



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2011

Ms. Dana Colbert
Records Coordinator
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2011-10819

Dear Ms. Colbert:

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# 425054 (TYC ORR # 16963).

The Texas Youth Commission (the "commission") received a request for the responses submitted for RFP numbers 694-0-0856 and 694-0-0853. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also inform us the release of the requested information may implicate the proprietary interests of third parties. Accordingly, you provided notice of this request to Acumen Enterprises, Inc. ("Acumen"), CME Builders & Engineers, Inc. ("CME"), Gaeke Construction Company, Inc. ("Gaeke"), Braun and Butler Construction, Inc. ("Braun and Butler"), Mega Contractors, Inc. ("Mega Contractors"), Imperial Construction, Inc. ("Imperial"), STR Constructors, Ltd. ("STR"), M. Scott Construction, Ltd. ("M. Scott"), Mages Group, L.L.C. ("Mages"), Tom Wright Construction, L.L.C. ("Tom Wright"), and Zimmerman Construction Company, Inc. ("Zimmerman") and notified them of their right to submit arguments to this office explaining why their information should not be released. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have received arguments from Gaeke. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address the commission's responsibilities under the Act. Under section 552.301(e) of the Government Code, a governmental body that receives a request for information it wishes to withhold under one of the Act's exceptions must submit to this

office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You state the commission received the request for information on May 5, 2011. Thus, the commission was required to submit a copy of the specific information requested by May 26, 2011. You have not provided evidence sufficient to establish that the commission placed the requested information in the interagency mail on or before May 26, 2011. *See id.* § 552.308(b) (agency must demonstrate timeliness of submission by interagency mail). Consequently, we find the commission failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you raise section 552.104 of the Government Code, this section is discretionary in nature and is, therefore, waived by a governmental body's failure to comply with section 552.301. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 592 (1991) (stating that governmental body may waive Gov't Code § 552.104). Accordingly, the commission may not withhold any of the submitted information under section 552.104. However, because third party interests and sections 552.101 and 552.136 of the Government Code can provide compelling reasons to withhold information, we will consider whether the submitted information is excepted from disclosure under the Act.¹

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Acumen, CME, Braun and Butler, Mega Contractors, Imperial, STR, M. Scott, Mages, Tom Wright, or Zimmerman on why their submitted information should not be released. Therefore, we have no basis to conclude Acumen, CME, Braun and Butler,

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Mega Contractors, Imperial, STR, M. Scott, Mages, Tom Wright, or Zimmerman has protected proprietary interests in their requested 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 commission may not withhold any portion of Acumen's, CME's, Braun and Butler's, Mega Contractors's, Imperial's, STR's, M. Scott's, Mages's, Tom Wright's, or Zimmerman's requested information on the basis of any proprietary interest they may have in it.

Although the commission argues the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the commission's argument under section 552.110. Gaeke also asserts portions of its submitted information are excepted from disclosure under section 552.110, which 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. *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.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. 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of Gaeke’s arguments, we find it has failed to demonstrate how any portion of its submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for the information at issue. *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 2 (1982) (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, the commission may not withhold any of Gaeke’s submitted information pursuant to section 552.110(a) of the Government Code.

Furthermore, we find Gaeke has made only conclusory allegations that release of its submitted information would cause the company substantial competitive injury and has made no specific factual or evidentiary showing to support such allegations. *See* ORDs 661 (for information to be withheld under commercial or financial information prong of

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).

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. Therefore, the commission may not withhold any of Gaeke's submitted information pursuant to section 552.110(b) of the Government Code.

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 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). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also 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). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public interest. Thus, the commission must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code provides in part 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 determined an insurance policy number is an access device number for purposes of section 552.136. Accordingly, the commission must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.³

We note some of the submitted 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.

³We 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 insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.⁴

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/tf

Ref: ID# 425054

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the remaining information contains social security numbers. 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. Gov't Code § 552.147(b).

Mr. Robert Carroll
President
CME Builders & Engineers, Inc.
1505 East Henderson Street
Cleburne, Texas 76031
(w/o enclosures)

Mr. Steve Schmitz
General Manager
Mages Group, LLC
P.O. Box 699
Gainesville, Texas 76241
(w/o enclosures)

Mr. R.D. Hogan
President
Mega Contractors
914 North Sylvania Avenue
Fort Worth, Texas 76111
(w/o enclosures)

Mr. Wayne Boyter
Owner
Acumen Enterprises
P.O. Box 673
DeSoto, Texas 75123
(w/o enclosures)

Mr. Scott McCashland
President
M Scott Construction
21815 Katy Freeway, C123
Katy, Texas 77450
(w/o enclosures)

Mr. Dick Zimmerman
President
Zimmerman Construction Company
300 Holiday Drive
Burnet, Texas 78611
(w/o enclosures)

Mr. Robert Gaeke
President
Gaeke Construction Company
2910 East Austin Street
Giddings, Texas 78942
(w/o enclosures)

Mr. Kenton C. Heinze
Vice President for Operations
Braun and Butler Construction
8130 North Lamar Boulevard
Austin, Texas 78753
(w/o enclosures)

Mr. Jon Jones
Vice President
Imperial Construction
P.O. Box 967
Weatherford, Texas 76086
(w/o enclosures)

Mr. T.R. Kennedy
President
STR Constructors Limited
15500 Highway 29 West
Liberty Hill, Texas 78642
(w/o enclosures)

Ms. Margie Wright
President
Tom Wright Construction LLC
963 South Loop 340
Waco, Texas 76706
(w/o enclosures)

