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OR2012-15334

Dear Ms. Nelson:

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# 466399.

The Lewisville Independent School District (the "district"), which you represent, received a request for all proposals submitted in response to RFP #2208-12. You state the district will make some information available to the requestor. You also state the district will redact insurance policy numbers pursuant to section 552.136 of the Government Code and social security numbers pursuant to section 552.147 of the Government Code.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of 1-2-1 Claims, Inc. ("1-2-1 Claims") and JI Companies ("JI"). Accordingly, you notified 1-2-1 Claims and JI of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from 1-2-1 Claims and JI. We have considered the submitted arguments and reviewed the submitted information.

¹Section 552.136 of the Government Code permits a governmental body to redact the information described in section 552.136(b) without the necessity of requesting a decision from this office. *See* Gov't Code § 552.136(c)-(e) (providing procedures for redaction of information). Section 552.147(b) of the Government Code permits a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office. *See id.* § 552.147(b).

1-2-1 Claims asserts its entire proposal is excepted under section 552.110 of the Government Code.² JI claims its audited financial statements, certificates of insurance, and its list of customers are confidential under section 552.110. Section 552.110 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.³ RESTATEMENT OF TORTS § 757 cmt. b. 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

²Although 1-2-1 Claims also raises sections 552.113 and 552.131 of the Government Code as exceptions to disclosure of its proposal, it makes no arguments to support these exceptions. Therefore, we assume 1-2-1 Claims has withdrawn its claim these exceptions apply to its information.

³The 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).

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 section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code 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).

Upon review, we find JI has established a *prima facie* case that some of its customer information, which we have marked, constitutes trade secrets. Therefore, the district must withhold the information we have marked pursuant to section 552.110(a). We note JI has published the identities of many of its customers on its website. Thus, JI has failed to demonstrate the information it has published on its website is a trade secret. Further, 1-2-1 Claims and JI have failed to demonstrate that any of the remaining information at issue meets the definition of a trade secret, nor has either party demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the remaining information may be withheld under section 552.110(a).

Furthermore, because JI published its remaining customer information on its website, it has failed to demonstrate how release of this information would cause the company substantial competitive harm. Additionally, we find 1-2-1 Claims and JI have made only conclusory allegations that release of the remaining information they seek to withhold would result in substantial damage to their competitive positions. Thus, 1-2-1 Claims and JI have not demonstrated that substantial competitive injury would result from the release of any of the 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 the remaining information may be withheld under section 552.110(b).

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685

(Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You state the district has highlighted in green information that reveals individuals' medical information. We are unable to determine whether this information pertains to actual living individuals or fictitious individuals created as samples by 1-2-1 Claims and JI for purposes of responding to the district's request for proposal. Therefore, to the extent the information you have highlighted in green pertains to living individuals, the district must withhold it under section 552.101 in conjunction with common-law privacy. To the extent the information highlighted in green does not pertain to actual living individuals, the district may not withhold it under section 552.101 in conjunction with common-law privacy.

We understand 1-2-1 Claims to assert common-law privacy protects its personnel information and JI raises section 552.101 in conjunction with common-law privacy for its audited financial statements, certificates of insurance, and customer list.⁴ We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). Upon review, we find 1-2-1 Claims and JI have failed to demonstrate any of the information either party seeks to withhold is highly intimate or embarrassing and a matter of no legitimate public interest. Consequently, the district may not withhold any of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

1-2-1 Claims argues a portion of its proposal is confidential under sections 401.057 and 401.058 of the Insurance Code.⁵ Section 552.101 of the Government Code also encompasses information protected by other statutes. Section 401.051 of the Insurance Code requires the Texas Department of Insurance (the "department"), or an examiner appointed by the department, to visit each insurance carrier and examine the carrier's financial condition, ability to meet liabilities, and compliance with the laws affecting the conduct of

⁴Although 1-2-1 Claims raises section 552.102 of the Government Code for its personnel information; because section 552.102 is only applicable to employees of a governmental body, we understand it to raise section 552.101 of the Government Code based on its arguments.

