



April 23, 2002

Ms. Loretta R. DeHay
General Counsel
Texas Real Estate Commission
P.O. Box 12188
Austin, Texas 78711-2188

OR2002-2072

Dear Ms. DeHay:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161564.

The Texas Real Estate Commission (the “commission”) received requests for proposals submitted in response to an RFP for examination services, the “Recommendation for Examination Services Contract,” and the evaluator notes, worksheets, and calculations for three of the bidders. You indicate that the commission has released some of the information responsive to the requests. However, you indicate that you have withheld portions of the requested proposals on the basis that the release of portions of the proposals may implicate the proprietary rights of third parties. Consequently, pursuant to section 552.305 of the Government Code, you notified five third parties—Castle Worldwide, Inc. (“Castle”), Assessment Systems, Inc. (“ASI”), Psychological Services, Inc. (“PSI”), Experior Assessments (“Experior”), and Applied Measurement Professionals (“AMP”). We have considered all of the submitted arguments and reviewed the submitted information.

Castle, ASI, PSI, and Experior have each submitted arguments to this office in favor of withholding portions of their proposals. We begin by addressing Castle’s contention that social security numbers contained in its proposal are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Castle contends that the social security numbers contained in its proposal are confidential under the federal Privacy Act of 1974. However, the federal Privacy Act of 1974 applies to federal agencies, not state agencies. *See* 5 U.S.C.A. § 551(1); *St. Michael's Convalescent Hosp. v. State of Cal.*, 643 F.2d 1369, 1373 (9th Cir.1981); *Williams v. City Bank*, 566 F.Supp. 827,

830 (E.D.Mo.1983); *Ferguson v. Alabama Criminal Justice Info. Ctr.*, 962 F.Supp. 1446, 1447 (M.D.Ala.1997). Therefore, even if the federal Privacy Act of 1974 requires the withholding of social security numbers, such a requirement does not apply to the commission. Nevertheless, social security numbers may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* We have no basis for concluding that any of the social security numbers in Castle's proposal are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law, enacted on or after October 1, 1990.

ASI contends that parts of its proposal are excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). We note that section 552.102 applies only to the personnel files of employees of a governmental body. Nevertheless, in *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and 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. 540 S.W.2d at 683. We find that none of the information in ASI's proposal is so intimate or embarrassing as to be protected under common-law privacy. Thus, none of ASI's proposal may be withheld under common-law privacy.

Similarly, PSI contends that the certified financial statements contained in its proposal are excepted from disclosure because they reflect personal financial information of PSI's president and owner. This office has considered personal financial information not relating to the financial transaction between an individual and a governmental body to be the type of information protected under common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). However, the financial information here relates to PSI, which is a corporation. Corporations are not afforded a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)); Open Records Decision No. 620 at 4 (1993) ("Corporations do not have a right to privacy."); see Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings, and does not protect evaluation report on private college). Therefore, PSI's financial statements must be released.

ASI also contends that portions of its proposal are excepted from disclosure under section 552.104 of the Government Code. The purpose of section 552.104 of the Government Code is to protect a governmental body's interests in competitive bidding situations. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* Because the commission does not raise section 552.104, this section is not applicable to ASI's proposal. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

Next, we turn to the arguments of Castle, ASI, and Experior that portions of their proposals are excepted from disclosure under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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. With respect to the trade secret prong of section 552.110, we note that 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).¹ 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).

With respect to the commercial and financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

Castle contends that pages i through 68 and Appendices A through I are excepted from disclosure under both prongs of section 552.110. In its arguments, Castle applies each of the six trade secret factors to the information it seeks to withhold. Based on Castle's argument and our review of Castle's proposal, we find that Castle has made a *prima facie* showing that some of its proposal consists of trade secrets. Furthermore, we have received no arguments that rebut Castle's trade secret claim as a matter of law. Thus, the commission must withhold portions of Castle's proposal, which we have marked, under section 552.110(a) of the Government Code. We note, however, that Castle has not adequately demonstrated how some of the information it seeks to withhold consists of either a trade secret or commercial or financial information the release of which would cause Castle substantial competitive injury. *See* Open Records Decision Nos. 661 (1999), 552 (1990).

¹The 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).

Similarly, ASI contends that portions of its proposal are excepted from disclosure under both prongs of section 552.110. ASI fails to make a *prima facie* showing that any of the information in its proposal consists of a trade secret. However, we find that ASI has made an adequate factual demonstration that the release of some of its information would cause it substantial competitive harm. We have marked this information, which must be withheld under section 552.110(b) of the Government Code. The remainder of ASI's proposal is not protected from disclosure under section 552.110.

Finally, Experior contends that portions of its proposal are also excepted from disclosure under section 552.110(a) and (b). Experior seeks to withhold the financial statement, organizational structure, client references, and cost quotation contained in its proposal. We find that Experior has adequately demonstrated that its client references and cost quotation are excepted from disclosure under section 552.110(a) and (b). Thus, the commission must withhold the client references and cost quotation in Experior's proposal, which we have marked, under section 552.110(a) and (b) of the Government Code. However, Experior has not adequately demonstrated that its financial statement and organizational structure consist of either trade secrets or commercial or financial information the release of which would cause it substantial competitive harm. *See* Open Records Decision Nos. 661 (1999), 552 (1990).

We note that although AMP was notified pursuant to section 552.305 of the Government Code, it has not provided this office with any arguments. Therefore, AMP has provided this office with no basis to conclude that its proposal is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Nevertheless, we note that portions of AMP's proposal, as well as portions of Castle's proposal, are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 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]."² Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the commission must withhold the e-mail addresses that we have marked under section 552.137.

Finally, we note that the proposals of Castle, ASI, Experior, and AMP appear to contain copyrighted material. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies

²The identical exception has been added as section 552.136 of the Government Code.

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. *See* Open Records Decision No. 550 (1990).

In summary, the commission must withhold portions of the proposals of Castle, ASI, and Exporior under section 552.110 of the Government Code. The commission must withhold the social security numbers contained in Castle's proposal under section 552.101 of the Government Code in conjunction with the federal Social Security Act if the commission obtained or maintains the numbers pursuant to a provision of law enacted on or after October 1, 1990. The commission must withhold certain e-mail addresses contained in the proposals of Castle and AMP under section 552.137 of the Government Code, unless the relevant individuals consented to the release of their e-mail addresses. The commission must release the remainder of the submitted proposals in compliance with federal copyright law.

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 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).

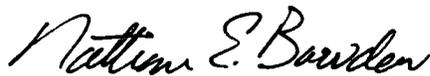
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 161564

Enc. Submitted documents

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