



September 20, 1999

Mr. Scott Fawcett
Legal Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR99-2620

Dear Mr. Fawcett:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 126677.

The Comptroller of Public Accounts (the "Comptroller") received a request for "copies of all materials/documents/files relating to the EBT Data Study Final Report." You contend that some of the requested information is excepted from disclosure. You claim that information about food stamp retailers is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 278.1(r) of Title 7 of the Code of Federal Regulations. On behalf of Electronic Data Systems Corporation ("EDS") and HNC Software, Inc. ("HNC"), you ask us to determine whether the joint proposal from EDS and HNC is excepted from disclosure under section 552.110 of the Government Code.¹ On behalf of the Texas Department of Human Services ("DHS"), you ask us to determine whether any of the information at issue is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. You have submitted a representative sample of the information at issue to this office for review.²

First, we consider whether the submitted information about food stamp retailers is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 278.1(r) of Title 7 of the Code of Federal Regulations. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either

¹You inform us that Intelligent Technologies Corporation ("ITC") also submitted a proposal to the Comptroller. However, because "ITC did not mark any portion of its document as proprietary or confidential," you "do not claim § 552.110 for this document."

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

constitutional, statutory, or by judicial decision.” A federal statute or administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision Nos. 476 (1987), 226 (1979). Section 278.1(r) provides in part:

(r) Use and disclosure of information provided by firms. With the exception of EINs and SSNs, the contents of an initial application [for the Food Stamp Program], or other information required to be submitted by retail food stores and wholesale food concerns to determine continued eligibility, such as ownership information and sales and redemption data, may be disclosed to and used by Federal and State law enforcement and investigative agencies for the purpose of administering or enforcing the Food Stamp Act or any other Federal or State law, and the regulations issued under the Food Stamp Act or such other law. Such disclosure and use shall also include companies or individuals under contract for the operation by, or on behalf of FNS to accomplish an FNS function. Such purposes include the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law or regulations any information obtained under this paragraph shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both.

7 C.F.R. § 278.1(r). You contend that enclosure #2 and similar information in the EDS/HNC report is confidential under section 278.1(r). We have marked on enclosure #2 the types of information that are confidential under section 278.1(r). The Comptroller must withhold these types of information from disclosure under section 552.101.

Enclosure #3 is the joint proposal from EDS and HNC. Pursuant to section 552.305 of the Government Code we notified EDS and HNC of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure. EDS contends that the Volume II including the narrative and appendices is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. HNC contends that pages 9-12 of Volume I and Volume II in its entirety are excepted from disclosure under section 552.110.

Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of this exception is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 does not, however, protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. The Comptroller has not raised section 552.104. Therefore, section 552.104 is not applicable in this instance.

Both EDS and HNC contend that portions of their joint proposal are trade secrets. Section 552.110 excepts from disclosure trade secrets of third parties. 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.), *cert. denied*, 358 U.S. 898 (1958); *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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Having carefully considered the arguments of EDS and HNC, we find that the following sections of their joint proposal are excepted from disclosure under section 552.110 as trade secrets:

Volume I - sections 3-4 (pages 9-12);

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (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 [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).

Volume II - bottom of page 6 (marked) through page 13, bottom of page 15 (marked) through page 18, appendices B, C, D, and F.

The Comptroller must withhold these portions of the proposal from disclosure.

You raised sections 552.107, 552.108, and 552.111 of the Government Code on behalf of DHS and asked DHS to submit arguments in support of these exceptions. DHS does not contend that the information at issue is excepted from disclosure under section 552.107 or section 552.111, and you have not demonstrated that these exceptions apply to the information. Therefore, the Comptroller may not withhold any of the requested information from disclosure under section 552.107 or section 552.111. DHS contends that information that identifies potential illegal traffickers in food stamp benefits is excepted from disclosure under section 552.108. DHS also claims that information about applicants for and recipients of food stamp benefits is excepted from disclosure under section 552.101 in conjunction with several statutes and regulations.

Section 552.108 of the Government Code excepts from disclosure certain records of law enforcement agencies and prosecutors. Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g.*, Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493 (1988), 272 (1981). For example, if an administrative agency's investigation reveals possible criminal conduct that the administrative agency intends to report or has already reported to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the administrative agency if its release would interfere with law enforcement. *See* Gov't Code § 552.108(a)(1), (b)(1), Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493 (1988), 272 (1981).

DHS explains that

The Texas Department of Human Services investigates potential violations of the state and federal law and regulations regarding food stamp benefits under an agreement with the United States Department of Agriculture, Food and Nutrition Service. The department is recognized as the State Law Enforcement Bureau to acquire Food Stamp Electronic Benefit Transfer (EBT) food benefits from the state for law enforcement and investigation purposes . . . If the department finds reason to believe that a violation has occurred, the case is referred to the District or County Attorney for prosecution. The documents requested . . . include information identifying retailers who show a high potential of being involved in illegal trafficking in benefits . . . Release

of information that certain retailers have been identified as potential illegal operators would have a negative impact on an investigation since these retailers would likely change their operation to frustrate a covert operation.

Based on these arguments from DHS, we find that the types of information found in enclosure #2 and appendices A, C, D, and F of the joint proposal of EDS and HNC are excepted from disclosure under section 552.108 to the extent that the information relates to pending investigations and DHS intends to refer the case for prosecution if it uncovers sufficient evidence to warrant referral. On behalf of DHS, the Comptroller may withhold information relating to pending investigations from disclosure under section 552.108. *See* Open Records Decision No. 474 (1987), 372 (1983) (where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to the incident). However, the notes that DHS attached to the documents at issue indicate that some fraud cases have been adjudicated. DHS has not demonstrated how the release of information relating to adjudicated cases would interfere with detection, investigation, or prosecution of crime. Therefore, the Comptroller may not rely on section 552.108 to withhold information relating to cases that have already been adjudicated.

Finally, section 552.101 excepts from disclosure information deemed confidential by statute. DHS contends that section 12.003 of the Human Resources Code excepts from disclosure information about applicants for and recipients of food stamp benefits. Section 12.003(a) provides:

Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a). We agree that the some of the information at issue is confidential under section 12.003(a).⁴ We have marked the type of information that is confidential (see markings on page 17⁵ of Volume II of the EDS/HNC proposal). The Comptroller must withhold this type of information from disclosure under section 552.101.

⁴Because we conclude that the applicant and recipient information is confidential under section 12.003(a), we need not consider the additional statutes and regulations that DHS contends makes this same information confidential.

⁵Please note that page 17 of Volume II of the EDS/HNC proposal is also excepted from disclosure under section 552.110.

The Comptroller should release to the requestor information that is not excepted from disclosure as discussed above.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 126677

Encl. Marked documents

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