



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2011

Mr. James Mu
Assistant General Counsel
Texas Department of Criminal Justice
Office of the General Counsel
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2011-16556

Dear Mr. Mu:

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# 435755.

The Texas Department of Criminal Justice (the "department") received a request for proposals, clarifications, best and final offers, and revisions, other than those of the requestor's company, submitted in response to Solicitation No. 696-PF-10-P018, Request for Proposal for Operation of One or Multiple Jail Facilities. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. You also state the information at issue may implicate the proprietary interests of third parties. Accordingly, you state, and submit documentation showing, you notified The GEO Group, Inc. ("GEO"); Southwestern Correctional, L.L.C., d/b/a LaSalle Southwest Corrections ("LaSalle"); and Management & Training Corp. ("MTC") of the request for information and of their right to submit arguments to this office as to why their submitted information should not be released. *See Gov't Code § 552.305(d)* (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 comments from all three third parties. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge, and we agree, the department 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 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 the information at issue is excepted under the Act.¹

Next, we note insurance policy numbers, portions of biographical and contact information, and a federal taxpayer identification number have been redacted from the submitted information. We note section 552.136 of the Government Code allows a governmental body to redact insurance policy numbers without requesting a decision from the attorney general. Act of May 30, 2011, 82nd Leg., R.S., S.B. 602 § 27 (to be codified at Gov't Code § 552.136(c)). However, you do not assert, nor does our review of the records indicate, you have been authorized to withhold any of the other redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the department should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

Next, we note GEO has submitted arguments regarding information beyond that which the department submitted to this office for our review. This ruling does not address such information, and is limited to the information submitted as responsive to the request by the department. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” *Id.*

¹We note section 552.110 of the Government Code is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the department's arguments under section 552.110.

§ 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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 private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial

²The following are the six factors the Restatement gives 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).

competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(b). 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

LaSalle and MTC contend portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find LaSalle and MTC have failed to establish a *prima facie* case that any of their information at issue is a trade secret protected by section 552.110(a). *See* ORDs 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 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We further note pricing information pertaining to a particular 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.” RESTATEMENT OF TORTS § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, the department may not withhold any of LaSalle’s or MTC’s information under section 552.110(a).

GEO, LaSalle, and MTC contend portions of their information are protected under section 552.110(b) of the Government Code. Upon review, we find GEO, LaSalle, and MTC have established their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause it substantial competitive injury. Therefore, the department must withhold the information we have marked under section 552.110(b). However, we find GEO, LaSalle, and MTC have made only conclusory allegations that the release of their remaining information would cause them substantial competitive injury. *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 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), 319 at 3 (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 department may not withhold any of the remaining information under section 552.110(b).

In summary, the department must withhold the information we have marked under section 552.110(b) of the Government Code. The department must release the remaining information.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 435755

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. J. Greg Hudson
Hudson & O'Leary LLP
1010 MoPac Circle, Suite 201
Austin, Texas 78746
(w/o enclosures)

Ms. Dawn M. Call
Management & Training Corporation
P.O. Box 10
Centerville, Utah 84014
(w/o enclosures)

Mr. Nathaniel Quarterman
Director of Business Development
LaSalle Southwest Corrections
26228 Ranch Road 12
Dripping Springs, Texas 78620
(w/o enclosures)