



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2012

Mr. David P. Backus
Underwood Law Firm
P.O. Box 16197
Lubbock, Texas 79490

OR2012-06599

Dear Mr. Backus:

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# 453517.

The Region 17 Education Service Center ("ESC 17"), which you represent, received a request for all submissions received in connection with RFQ #1112-01 for the Texas Kindergarten Readiness System. Although you take no position on the public availability of the requested information, you believe the information may implicate the proprietary interests of OZ Systems ("OZ"). You inform us OZ was notified of the request for information and of its right to submit arguments to this office as to why the requested information should not be released.¹ We have considered the arguments we received from OZ and reviewed the information you submitted.

OZ contends specific parts of its proposal should be withheld from disclosure. Among other things, OZ contends those parts of the proposal "are not material and necessary to the open records request." OZ does not deny, however, that the information at issue is responsive to the request. Therefore, the information at issue must be released unless OZ demonstrates it is excepted from disclosure. *See* Gov't Code § 552.006; Open Records Decision No. 463

¹*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

at 2 (1987) (if information does not fall within a specific exception, it must be disclosed to any person who requests it).

OZ also notes the information at issue was designated as being “proprietary and confidential” when it was submitted to ESC 17. Information is not confidential under the Act, however, simply because the party that submitted the information anticipated or requested confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Therefore, the information at issue must be released unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

OZ also contends the information at issue is excepted from disclosure under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “commercial 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(a)-(b).

The Supreme Court of Texas has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds 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 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 [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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the

exception, and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude section 552.110(a) is applicable, however, 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) 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 Records Decision 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause substantial competitive harm).

We understand OZ to contend the information at issue constitutes a trade secret under section 552.110(a) of the Government Code and commercial or financial information protected by section 552.110(b). Having considered OZ's arguments and reviewed the information at issue, we find OZ has not established any of the information at issue constitutes a trade secret for purposes of section 552.110(a). We also find OZ has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information at issue would cause the company substantial competitive harm. We therefore conclude ESC 17 may not withhold any of the submitted information under section 552.110 of the Government Code.

We note some of the submitted information falls within the scope of section 552.101 of the Government Code.³ This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found.*

²The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

³This office will raise section 552.101 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976). This office has determined common-law privacy encompasses certain types of personal financial information. Personal financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We conclude the personal financial information we have marked is highly intimate or embarrassing and not a matter of legitimate public interest. Therefore, ESC 17 must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

Lastly, we note some of the submitted information appears to be protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1977); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, ESC 17 must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁴ The rest of the submitted information must be released, but any information protected by copyright may only be released in compliance with copyright law.

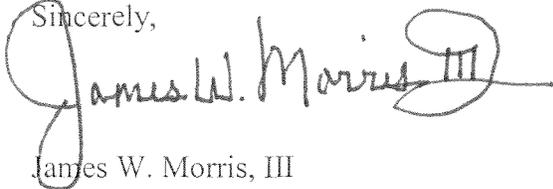
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,

⁴We note the submitted information also includes social security numbers. 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 a decision from this office under the Act.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, looped initial "J" and a distinct "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 453517

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. Steve Montgomery
OZ Systems
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(w/o enclosures)