



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2010

Ms. Cynthia Villarreal-Reyna
Legal and Regulatory Affairs Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2010-17004

Dear Ms. Villarreal-Reyna:

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# 399460 (TDI #107647).

The Texas Department of Insurance (the "department") received a request for the 2009 provider reports for ten named companies. You state the department released some information to the requestor. Although you take no position with respect to the submitted information, you state release of the information may implicate the proprietary interests of Wm. Page & Associates, Inc. ("Wm. Page"); D3G Capital Management, L.L.C. ("D3G"); and Financial Life Services, L.L.C. ("FLS"). Accordingly, you notified these companies 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 FLS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you are withholding e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general opinion. We note, however, some of

the e-mail addresses you have redacted are the work e-mail addresses of department employees. A government employee's work e-mail address is not an e-mail address of a member of the public. *See* Gov't Code § 552.137(a) (section 552.137(a) not applicable to institutional e-mail address, internet website address, or e-mail address a governmental body provides for use of its officials or employees). Therefore, the department may not withhold the work e-mail addresses you redacted under section 552.137 pursuant to Open Records Decision No. 684. Accordingly, the department must release its employees' work e-mail addresses, which we have marked for release. *See* Gov't Code §§ 552.301(b), (e)(1)(D), .302. However, we agree the department must withhold the remaining e-mail addresses you redacted under section 552.137.

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, this office has only received comments from FLS. Wm. Page and D3G have not submitted comments explaining why their reports should not be released. Therefore, we have no basis to conclude these companies have protected proprietary interests 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 reports based upon the proprietary interests of Wm. Page or D3g.

FLS claims exceptions to disclosure under sections 552.101, 552.104, and 552.110 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. This exception encompasses information that other constitutional, statutory, or case law makes confidential. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). FLS has not directed our attention to any law under which any of its report is considered to be confidential for the purposes of section 552.101. We therefore conclude the department may not withhold any of FLS's report under section 552.101.

FLS 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 FLS's report. *See* ORD 592 (governmental body may waive section 552.104). Accordingly, none of FLS's report may be withheld under section 552.104.

FLS also raises section 552.110 of the Government Code for portions of its report. 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* 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a

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).

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).

FLS claims information about the companies with which it does business and the purchasing parameters for its policies are excepted from disclosure under section 552.110(b). Upon review of FLS’s arguments and the information at issue, we find FLS established release of some of its information would cause substantial competitive injury to the company. Therefore, the department must withhold this information, which we have marked, under section 552.110(b). We find, however, FLS failed to provide specific factual evidence demonstrating that release of any of its remaining 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). Accordingly, the department may not withhold any of the remainder of FLS’s report pursuant to section 552.110(b).

FLS also contends information about companies with which it does business and the purchasing parameters for its policies consist of confidential and proprietary information. Thus, we understand FLS to argue this information is excepted under section 552.110(a). However, we find FLS failed to demonstrate how any of its remaining information meets the definition of a trade secret. Therefore, the department may not withhold any of the remainder of FLS’s report under section 552.110(a).

In summary, the department must withhold the information we marked under section 552.110(b) of the Government Code. The department must release the remaining information, including the department’s employees’ work e-mail addresses, which we marked.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 399460

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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