



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 23, 2010

Mr. Mark Adams
Office of the General Counsel
Office of the Governor
P.O Box 12428
Austin, Texas 78711

OR2010-17689

Dear Mr. Adams:

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# 401037.

The Office of the Governor (the "governor") received a request for e-mails, correspondence, or documents to or from the Texas Film Commission (the "TFC") related to the My Generation television show ("My Generation"), the requestor, or a specified address during a specified time period; documentation of communications between a named individual and several other individuals pertaining to My Generation during the same time period; information sent to the TFC's digital film library by two named individuals; and any application for or documents granting a tax exemption or refund for filming My Generation. You state you have released some of the responsive information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.131 of the Government Code. Although you take no position as to whether the remaining submitted information is excepted under the Act, you state release of the remaining information may implicate the proprietary interests of FTP Productions, LLC ("FTP"). Accordingly, you state you notified FTP of the request for information and of its right to submit arguments to this office as to why the remaining submitted information should not be released. *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 received comments from FTP. We have considered the submitted arguments and reviewed the submitted information.

Section 552.104 of the Government Code exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state portions of the submitted information, which you have marked, are subject to section 552.104. You explain the TFC provides financial incentives for makers of movies and television programs to film their programs in Texas. You state in its effort to bring jobs related to the entertainment industry to Texas, the TFC "is competing with more than [forty] states who also offer financial incentives." You further state release of the information related to possible incentives being offered would place Texas at a competitive disadvantage relative to the other states. We note the TFC is a part of the governor's office. Based on your representations and our review of the submitted information, we find you have demonstrated the applicability of section 552.104 to a portion of the information at issue. Thus, the governor may withhold the information we have marked under section 552.104 of the Government Code.¹ However, the remaining information consists of general e-mails that do not discuss the financial incentives being offered. Thus, we find you have not demonstrated the remaining marked information consists of information that, if released, would give advantage to a competitor. Accordingly, the remaining information you have marked may not be withheld under section 552.104 of the Government Code.

You argue the remaining information you have marked is protected by section 552.131(b) of the Government Code. Section 552.131 relates to economic development information and provides, in relevant part:

¹As our ruling is dispositive with respect to the information we have marked, we need not address the remaining argument against its disclosure.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). You state the remaining information relates to ongoing negotiations TFC is having with FTP, an entity currently filming a television program in the Austin area. However, as stated above, the remaining information at issue consists of general e-mails that do not discuss any incentives. Thus, we find you have failed to demonstrate how the remaining information you have marked consists of information about financial or other incentives being offered to business prospects, and the governor may not withhold any portion of the remaining marked information under section 552.131(b) of the Government Code.

We now turn to FTP's arguments against disclosure of its information. FTP argues portions of its submitted information constitute confidential taxpayer information. 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. This section encompasses information protected by other statutes. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find FTP has failed to demonstrate the information at issue falls within the definition of "return information" under section 6103(b)(2). Therefore, none of the information at issue is confidential under section 6103(a), and the governor may not withhold the information under section 552.101 on that ground.

We further understand FTP to argue portions of its information are excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 also encompasses common-law privacy. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the

criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note an individual's name, home address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision Nos. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers not protected under privacy). Upon review, we find FTP has not demonstrated how any portion of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

FTP argues its remaining information is excepted from disclosure 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. *See* Gov't Code § 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 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.² 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* Open Records Decision No. 552 at 5 (1990). 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) 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 (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).

FTP asserts its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude FTP has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find FTP has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Therefore, none of FTP’s information may be withheld under section 552.110(a).

FTP argues the release of its “confidential, proprietary and trade secrets information contained in the [d]ocuments will provide little incentive to FTP, as well as to FTP’s Local

²The 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 other 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).

and General Competitors[,] to come to the state of Texas to produce their programming.” In advancing this argument, FTP appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). See also *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). The *National Parks* test provides commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration showing the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of Gov’t Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only FTP’s interests in withholding its information.

FTP further argues the submitted information contains commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find FTP has made only conclusory allegations that the release of any of its information would result in substantial harm to its competitive position. 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), 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 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of FTP’s information may be withheld under section 552.110(b).

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not excluded by subsection (c). Therefore, the governor must withhold the marked personal e-mail addresses under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure.

In summary, the governor may withhold the information we have marked under section 552.104 of the Government Code. The governor must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure. 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 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tp

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 401037

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Milinda McNeely
President
FTP Productions, LLC
5300 Fleming Court
Austin, Texas 78744
(w/o enclosures)

FTP Productions, LLC
Attention: Legal Affairs
500 South Buena Vista Street
Burbank, California 91521
(w/o enclosures)