



ATTORNEY GENERAL OF TEXAS  
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February 25, 2011

Ms. Michelle L. Villarreal  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2011-02845

Dear Ms. Villarreal:

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# 410074 (LGL-10-1739).

The City of Waco (the "city") received a request for the responses submitted to a request for proposals for third party administrator services. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of interested third parties. Accordingly, you notified the third parties of this request for information and of their right to submit arguments to this office as to why their respective proposals should not be released.<sup>1</sup> See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received correspondence from CMS, CorVel, and 1-2-1 Claims. We have considered the submitted claims and reviewed the submitted information.

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<sup>1</sup>The third parties notified by the city pursuant to section 552.305 are the following: AS&G Claims Administration, Inc. ("AS&G"); Broadspire; Claims Administrative Services, Inc. ("CAS"); CorVel Corporation ("CorVel"); JI Companies ("JI"); NovaPro Risk Solutions, L.P. ("NPRS"); Sedgwick CMS ("CMS"); TML Intergovernmental Risk Pool ("TML"); and 1-2-1 Claims, Inc. ("1-2-1 Claims").

Initially, we note the requested information relating to JI and TRISTAR was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2011-02530 (2011). In that ruling, we concluded the city must withhold insurance policy numbers under section 552.136 of the Government Code. We also concluded the remaining information relating to JI and TRISTAR must be released, but any information protected by copyright must be released in accordance with copyright law. You do not indicate there has been any change in the law, facts, and circumstances on which the previous ruling is based. Therefore, the city must dispose of the requested information relating to JI and TRISTAR in accordance with Open Records Letter No. 2011-02530. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We next 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of this date, we have received no arguments from AS&G, Broadspire, CAS, NPRS, or TML. Thus, AS&G, Broadspire, CAS, NPRS, and TML have not demonstrated any portion of their information is proprietary for purposes of the Act. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 2 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any of the submitted information on the basis of any proprietary interest AS&G, Broadspire, CAS, NPRS, or TML may have in the information.

CMS 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. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the city does not argue section 552.104 is applicable, we will not consider CMS's claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the city may not withhold any of CMS's information under section 552.104 of the Government Code.

CMS, CorVel, and 1-2-1 Claims argue certain information is excepted from disclosure 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(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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 2. Section 757 provides that 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 will accept a

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<sup>2</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).

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 that section 552.110(a) is applicable unless it has been shown that 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). We note pricing information pertaining to a particular solicitation or contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3.

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 ORD 661 at 5-6.

Upon review of the submitted arguments under section 552.110(a) and the information at issue, we find 1-2-1 Claims has shown that information pertaining to its customers is a protected trade secret under section 552.110(a). Accordingly, the city must withhold the information we have marked under section 552.110(a). However, CMS, CorVel, and 1-2-1 Claims have failed to establish that any of the remaining information is a trade secret protected by section 552.110(a). See Open Record Decision Nos. 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 was entirely too speculative), 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, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the city may not withhold any of the remaining information under section 552.110(a).

Further, we find that CMS, CorVel, and 1-2-1 Claims have all demonstrated that the release of their pricing information would cause these companies substantial competitive injury. In addition, we find CorVel has established that the release of its sample screen shots would cause the company substantial competitive injury. Therefore, the city must withhold the information we have marked under section 552.110(b) of the Government Code. However, CMS, CorVel, and 1-2-1 Claims have made only conclusory allegations that release of their remaining information would result in substantial damage to their competitive positions. Thus, CMS, CorVel, and 1-2-1 Claims have not made the specific factual or evidentiary

showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORDs 661 at 5-6, 509 at 5. Accordingly, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information is subject to common-law privacy.<sup>3</sup> Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which 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 that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note the remaining information contains business ownership percentages. This personal financial information is intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we note the remaining information contains insurance policy numbers. Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>4</sup>

Finally, we note that some of the information at issue appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to

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<sup>3</sup>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. The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</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 an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

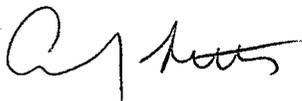
furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city must dispose of the information relating to JI and TRISTAR in accordance with Open Records Letter No. 2011-02530. The city must withhold the information we have marked under (1) section 552.101 of the Government Code in conjunction with common-law privacy, (2) section 552.110 of the Government Code, and (3) section 552.136 of the Government Code. The city must release the remaining information, but any information protected by copyright must be released in accordance with copyright law.

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,



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CN/dls

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