



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2011

Ms. Candice M. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2011-12396

Dear Ms. Gambrell:

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# 428787 (G.C. No. 18681).

The City of Houston (the "city") received a request for the bid tabulation, evaluation notes, all submitted proposals, and the rationale for the award pertaining to a specified solicitation. You state you will release the bid tabulation to the requestor. You indicate you have no information responsive to portions of the request.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Advacs, Inc. ("Advacs"); American Facility Services, Inc. ("American"); A.M.E. Services, Inc. ("A.M.E."); GCA Services Group ("GCA"); McLemore Building Maintenance ("McLemore"); and UBM Enterprises, Inc. ("UBM"). Accordingly, you state you notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the 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

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

exception in the Act in certain circumstances). We have received comments from American, A.M.E., and GCA. We have considered the submitted arguments and reviewed the submitted information.

Initially, the city acknowledges, and we agree, that it failed to comply with the procedural requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information presumed public 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); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider whether or not the information at issue is excepted under the Act.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons under section 552.305 of the Government Code, 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, Advacs, McLemore, and UBM have not submitted to this office reasons explaining why their information should not be released. Therefore, Advacs, McLemore, and UBM have provided us with no basis to conclude they have protected proprietary interests in the submitted information. Accordingly, the city may not withhold any portion of the submitted information on the basis of any proprietary interest these companies may have in this information. *See* Open Records Decision Nos. 661 at 5-6 (1999) (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

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. American asserts its submitted W-9 form is confidential under section 6103(a) of title 26 of the United States Code, which is encompassed by section 552.101 of the Government Code. 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), 226 (1979) (W-2 forms). 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). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . 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 . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Upon review, we find the submitted information contains corporate tax return information, which we have marked, that the city must withhold under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. W-9 forms, however, are requests for taxpayer identification numbers and do not fall within the definition of "tax return information." As such, the city may not withhold American's submitted W-9 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

A.M.E. and GCA argue portions of their submitted information is confidential 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (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* ORD 232. This office must accept a claim that information subject to the Act is exempted 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 2. However, we cannot conclude 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.* § 552.110(b); ORD 661 at 5-6 (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).

A.M.E. and GCA claim portions of their information contain trade secrets that should be protected by section 552.110(a) of the Government Code. Having reviewed their arguments, we find the companies have failed to demonstrate how the information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a

trade secret claim for this information. Thus, the city may not withhold this information under section 552.110(a).

A.M.E. and GCA assert their submitted information is confidential under section 552.110(b). Upon review, we find A.M.E. has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the city must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find A.M.E. and GCA have made only conclusory allegations that release of any of the remaining information at issue would cause the companies substantial competitive injury. *See* ORD 661; *see also* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the city may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

We note that some of the remaining information is excepted from public disclosure under section 552.136 of the Government Code, which states 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.”² Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, we find the city must withhold the information we marked under section 552.136.³

In summary, the city must withhold the corporate tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. The city must withhold the information we marked under sections 552.110(b) and 552.136 of the Government Code. 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including credit card numbers and bank account numbers 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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/em

Ref: ID# 428787

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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