



ATTORNEY GENERAL OF TEXAS  
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June 5, 2013

Ms. Anne Kimbol  
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OR2013-09265

Dear Ms. Kimbol:

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# 489618.

The Texas Health Services Authority (the "authority") received a request for the contract and responses related to request for proposals number A1548-12-00002 for State-Level Shared Services. You claim some of the requested information is excepted from disclosure under section 552.104 of the Government Code. Although you take no position with respect to the public availability of the remaining submitted information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified the affected third parties of the request and of their right to submit arguments to this office explaining why their information should not be released.<sup>1</sup> *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 arguments submitted by Deloitte, Drummond, GDIT, Jericho, and Medicity. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Deloitte and GDIT seek to withhold information the authority has not submitted for our review. This ruling does not address information beyond what the

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<sup>1</sup>The affected third parties are the following: Alimetrik; Cognosante; Deloitte Consulting ("Deloitte"); Drummond Group ("Drummond"); EHR Doctors, Inc.; General Dynamics Information Technology ("GDIT"); INX, L.L.C., a wholly owned subsidiary of Presidio Networked Solutions, Inc.; Intersystems Corp.; Jericho Systems Corp. ("Jericho"); Medicity; Nitor Group, Ltd.; Orion Health; Symantec; and Timba.

authority has submitted to us for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the authority submitted as responsive to the request for information. *See id.*

The authority and Jericho each raise section 552.104 of the Government Code. We note this section protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 (1991). Accordingly, we will address the authority's argument under section 552.104, but, because section 552.104 does not protect the interests of third parties, we will not address Jericho's argument under this exception.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* ORD 592 (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, this office has determined in some circumstances section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).

The authority seeks to withhold pricing information in the submitted contract and proposals under section 552.104. You assert the pricing information "could be used against the [authority] in the future in any negotiations for similar services[.]" However, you acknowledge a winning bidder has been selected for the request for proposals at issue and a contract has been executed. Thus, the submitted information relates to a contract that has already been executed. Upon review, we find you have not demonstrated how the release of the pricing information would affect an ongoing competitive bidding situation or how the information at issue pertains to the solicitation of bids for the same or similar goods or services on a recurring basis. Therefore, the authority has failed to demonstrate the applicability of section 552.104 of the Government Code to this information. Accordingly, we conclude the authority may not withhold any of the submitted information under section 552.104 of the Government Code.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from the remaining third parties. Thus, none of these third parties has demonstrated it has a protected proprietary interest in any of 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 authority may not withhold the submitted information pertaining to the remaining third parties on the basis of any proprietary interests they may have in the information.

Next, we address Drummond's expectations of confidentiality. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *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 through an 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 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 does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.<sup>2</sup>

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 information made confidential by other statutes, such as section 6103(a) of title 26 of the United States Code. Some of the submitted information contains corporate tax return information. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term “return information” as “a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for

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<sup>2</sup>Drummond raises no exceptions to disclosure under the Act.

any tax, penalty, . . . or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Upon review, we determine the authority must withhold the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

GDIT and Jericho assert some of their information is private. Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 elements of this test must be demonstrated. See *id.* at 681-82.

This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. See Open Records Decision Nos. 600, 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). 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). We further note that the names, addresses, and telephone numbers of members of the public are generally 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).

We note some of the submitted information contains business ownership percentages. This personal financial information is highly intimate or embarrassing and of no legitimate public interest. Upon review, we find no portion of the remaining information is private and it may not be withheld under section 552.101 of the Government Code on that basis. Accordingly, the authority must withhold only the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Deloitte, GDIT, Jericho, and Medicity assert some or all of their information is excepted from public disclosure under section 552.110 of the Government Code. 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. Gov't Code § 552.110.

Section 552.110(a) of the Government Code protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *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>3</sup> *See* 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 exemption is made and no argument is submitted that rebuts the claim as a matter

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<sup>3</sup>There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular proposal or 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; *see also Huffines*, 314 S.W.2d at 776.

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.* § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Deloitte, GDIT, and Medicity have demonstrated that substantial competitive harm would result from the release of portions of their information. Therefore, we have marked portions of the submitted information relating to these companies that the authority must withhold under section 552.110(b) of the Government Code. We note, however, Medicity has published the identities of some of its customers on its website. Thus, Medicity has failed to demonstrate that substantial competitive harm would result from the release of the customer information it has published on its website. Further, Deloitte, GDIT, Jericho, and Medicity have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information at issue would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience). Consequently, the authority may not withhold any of the remaining information of these companies under section 552.110(b).

Upon further review, we find Deloitte, GDIT, Jericho, and Medicity have failed to demonstrate that any of the remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for the remaining information. Therefore, the authority may not withhold any portion of the remaining information pertaining to these companies under section 552.110(a).

Finally, we note some of the submitted information appears to 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.

In summary, the authority must withhold (1) the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and (3) the information we have marked under section 552.110(b) of the Government Code. The authority must release the remaining information; however, any information 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.texasattorneygeneral.gov/open\\_orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open_orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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CN/dls

Ref: ID# 489618

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