



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 16, 2002

Mr. Steve Aragón  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2002-7182

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173762.

The Texas Health and Human Services Commission (the "commission") received a request for all vendor proposals and supplements submitted for a particular project. You state that the requested information may be confidential under section 552.110 of the Government Code but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office and provide documentation showing that you have notified nine interested third parties (American Management Systems, Inc., Govconnect, Duration Software, MicroAssist, SBC, PSINet, EnFORM Technology, L.L.C., KPMG Consulting LLC, and ClickFind) whose proprietary interests may be implicated by the request, of the request for information. *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 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 (the "Act") in certain circumstances). As of the date of this ruling, this office has received responses from Duration Software and EnFORM Technology, L.L.C. ("EnFORM") objecting to the release of some of their information. We have considered all arguments and have reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the remaining third parties has submitted to this office its reasons explaining why its information should not be released. Therefore, American Management Systems, Inc., Govconnect, MicroAssist, SBC, PSINet, KPMG Consulting LLC, and ClickFind have provided us no basis to conclude that their information is excepted from disclosure under section 552.110. *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). Consequently, the information of these parties must be released, except as noted below.

We now address the arguments submitted by Duration Software and EnFORM claiming that some of their information is excepted under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “[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[.]” *See* Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the

governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>1</sup> See Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) 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. See 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); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Duration Software does not object to the release of any of its information other than Section III of its proposal. Therefore, all of its information apart from Section III must be released, with any exceptions noted below that apply. Duration Software claims that Section III of its proposal is excepted under sections 552.110(a) and 552.110(b). Upon consideration of its arguments and review of the relevant information, we find that Duration Software has demonstrated that Section III constitutes commercial or financial information the disclosure of which would cause substantial competitive harm. Therefore, this information must be withheld under section 552.110(b). Accordingly, we need not consider whether the information qualifies as a trade secret under section 552.110(a).

Further, EnFORM argues that Sections 2, 3, and Appendix A of its proposal are excepted pursuant to sections 552.110(a) and (b). Upon considering EnFORM's arguments and the information at issue, we conclude that the client information we have marked in Section 2 of its proposal must be withheld under section 552.110(a). Further, we find that EnFORM has demonstrated that some information in its materials is commercial or financial information that must be withheld under section 552.110(b). We have marked this

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<sup>1</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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).

information. EnFORM has not demonstrated that any of its remaining information is excepted as either commercial or financial information under section 552.110(b), or trade secret information under section 552.110(a).

However, the submitted documents contain some additional information that must be withheld. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by the common-law right of privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public under common-law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found.*, 540 S.W.2d at 685; *see also* Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance, designation of beneficiary of employee's retirement benefits are generally confidential), 545 (1990) (common-law privacy protects personal financial information pertaining to voluntary financial decisions and financial transactions not involving public funds). Thus, we have marked some personal financial information that is private and must be withheld under section 552.101.

Further, we note that a social security number contained within MicroAssist's information may be confidential under section 552.101 and federal law. Section 552.101 also encompasses information protected by other statutes. A social security number may be withheld in some circumstances 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 the social security number is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, you should ensure that it was not obtained or is not maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

Moreover, the submitted documents contain personal e-mail addresses of private individuals that must be withheld under section 552.137 of the Government Code. Section 552.137 requires the commission to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless

the member of the public has affirmatively consented to its release. *See* Gov't Code § 552.137(a), (b). Section 552.137 does not apply to a general e-mail address of a business or to a government employee's work e-mail address. You do not inform us that a member of the public has affirmatively consented to the release of any of the personal e-mail addresses contained in the submitted materials. Therefore, these e-mail addresses must be withheld under section 552.137. We have marked a representative sample of the e-mail addresses that must be withheld.

Finally, we note that 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. 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 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). Therefore, the commission need only provide access to the copyrighted information; it need not furnish copies.

In summary, you must withhold Section III of Duration Software's proposal under section 552.110(b). You must withhold the information we have marked in Section 2 of EnFORM's proposal under section 552.110(a), and must withhold the additional information we have marked in EnFORM's proposal under section 552.110(b). We have marked some personal financial information that must be withheld under section 552.101 and common-law privacy. A social security number contained in the submitted documents may be confidential under section 552.101 and the federal Social Security Act. You must withhold personal e-mail addresses of private individuals contained in the documents under section 552.137. The remaining information must be released, but the commission must comply with the copyright law and is not required to furnish copies of information that is copyrighted.

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); *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. 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,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 173762

Enc. Submitted documents

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