



January 4, 2002

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2002-0059

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156861.

The Texas Department of Human Services (the "department") received a request for the contract awarded to Deloitte Consulting, L.L.C., ("Deloitte"), as well as the proposals submitted by Deloitte, IBM ("IBM") and Accenture ("Accenture"), in response to the department's Texas Integrated Eligibility Redesign System ("TIERS") Phase One Request for Offers ("RFO"). You state that you have no objection to releasing the contract that was awarded to Deloitte. You claim, however, that the submitted information is or may be excepted from disclosure pursuant to sections 552.110 and 552.137 of the Government Code. You also state, and provide documentation showing, that you notified Accenture, Deloitte, and IBM of the request for information.¹ All three of these entities responded with briefs to this office. We have considered the exceptions claimed and have reviewed the submitted information.

We first note, and you inform us, that the current request seeks certain information that is identical to a portion of the information previously requested and ruled upon by this office

¹See 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 that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

in Open Records Letter Ruling No. OR2001-4874 (2001), namely, the information pertaining to Deloitte and Accenture. As Deloitte and Accenture have made the identical arguments earlier made for withholding their information, we conclude you must rely on that ruling as a previous determination and withhold the Deloitte and Accenture information in accordance with OR2001-4874 (2001), except as noted below. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, the first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure).

We note, however, that as you inform us that the contract for Part D of the RFO has been cancelled, the bidding process for that part is no longer operative. Thus, section 552.104 of the Government Code is no longer applicable to except information pertaining to Part D. Accordingly, OR2001-4874 may not be relied upon to withhold section 8 of Accenture's Proposal pertaining to Help Desk Services. We will therefore address Accenture's arguments under section 552.110 for withholding the information contained in section 8.

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). 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.

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).² 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).

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999).

Upon review of the arguments submitted by Accenture, we conclude that Accenture has established that release of the information contained in section 8 of its proposal would result in substantial competitive injury. Therefore, section 8 of Accenture's proposal must be withheld under section 552.110(b).

We will next address IBM's arguments for withholding their information. IBM asserts that certain information contained in its proposal is excepted under sections 552.104 and 552.110 of the Government Code. We first note that section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the requested information pertaining to IBM may not be withheld under section 552.104.

Upon review of the arguments submitted to this office by IBM under section 552.110, we conclude that IBM has failed to establish that its information is confidential as either a trade secret under section 552.110(a), or as commercial or financial information the release of which would cause substantial competitive harm under section 552.110(b). Therefore, the IBM proposal must be released to the requestor in its entirety, with the following exceptions.

²The 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).

We note that the submitted information pertaining to IBM contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137, recently added to the Public Information Act by the Seventy-seventh Legislature,³ provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act].” See Gov’t Code § 552.137(a). As there is no indication that any of the individuals to whom the e-mail addresses belong have consented to their release, the department must withhold the e-mail addresses in the IBM proposal that we have marked (see red tags) under section 552.137 of the Government Code. See Gov’t Code § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release).

Finally, in response to IBM’s assertion that a portion of its information was marked confidential when submitted to the department, we note that information is not confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977), see also Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke predecessor to section 552.110).

To summarize, the department must withhold the responsive information pertaining to Accenture and Deloitte in accordance with this office’s previous ruling in OR2001-4874, except for section 8 of Accenture’s proposal, which must be withheld under section 552.110(b). The responsive information pertaining to IBM is not excepted under sections 552.104 or 552.110 and must be released to the requestor, with the exception of e-mail addresses that must be withheld under section 552.137(a). The contract between the department and Deloitte must be released in its entirety.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

³Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 614; see also Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. Laws 974, 975 (adding this exception as § 552.136).

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

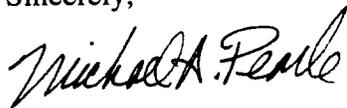
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 156861

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