



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2014

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2014-22495

Dear Mr. Ramirez:

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# 546434.

The Lower Colorado River Authority (the "authority") received a request for all proposals submitted for Request for Proposal 9099. We understand the authority takes no position with respect to the submitted information; however, the authority states the release of the requested information may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the authority notified ARAG Services, L.L.C. ("ARAG"); Hyatt Legal Plans ("Hyatt"); and Legal Plans USA (LegalEASE) ("LegalEASE") of the request for information and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 reviewed the submitted information and the arguments submitted by ARAG, Hyatt, and LegalEASE.

Hyatt raises section 552.104 of the Government Code. This section excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions

which are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the authority does not seek to withhold any information pursuant to this exception, no portion of Hyatt's information may be withheld on this basis.

ARAG, LegalEASE, and Hyatt submit arguments against disclosure of some of their information 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) 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 Open Records Decision No. 552 at 2 (1990). 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.¹ 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 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).

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.*; 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).

ARAG, Hyatt, and LegaleASE each contend some of their information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we conclude ARAG and LegaleASE have established the release of their client references would cause the companies substantial competitive injury. Accordingly, to the extent ARAG’s and LegaleASE’s client reference information within the submitted information is not publicly available on the companies’ websites, the authority must withhold the client reference information at issue under section 552.110(b). To the extent ARAG’s and LegaleASE’s client reference information is publicly available on the companies’ websites, the authority may not withhold such information under section 552.110(b). In that event, we will address ARAG’s and LegaleASE’s arguments under section 552.110(a) for their client reference information that is publicly available on the companies’ websites. Additionally, we find ARAG, Hyatt, and LegaleASE have each established the release of some of their information, which we have marked, would cause the companies substantial competitive injury. Accordingly, the authority must withhold the

¹There 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).

information we have marked under section 552.110(b).² However, we find ARAG, Hyatt, and LegalEASE 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) (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 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the authority may not withhold the remaining information under section 552.110(b).

ARAG, Hyatt, and LegalEASE also claim their remaining information constitutes trade secrets. To the extent the client references of ARAG and LegaEASE are publicly available on the companies' websites and not excepted from disclosure under section 552.110(b), the authority may not withhold such information under section 552.110(a). Additionally, we find ARAG, Hyatt, and LegalEASE have failed to demonstrate the necessary factors to establish a trade secret claim for their remaining information. Accordingly, the authority may not withhold the remaining information under section 552.110(a).

We note some of the remaining information appears to be subject to copyright law. 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, to the extent ARAG's and LegalEASE's client reference information within the submitted information is not publicly available on the companies' websites, the authority must withhold the client reference information at issue under section 552.110(b) of the Government Code. The authority must withhold 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.

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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, 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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 546434

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Kyle L. Howe
LegalEASE
5850 San Felipe, Suite 600
Houston, Texas 77057
(w/o enclosures)

Ms. Jennifer L. McKeegan
Assistant Counsel
Hyatt Legal Plans
1111 Superior Avenue
Cleveland, Ohio 44114-2507
(w/o enclosures)

Ms. Ann Cosimano
General Counsel
ARAG Services, L.L.C.
400 Locust, Suite 480
Des Moines, Iowa 50309
(w/o enclosures)