



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 8, 2013

Ms. Mary Salluce  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2013-02272

Dear Ms. Salluce:

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# 478338 (DSHS #21021 and #21078).

The Texas Department of State Health Services (the "department") received a request for all proposals submitted in response to RFP #53700-3-0000100516 for conference planning services and a request for information pertaining to the award. Although you take no position with respect to the public availability of the requested information, you state release of this information may implicate the proprietary interests of Affirma Solutions, Inc. ("Affirma"); Grant Thornton, LLP ("Grant Thornton"); Oak Hill Technology, Inc. ("Oak Hill"); and Swift Solutions ("Swift"). Accordingly, you notified these third parties 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) (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 the circumstances). We have received comments submitted by Affirma.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>We note Affirma seeks to withhold a social security number contained in its information. 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 an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this decision, we have not received correspondence from Grant Thornton, Oak Hill, or Swift. Therefore, we have no basis to conclude these companies have protected proprietary interests in the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interests Grant Thornton, Oak Hill, or Swift may have in the information.

We understand Affirma to raise common-law privacy for portions of its information. 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 that (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). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note the names of members of the public are not excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy). Upon review, we find no portion of the submitted information to be highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy.

Affirma also contends portions of its information are excepted from disclosure under section 552.110 of the Government Code. 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. Gov't Code § 552.110. 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* ORD 552 at 2. 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>2</sup> 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 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) 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* ORD 661 at 5-6 (business

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<sup>2</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).

enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Affirma contends portions of its information constitute trade secrets. Upon review, we find Affirma has demonstrated some of its client information, which we have marked, constitutes trade secrets of the company. Accordingly, the department must withhold the information we have marked under section 552.110(a) of the Government Code. However, we note Affirma has made some of its client information publicly available on its website. In light of Affirma's own publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. Furthermore, we find Affirma has failed to demonstrate how any portion of the remaining information at issue meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See Open Records Decision Nos. 402* (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, the department may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Affirma contends release of some of its remaining information will cause the company substantial competitive harm. Upon review, we find Affirma has established its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, the department must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Affirma has not established how any of the remaining information it seeks to withhold constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. *See Open Records Decision Nos. 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). Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the department must withhold the information we have marked under section 552.110 of the Government Code. As no further exceptions to disclosure are raised, the remaining information must be released.

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](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,



Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/dls

Ref: ID# 478338

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

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