



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-05927

Dear Ms. Evans:

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# 451488 (GC No. 19322).

The City of Houston (the "city") received a request for proposals, evaluator notes, and protests pertaining to a specified solicitation. You state that you are releasing the requested evaluator notes and protests. You state that, although the city takes no position with respect to the requested proposals, they may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the city notified the third parties of the request for information and of their right to submit arguments stating why their information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from an attorney for HCG. We have considered the submitted arguments and reviewed the submitted information.

¹The third parties notified pursuant to section 552.305 are Hallmark Capital Group, L.L.C. ("HCG") and Star Service, Inc. of Houston ("Star Service").

Initially, we note the proposal submitted by Star Service was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-04719 (2012). In that ruling, we determined the city must withhold the information we marked under section 552.136 of the Government Code and release the remaining information. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling as to Star Service's proposal was based, we conclude the city must rely on Open Records Letter No. 2012-04719 as a previous determination for Star Service's proposal and continue to withhold or release that information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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 information protected by other statutes, including federal law. HCG claims portions of its information are confidential under the Privacy Act. Section 552a(b) of the Privacy Act provides, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]" 5 U.S.C. § 552a(b). However, our office and the courts have stated the Privacy Act applies only to federal agencies and not to state or local agencies. *See St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); Attorney General Opinion MW-95 at 2 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). Thus, the city may not withhold any of the submitted information on the basis of the Privacy Act.

Section 552.101 of the Government Code also encompasses the Federal Financial Modernization Act, also known as the Gramm-Leach-Bliley Act (the "GLB Act"), which became law in November 1999. *See* 15 U.S.C. § 6801 *et seq.* The purpose of the GLB Act was to promote competition in the financial services industry. *See* H.R. Conf. Rep. No. 106-434, at 245 (1999), reprinted in 1999 U.S.C.C.A.N. 245, 245. Reflecting Congressional concern regarding the dissemination of consumers' personal financial information, the Act provides certain privacy protections "to protect the security and confidentiality of [consumers'] nonpublic personal information." 15 U.S.C. § 6801. The statute defines nonpublic personal information ("NPI") as "personally identifiable financial information ["PIFI"] - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution." *Id.* § 6809(4)(A). Federal Regulations

define "PIFI" as "any information: (i) [a] consumer provides to [a regulated financial institution] to obtain a financial product or service ...; (ii) [a]bout a consumer resulting from any transaction involving a financial product or service between [a regulated financial institution] and a consumer; or (iii) [a regulated financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer." 16 C.F.R. § 313.3(o)(1).

Additional protection is provided to consumers by limitations placed on the reuse of PIFI obtained from a financial institution by a nonaffiliated third party. Section 6802(c) provides as follows:

... a nonaffiliated third party that receives from a financial institution [NPI] under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6802(c). HCG states the financial information should be confidential under the GLB Act. However, HCG does not inform this office, nor does the information on its face reflect, that the information at issue is NPI or PIFI as defined by the federal regulations. *See Individual Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) ("It is the context in which information is disclosed-rather than the intrinsic nature of the information itself-that determines whether information falls within the GLB Act."). Thus, we are unable to conclude that the GLB Act is applicable to this information, and it may not be withheld on this basis.

HCG claims section 552.110 of the Government Code for portions of its submitted information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 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 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 private person's claim for exception as valid under section 552.110(a) 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 that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We 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 (1939); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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 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).

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).

After reviewing the submitted arguments and the information at issue, we conclude HCG has demonstrated that a portion of its information constitutes trade secrets for purposes of section 552.110(a). Accordingly, the city must withhold the information we have marked under section 552.110(a). However, we note HCG has made all of its client information publicly available on its website. Because HCG has published this information, HCG has failed to demonstrate how this information constitutes trade secret information for purposes of section 552.110(a). In addition, we find HCG has failed to establish any of the remaining information at issue meets the definition of a trade secret, nor has HCG demonstrated the necessary factors to establish a trade secret claim for the remaining information. Thus, the city may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

After reviewing the submitted arguments and the information at issue, we conclude HCG has established that release of portions of the remaining information would cause the company substantial competitive harm. Accordingly, the city must withhold the information we have marked in the remaining information under section 552.110(b). However, we find HCG has failed to provide specific factual evidence demonstrating release of any of the remaining information would result in substantial competitive harm to the company. *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 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, the city may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

Section 552.136 of the Government Code provides 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”). HCG states portions of its remaining information are subject to section 552.136. However, HCG has not explained, and we cannot discern, how any of the remaining information consists of a credit card, debit card, or charge card number, or can be used to obtain money, goods, services, or another thing of value or initiate a transfer of funds. Thus, we find none of the remaining information may be withheld under section 552.136 of the Government Code.

We note portions of the remaining information may 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). 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.

In summary, with regards to the proposal submitted by Star Service, the city must rely on Open Records Letter No. 2012-04719 as a previous determination and continue to withhold or release Star Service's proposal in accordance with that ruling. The city must withhold the information we have marked under section 552.110 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.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/som

Ref: ID# 451488

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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