ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2012

Ms. Susan M. Fillion
Assistant County Attorney
Harris County Attorney's Office
1019 Congress 15th Floor
Houston, Texas 77002

OR2012-14031

Dear Ms. Fillion:

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# 464004 (C.A. File No. 12PIA0315).

The Harris County Attorney's Office (the "county attorney's office") received a request for current contracts with and proposals submitted by online legal research providers. You indicate some of the requested information either has been or will be released. You believe some of the submitted information may be excepted from disclosure under section 552.101 of the Government Code. You also believe the submitted information may implicate the interests of West, a Thomson Reuters business ("West"), under section 552.110 of the Government Code. You inform us West was notified of the present request for information and of its right to submit arguments to this office as to why the submitted information should not be released.[1] You have submitted arguments the county attorney's office received from West. We have considered all the submitted arguments and reviewed the submitted information.

We begin with West's arguments against disclosure.[2] West claims portions of the submitted information are protected by section 552(b)(6) of title 5 of the United States Code, the

[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).

[2]We note West raises section 552.022 of the Government Code, which is not an exception to disclosure under subchapter C of the Act. Instead, section 552.022(a) provides for required public disclosure of eighteen specific categories of information, unless the information is made confidential under the Act or other law or subject to section 552.022(a)(1) but excepted from disclosure under section 552.108 of the Government Code. *See* Gov't Code § 552.022(a)(1)-(18). West also cites provisions of Nebraska and New York law but does not indicate how or why they would be applicable to information held by the county attorney's office.

Freedom of Information Act ("FOIA"). We note FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue is held by an agency of Harris County (the "county"), which is subject to the laws of the State of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Open Records Decision No. 561 at 7 n.3 (1990) (noting federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). This office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.*, Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); ORD 124 (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas governmental body). Thus, the county attorney's office may not withhold any of the submitted information on the basis of FOIA.

We also understand West to claim section 552.110 of the Government Code. This section 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.[3] *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude section 552.110(a) is applicable, however, unless the information is shown to meet 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 No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

West contends portions of the submitted documents, including pricing information, constitute trade secrets of the company protected by section 552.110(a) and commercial or financial information protected by section 552.110(b).[4] We note the information at issue either is contained in or otherwise pertains to contracts between West and the county. Pricing information pertaining to a particular contract with a governmental body is generally not a trade secret under section 552.110(a) 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 Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 2 (1982), 306 at 2. Likewise, the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dept of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing

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

[4]We note the county attorney's office also generally contends portions of the submitted documents are protected under both aspects of section 552.110. Because this exception protects the proprietary interests of a third party such as West that has provided information to a governmental body, not the interests of the governmental body itself, we consider only West's arguments against disclosure.

business with government). We also note the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Having considered West's arguments and reviewed the submitted information, we conclude West has neither established any of the information at issue constitutes a trade secret under section 552.110(a) nor made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information would cause West substantial competitive harm. Therefore, the county attorney's office may not withhold any of the submitted information under section 552.110 of the Government Code.

We note the submitted information includes an account number. Section 552.136(b) 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."[5] Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). The county attorney's office must withhold the account number we have marked under section 552.136 of the Government Code.

Lastly, we address the county's claims under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information other statutes make confidential. The county believes some of the submitted information may be confidential under trademark law. Section 1127 of title 15 of the United States Code provides that a trademark consists of

> any word, name, symbol, or device, or any combination thereof . . . used by a person, or . . . which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C. § 1127. Thus, a trademark pertains to the public use of information by a business enterprise to distinguish its goods or services from those of its competitors. The mere fact information contains a trademark does not make the information confidential. Therefore, the county attorney's office may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of trademark law. *See also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating information shall not be released to public).

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[5]This office will raise section 552.136 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).

The county attorney's office also believes some of the submitted information may be protected by copyright law. We note copyright law does not make information confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 660 at 5 (1999). We also note none of the submitted information appears to be protected by copyright law. In any event, a governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Open Records Decision Nos. 180 at 3 (1977), 109 (1975). A custodian of public records must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. If a member of the public wishes to make copies of copyrighted materials, he or she 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, the county attorney's office must withhold the information we have marked under section 552.136 of the Government Code. The rest of the submitted information must be released, but any copyrighted information 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,

James W. Morris III

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

JWM/bhf

Ref: ID# 464004

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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