



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 17, 2011

Ms. Barbara Smith Armstrong
Assistant County Attorney
Harris County Purchasing Department
1019 Congress, 15th Floor
Houston, Texas 77002

OR2011-06939

Dear Ms. Armstrong:

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# 417735 (C.A. File No. 10GEN2399).

The Harris County Purchasing Agent (the "county") received a request for four categories of information pertaining to Request for Proposal No. 10/0097. You indicate you have released some of the requested information. You state the county does not have a portion of the requested information.¹ Although you state the county takes no position with respect to the public availability of the submitted information, you state its release may implicate the proprietary interests of Global Tel*Link Corporation ("GTL") and its subsidiary, Public Communications Services, Inc. ("PCS"). Accordingly, you state, and provide documentation showing, the county notified these companies of the request and of their right to submit arguments to this office as to why the requested 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 arguments submitted by an individual on behalf of both GTL and PCS. We have considered the submitted arguments and reviewed the submitted information.

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

Initially, you state some of the requested information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2011-01841 (2011). In that ruling, we determined that the county must withhold some of the information under sections 552.110(b) and 552.136 of the Government Code, and release the remaining information in accordance with copyright law. There has been no change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the county must continue rely on Open Records Letter No. 2011-01841 as a previous determination and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address the arguments for the information that was not the subject of the previous request.

Next, we note that GTL argues to withhold from public disclosure financial statements from 2007, 2008, and 2009 as well as an Independent Auditor's Report that the county did not submit. This ruling does not address information that was not submitted by the county and is limited to the information submitted as responsive by the county. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

GTL raises section 552.110 of the Government Code for some of the submitted information pertaining to itself and PCS. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). 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.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* 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. *See* 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 5-6 (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).

GTL claims portions of the submitted information are excepted from disclosure under section 552.110(a) of the Government Code. Upon review, we find GTL has established the customer information it seeks to withhold constitutes a trade secret. Thus, the county must withhold this information, which we have marked, under section 552.110(a) of the Government Code. However, we determine GTL has failed to demonstrate that any of the

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 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).

remaining information it seeks to withhold on behalf of itself and PCS meets the definition of a trade secret, nor has it established a trade secret claim for this information. *See* ORD 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). Therefore, the county may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

GTL also contends some of the remaining information is excepted from public disclosure under section 552.110(b) of the Government Code. We find GTL has established that release of the PCS financial statement it seeks to withhold would cause PCS substantial competitive injury. Therefore, the county must withhold the financial statement, which we have marked, under section 552.110(b) of the Government Code. However, we find that GTL has failed to provide specific factual evidence demonstrating that release of any of the remaining information at issue would result in substantial competitive harm to GTL or PCS. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the county may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Next, we consider GTL's claim under section 552.139 of the Government Code for a portion the remaining information. Section 552.139 of the Government Code provides in part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, . . . or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

...

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

Gov't Code § 552.139(a), (b)(2). After review of the information at issue, we conclude GTL has not established it is excepted under section 552.139. Thus, the county may not withhold any portion of the remaining information under section 552.139 of the Government Code.

We note the remaining documents contain information subject to section 552.136 of the Government Code. Section 552.136 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.”³ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, the insurance policy numbers we have marked must be withheld under section 552.136 of the Government Code.⁴ We note the remaining information may contain debit card numbers also subject to section 552.136. However, we are unable to determine whether the debit card numbers constitute genuine account numbers for purposes of section 552.136. Thus, to the extent the debit card numbers, which we have marked, constitute genuine account numbers, the county must also withhold the marked debit card numbers under section 552.136 of the Government Code.

Finally, we note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to 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 county must continue rely on Open Records Letter No. 2011-01841 as a previous determination and withhold or release any previously ruled upon information in accordance with the prior ruling. The county must withhold the information we have marked under section 552.110 of the Government Code. The county must also withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. To the extent the marked debit card numbers constitute genuine account numbers, the county must also withhold the marked debit card numbers under section 552.136 of the Government Code. The county 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

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).

⁴We 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 and debit card number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Christina Alyarado
Assistant Attorney General
Open Records Division

CA/eb

Ref: ID# 417735

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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