⁵1-2-1 Claims cites to the former article 1.15 of the Insurance Code, which was codified as sections 401.057 and 401.058 of the Insurance Code in 2005. Act of 2005, 79th Leg., R.S., ch. 727, § 1, secs. 401.057 and 401.058, 2005 Tex. Gen. Laws 1765, 1766. Therefore, we will address 1-2-1 Claims' arguments under sections 401.057 and 401.058.

the carrier's business. Ins. Code § 401.051(a), (b). In connection with this examination process, section 401.057 provides in part:

(b) In conducting an examination under this subchapter, the department shall use audits and work papers that the carrier makes available to the department and that are prepared by an accountant or accounting firm meeting the qualifications of Section 401.011. The department may conduct a separate audit of the carrier if necessary. Work papers developed in the audit shall be maintained in the manner provided by Sections 401.020(b) and (c).

(c) The carrier shall provide the department with:

(1) the work papers of an accountant or accounting firm or the carrier;
and

(2) a record of any communications between the accountant or accounting firm and the carrier that relate to an audit.

...

(e) Information obtained under this section is confidential and may not be disclosed to the public except when introduced as evidence in a hearing.

Id. § 401.057(b)-(c), (e). Additionally, section 401.058 states:

(a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

Id. § 401.058. In this instance, 1-2-1 Claims submitted its information to the district in response to a request for proposal, not during the course of an examination under chapter 401 of the Insurance Code. Therefore, we conclude the district may not withhold any of the information at issue under section 552.101 on the basis of either section 401.057 or section 401.058 of the Insurance Code.

1-2-1 Claims also generally raises section 552.101 of the Government Code. However, 1-2-1 Claims has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any portion of its proposal confidential under section 552.101. Therefore, the district may not withhold any of the remaining information at issue on that ground.

We also understand 1-2-1 Claims to assert the work product privilege for some of its information. Section 552.111 of the Government Code encompasses the work product privilege. However, section 552.111 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991), 522 (1989) (discretionary exceptions in general). Therefore, the district may not withhold any of the information at issue pursuant to section 552.111.

Next, we note section 552.136 of the Government Code may be applicable to some of the remaining information. Section 552.136 provides that “[n]otwithstanding any other provision of this chapter, 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.”⁶ Gov’t Code § 552.136. Accordingly, the district must withhold the insurance policy number we have marked under section 552.136, provided that the insurance policy number is real and belongs to an actual living individual. Fictitious insurance policy numbers may not be withheld under section 552.136.

You state the district will redact e-mail addresses in the submitted proposals under section 552.137 of the Government Code, pursuant to Open Records Decision No. 684 (2009). This decision acts as a previous determination to all governmental bodies authorizing them to withhold several categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision. This decision, however, does not authorize governmental bodies to withhold e-mail addresses that are subject to section 552.137(c). *See* ORD 684 at 10. Section 552.137(c)(3) provides an e-mail address “contained in a response to a request for bids or proposals” may not be withheld under section 552.137. *See* Gov’t Code § 552.137(c)(3). In this instance, the e-mail addresses you have highlighted are contained in responses to a request for bids or proposals. As such, those e-mail addresses are subject to section 552.137(c)(3). Consequently, the district may not withhold the e-mail addresses at issue under section 552.137.

You contend some of the information at issue may be protected by copyright. A custodian of public records must comply with the 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 the copyright law and the risk of a copyright infringement suit.

⁶The 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).

In summary, the district must withhold the information we have marked under section 552.110(a) of the Government Code. To the extent the information you have highlighted in green pertains to living individuals, the district must withhold it under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the insurance policy number we have marked under section 552.136 of the Government Code, provided the insurance policy number is real. The remaining information at issue must be released, but if any information is protected by copyright, it 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,



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Open Records Division

ACV/eb

Ref: ID# 466399

Enc. Submitted documents

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