



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 19, 2012

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2012-05630

Dear Mr. Smith:

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# 450968.

The Texas Health and Human Services Commission (the "commission") received a request for documents pertaining to Request for Proposal No. 529-11-0004, Region 4. You state the commission is releasing most of the requested information to the requestor. Although the commission takes no position on the public availability of the submitted information, you state the release of the submitted information may implicate the proprietary interests of Irving Holdings, Inc. ("Irving"), Logisticare Solutions, LLC ("Logisticare"), and Medical Transportation Management, Inc. ("MTM"). Accordingly, you notified these companies of this 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); 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 Logisticare and MTM. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address your assertion that portions of the information at issue were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-04082 (2012). Although you contend portions of the information submitted for the present request consist of the same information previously ruled upon, we note that in the previous ruling the request sought the bid proposals for Regions 15 and 16, while the

current request seeks the bid proposals for Region 4. Additionally, you inform us that the winning bidder for the current request for proposal is different from that in the previous ruling. Further, you acknowledge that some of the submitted documents are not precisely the same as the documents addressed in the previous ruling. Thus, we find the facts and circumstances are not the same and the commission may not rely upon Open Records Letter No. 2012-04082 as a previous determination in this instance. *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 information is precisely the same information as was addressed in a prior attorney general ruling, ruling was addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure.)

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 under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Irving has not submitted comments to this office explaining how the release of its proposal will affect its proprietary interests. Thus, we have no basis to conclude that the release of any portion of Irving's information would implicate Irving's proprietary interests. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, the commission may not withhold any portion of Irving's information on the basis of any proprietary interest Irving may have in its information.

Section 552.110 of the Government Code 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* Open Records Decision No. 552 at 2 (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.<sup>1</sup> 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* 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).

Logisticare claims portions of its proposal are confidential under section 552.110(a) of the Government Code. Upon review, we find that Logisticare has established a *prima facie* case that some of its customer information, which we have marked, constitutes a trade secret. We also find that Logisticare has demonstrated that portions of its proprietary software information constitute protected trade secrets. Therefore, the commission must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note that Logisticare has published the identities of many of its customers on its website. Thus, Logisticare has failed to demonstrate that the information it has published on its website is a trade secret. Further, Logisticare has failed to demonstrate that any of the

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<sup>1</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 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).

remaining information at issue meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. We note that 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 (1939); see *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Logisticare claims portions of its proposal are excepted from disclosure under section 552.110(b) of the Government Code. In advancing its arguments, Logisticare relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, in making a determination under section 552.110(b), we will only consider Logisticare’s interest in withholding its information.

Both Logisticare and MTM argue portions of their proposals are excepted under section 552.110(b). Upon review, we find that MTM has established that its financial statements, which we have marked, constitute commercial or financial information, the release of which would cause the company substantial competitive harm. Thus, the commission must withhold the information we have marked under section 552.110(b) of the Government Code. We note the contract at issue was awarded to Logisticare. This office considers the price charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). 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 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We therefore find the commission may not withhold any of Logisticare’s pricing information under section 552.110(b) of the Government Code. Additionally, we find Logisticare has made only conclusory allegations that the release of

the remaining submitted information it seeks to withhold would result in substantial damage to its competitive position. Thus, Logisticare has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* Open Records Decision Nos. 661, 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 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of Logisticare's information may be withheld under section 552.110(b).

We note portions of the remaining information are subject to section 552.136 of the Government Code, which 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."<sup>2</sup> Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers 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.

We note some of the information in Irving's proposal appears to be 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). 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.

In summary, the commission must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. Except for the copyrighted material, which the commission may only release in accordance with copyright law, the commission 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

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<sup>2</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. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Kristi L. Wilkins  
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Open Records Division

KLW/eb

Ref: ID# 450968

Enc. Submitted documents

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