



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 3, 2003

Mr. Hans P. Graff
Assistant General Counsel
Houston Independent School District
3830 Richmond Avenue
Houston, Texas 77027-5838

OR2003-2264

Dear Mr. Graff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178905.

The Houston Independent School District (the "district") received a request for the following information: in relation to the district's Request for Proposal Project Number 02-09-08, the requestor seeks a copy of the proposal and all submitted media, all exhibits submitted in relation to the proposal, all materials submitted by proposing companies during any presentation made attendant to the proposal review and selection process, and any correspondence between proposing companies and district officials during the proposal review process; and in relation to the general review and rating of proposals, the requestor seeks a roster of those participating in the review of proposals, a narrative description of the proposal review process, and other information relating to the proposal rating process. You state that the release of the submitted information may implicate the proprietary rights of VALIC Retirement Services ("VALIC"), Dearborn & Creggs, and TIAA-CREF. Consequently, you notified these third parties of the request for information under section 552.305 of the Government Code. Although you do not take a position with regard to the disclosure of the requested information, VALIC has submitted briefing to this office in which it contends that its information is excepted from disclosure under sections 552.101, 552.102, and 552.110 of the Government Code. We have considered VALIC's claimed exceptions and reviewed the submitted information.

We first note that you have not submitted information responsive to the request for a roster of those participating in the review of proposals, a narrative description of the proposal review process, and other information relating to the proposal rating process. As you have not submitted this information, we assume that it has been released, to the extent that it exists. If you have not released this information, you must do so at this time. *See Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).*

With respect to document number HISD0000000334, VALIC states that in listing the names of certain individuals in its bid to the district, "VALIC represented to them that their identity would be kept private and confidential and used only for the specific purpose of being included in the bid submitted to [the district]." We note that information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information to the governmental body 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 No. 180 (1977). Furthermore, governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. See Open Records Decision Nos. 605 (1992), 585 (1991), 514 (1988). Accordingly, the district may not withhold from disclosure any portion of VALIC's information on the basis of VALIC's representations to the individuals at issue.

VALIC next raises section 552.102(a) of the Government Code for document number HISD0000000522. This exception protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy [.]". Section 552.102(a) is applicable only to the personnel records of employees of governmental bodies. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 444 at 3-4 (1986), 423 at 2 (1984). In this instance, the information in question relates to a private entity and its employees. Therefore, section 552.102 is not applicable to any of this information.

VALIC next indicates that lists of individuals on documents numbered HISD0000000334 and HISD0000000522 are confidential under section 552.101 in conjunction with common-law privacy. Upon review of the documents, we note that document number HISD0000000522 contains no descriptions of individuals as VALIC maintains. After carefully reviewing the entirety of VALIC's information, we note that documents numbered HISD0000000315 through HISD0000000316 apparently contain the information for which VALIC claims exception under the common-law privacy principles incorporated into section 552.101. Accordingly, we will address VALIC's common-law privacy arguments for documents numbered HISD0000000315 through HISD0000000316 and document number HISD0000000334. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). 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. 540 S.W.2d at 685.

Having carefully considered the information at issue and VALIC's arguments, we find that the identity of the individuals listed in documents numbered HISD0000000315 through HISD0000000316 and document number HISD0000000334 is not highly intimate or

embarrassing. Accordingly, you may not withhold any of the information in documents numbered HISD0000000315 through HISD0000000316 and document number HISD0000000334 on the basis of the listed individuals' common-law privacy interests.

We turn now to VALIC's arguments 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. VALIC contends that its customer list is excepted from disclosure as a trade secret under section 552.110(a). 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,

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).

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).

Upon review of VALIC's arguments and its information, we conclude that VALIC has established that its customer list is excepted from disclosure as a trade secret. See Open Records Decision Nos. 552 (1990); 437 (1986); 306 (1982); 255 (1980) (customer lists may be withheld under predecessor to section 552.110). Further, we have not received any arguments that rebut VALIC's claims as a matter of law. Thus, based on VALIC's arguments, we agree that the district must withhold VALIC's customer list, located at documents numbered HISD0000000507 through HISD0000000516, under section 552.110(a).

We note that although the remaining parties were notified pursuant to section 552.305 of the Government Code, they have not provided this office with any arguments. Therefore, we have no basis to conclude that their information is protected proprietary information. 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).

However, we note that portions of the submitted information not otherwise excepted under section 552.110 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 Act]." Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the district must withhold the e-mail addresses in the remaining submitted information, a representative sample of which we have marked under section 552.137.²

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

²We note that section 552.137 does not apply to a government employee's work e-mail address, the general e-mail address of a business, nor to a web site or web page.

In summary, the district must withhold from disclosure VALIC's customer list located at documents numbered HISD0000000507 through HISD0000000516 under section 552.110(a) of the Government Code. E-mail addresses in the submitted information, a representative sample of which we have marked, are excepted from disclosure under section 552.137. The district must release the remaining information to the requestor in accordance 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); *Texas 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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 178905

Enc: Submitted documents

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