal under section 552.110(b). As no other exceptions to disclosure are raised, the county must release the submitted proposal.<sup>3</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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/tp

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<sup>3</sup>We note the information being released contains 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. *See* Gov't Code § 552.147.

Ref: ID# 397831

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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(enclosures)