



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

February 7, 2003

Ms. Carmen B. Hegeman  
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1700 North Stanton  
El Paso, Texas 79902

OR2003-0825

Dear Ms. Hegeman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176155.

The Housing Authority of the City of El Paso (the "authority"), which you represent, received a request for copies of proposals related to RFP Nos. HR 02-R-006 and HR 03-R-0003, and for Evaluation Criteria scores for all proposals. You state that some responsive information has been released to the requestor. You state, and provide documentation showing, that you notified the third parties whose proprietary interests may be implicated of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> 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 in certain circumstances). You raise no exception to disclosure on behalf of the authority and make no arguments regarding the proprietary nature of the third parties' information.

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<sup>1</sup>The third parties that were sent notice under section 552.305 are the following: Buchanan and Associates, WorkLife Solutions, Access Administrators, Inc., Gomez y Gomez EAP Preferred, Horizon Behavioral Services, Center for Employee Assistance, Employee Support Systems, and Alpha & Omega Wellness Center.

Section 552.305(d) allows a third party ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code §552.305(d)(2)(B). As of the date of this ruling, we have not received any arguments from the following third parties: Buchanan and Associates; Access Administrators, Inc.; Gomez y Gomez EAP Preferred; Employee Support Systems; and Alpha & Omega Wellness Center. Because these companies did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that their information is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 639 at 4 (1996) (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, responsive information of these companies may not be withheld from disclosure under section 552.110.

WorkLife Solutions ("WorkLife"), Horizon Behavioral Services ("Horizon"), and the Center for Employee Assistance ("CEA") responded to the notice. WorkLife claims that sections 552.110(a) and (b) of the Government Code except from disclosure all of its proposal. Horizon asserts that portions of its proposal are excepted under sections 552.101 and 552.110. CEA claims that its proposal is excepted from public disclosure under sections 552.022, 552.101, 552.104, 552.110, 552.113, and 552.131 of the Government Code.<sup>2</sup>

We begin by noting that one of the submitted documents is not responsive to the instant request for information. We have marked this information, which the authority need not release in response to this request.

CEA argues that section 552.104 of the Government Code excepts the requested information from disclosure. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the authority does not raise section

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<sup>2</sup>As neither CEA nor the authority submitted to this office written comments stating the reasons why sections 552.113 and 552.131 would allow the information to be withheld, we find that these exceptions have been waived. *See* Gov't Code §§ 552.301, .302. We further note that while CEA claims that the requested information is also excepted under section 552.022, this provisions does not constitute an exception to disclosure. Rather, the section provides a list of the types of information that are considered expressly public, and that generally may only be withheld if they are expressly confidential under "other law." Gov't Code § 552.022(a).

552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). The requested information may not be withheld under section 552.104.

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.

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). Under section 757 of the Restatement of Torts, a "trade secret"

may consist of any 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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).<sup>3</sup> 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).

Section 552.110(b) excepts from disclosure "[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." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 661 (1999); *see also National Parks*, 498 F.2d at 770.

Having reviewed the arguments presented by WorkLife and CEA, we find that neither company has adequately demonstrated that its information either consists of trade secrets or would substantially harm its competitive interests if released. Consequently, we find that the

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<sup>3</sup>The 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).

submitted information in the proposals of WorkLife and CEA is not excepted from disclosure under section 552.110.

After reviewing Horizon's arguments and the information at issue, we conclude that the company has established a prima facie case that a portion of the information at issue is a trade secret. Because we have received no argument to rebut the company's claim as a matter of law, you must withhold the information that we have marked under section 552.110(a). However, although Horizon argues that portions of its proposal containing pricing information must be withheld under section 552.110(a), we note Horizon's assertion that "[p]ricing is specific to each new prospective client." We find that Horizon has failed to establish that this information constitutes a trade secret of the company. *See Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted); see also Gov't Code § 552.022(a)(3) (information in an account, voucher, or contract relating to the receipt or expenditure of public funds by a governmental body is public information).* Therefore, the authority may not withhold Horizon's remaining information under section 552.110.

Horizon and CEA each claim that section 552.101 excepts from disclosure portions of their respective proposals. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or

information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We note, however, that the common-law right to privacy protects the rights of individuals, not business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no common-law privacy interest in its financial information), 192 (1978); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Accordingly, based upon the arguments of CEA and Horizon and our review of the submitted records, we conclude that no portion of the information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We note that Horizon's proposal contains a bank account number. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The authority must, therefore, withhold the marked bank account number under section 552.136.<sup>4</sup>

The submitted information also contains e-mail addresses obtained from the public. Section 552.137<sup>5</sup> of the Government Code provides:

- (a) An 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 this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

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<sup>4</sup>Because section 552.136 is dispositive, we need not address the applicability of your other claimed exception for this information.

<sup>5</sup>The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. We have marked the types of e-mail addresses that must be withheld under section 552.137. We note that section 552.137 does not apply to the general e-mail address of a business or to a government employee's work e-mail address.

Finally, we note that some of the materials at issue are 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).

To summarize: (1) we have marked the information in Horizon's proposal that must be withheld under section 552.110(a); (2) the authority must withhold the marked bank account number under section 552.136; (3) we have marked the types of e-mail addresses that must be withheld under section 552.137; and (4) the remaining submitted information must be released to the requestor in accordance with 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); *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,

Cindy Nettles  
Assistant Attorney General  
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Ms. Carmen B. Hegeman - Page 9

CN/jh

Ref: ID# 176155

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