



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 21, 2011

Ms. Neera Chatterjee  
Office of the General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701

OR2011-13672

Dear Ms. Chatterjee:

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# 430595.

The University of Texas System (the "system") received a request for information regarding a specified request for proposal. You state the system has released most of the requested information to the requestor. We note you have redacted a social security number as permitted by section 552.147(b) of the Government Code.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. In addition, you state release of the requested information may implicate the proprietary interests of Private Jet Services Group ("PJS"). Accordingly, you provide documentation showing you have notified PJS of the request and its right to submit arguments to this office. *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 PJS. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>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 an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

We first note PJS 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. However, 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 system does not raise 552.104, we will not consider PJS’s claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the system may not withhold any of the submitted information under section 552.104 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. You and PJS both raise section 552.101 in conjunction with provisions of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code for Attachments H and I.<sup>2</sup> The HSA makes certain information related to terrorism confidential. Section 418.176 provides in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

*Id.* § 418.176(a). Section 418.177 provides as follows:

Information is confidential if the information

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<sup>2</sup>Pursuant to section 552.303 of the Government Code, this office asked the system to provide assertions regarding the applicability of the HSA to the submitted information. *See id.* § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). The system timely submitted its response to our request.

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

*Id.* § 418.177. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

*Id.* § 418.181. Section 418.182 provides, in relevant part:

(a) Except as provided by Subsections (b) and (c), information . . . in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental body that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required public disclosure under [the Act].

*Id.* § 418.182(a)-(b). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting one of these sections must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You and PJS seek to withhold PJS's Safety & Standards document and Aviation Emergency Plan ("the emergency plan") under the HSA. The system and PJS state the emergency plan is a document that details personnel responsibilities and prioritizes actions in the event of a hijacking, bomb threat, or other major event. PJS further states the emergency plan contains

technical details of operations in the event of a major incident and contact information for certain individuals to be notified. PJS asserts release of this information would permit the detection of any weaknesses in the emergency plan and “provide a road map to avoid or otherwise thwart responses to terrorist threats[.]” Based on these representations and our review of the information at issue, we find the emergency plan is confidential under section 418.177 and must be withheld under section 552.101 of the Government Code. However, we find you and PJS have not demonstrated how section 418.176, 418.177, 418.181, or 418.182 of the Government Code applies to the remaining information you and PJS seek to withhold. Therefore, the system may not withhold any of the remaining information at issue under section 552.101 in conjunction with the HSA.

We also understand you to raise section 552.101 in conjunction with Homeland Security Presidential Directive 7 (“HSPD-7”). HSPD-7 establishes a national policy for federal agencies to identify and prioritize key resources and critical infrastructure in order to prevent terrorist attacks. *See Homeland Security Presidential Directive 7: Critical Infrastructure Identification, Prioritization, and Protection* § 1 (President George W. Bush, Dec. 17, 2003). This directive issues instructions to various federal agencies regarding establishing policies, coordinating activities, and developing plans for the protection of key resources and critical infrastructure. *See generally id.* We first note HSPD-7 applies only to federal agencies. *See id.* §§ 1, 11. Although federal agencies are directed to coordinate with state agencies in certain instances, the directive requires certain actions only of federal agencies. *See id.* §§ 8, 12, 19.a. In addition, HSPD-7 does not make any information confidential. *See Open Records Decision No. 478* (1987) (as general rule, statutory confidentiality requires express language making information confidential). Therefore, the system may not withhold any of the submitted information under section 552.101 in conjunction with HSPD-7.

PJS also raises section 552.101 in conjunction with the common-law physical safety exception for Attachments F through I. For many years, this office determined section 552.101 of the Government Code, in conjunction with the common-law right to privacy, protected information from disclosure when “special circumstances” existed in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g., Open Records Decision Nos. 169* (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court recently held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 54 Tex. Sup. Ct. J. 1428, 2011 WL 2586861 at \*4 (Tex. July 1, 2011) (holding “freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at \*5. Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a

substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned that “vague assertions of risk will not carry the day.” *Id.* at \*6. You state the information at issue reveals travel arrangements that may be repeated, personal information of high-profile individuals, details regarding specific aircraft, and PJS’s emergency plans. You assert this information could be used to inflict harm. Upon review, we find you have made only vague assertions of risk of harm if the information at issue is released. Accordingly, we find you have not established disclosure of this information would create a substantial threat of physical harm to an individual, and the system may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure (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 a “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 Record Decision No. 552 (1990). Section 757 defines 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 a single or ephemeral event 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) (citation omitted); *see also Huffines*, 314 S.W.2d at 776. This office will accept a 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 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.<sup>3</sup> Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* Open Record Decision No. 661 at 5-6 (1999) (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).

Upon review, we find PJS has established a *prima facie* case that its customer information, which we have marked, constitutes trade secret information for purposes of section 552.110(a). Accordingly, the system must withhold the information we have marked in Attachment G under section 552.110(a). However, we find PJS has not demonstrated the remaining information it seeks to withhold constitutes trade secrets for purposes of section 552.110(a). *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). We note that information, including pricing information, pertaining to a particular proposal 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; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Consequently, the system may not withhold any of the remaining information under section 552.110(a) of the Government Code.

In addition, we find PJS has not established by a factual or evidentiary showing that release of the remaining information it seeks to withhold would cause the company substantial competitive injury for purposes of section 552.110(b). *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 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 (1982) (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from

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<sup>3</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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

disclosure under statutory predecessor to section 552.110). We note the pricing information of a company contracting with a governmental body is generally not excepted under section 552.110. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, as PJS was the winning bidder in this instance, the system may not withhold any of PJS's pricing information under section 552.110. Accordingly, none of the remaining information may be withheld under section 552.110(b).

We note a portion of the remaining information is protected by section 552.136 of the Government Code.<sup>4</sup> Section 552.136 provides that "[n]otwithstanding any other provision of this chapter, 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). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). This office has held an insurance policy number constitutes an access device number for purposes of section 552.136. Therefore, the system must withhold the policy numbers we have marked in Attachments C and D.

Finally, we note portions of the submitted information are protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, 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 copyright law and the risk of a copyright infringement suit. As no exceptions to disclosure have been raised, the submitted information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.

In summary, the system must withhold Attachment I under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. The system must withhold the information we marked in Attachment G under section 552.110(a) of the Government Code and in Attachments C and D under section 552.136 of the Government Code. The remaining information must be released to the requestor, but any

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<sup>4</sup>The 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).

information that is protected by copyright may only 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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/agn

Ref: ID # 430595

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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