



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 19, 2003

Ms. Ruth H. Soucy
Deputy General Counsel
Open Government Section
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2003-3347

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181238.

The Comptroller of Public Accounts (the "Comptroller") received two requests for retail fuel card program proposals submitted to the Comptroller in September 2002. You state that one of the requestors has narrowed the request to exclude certain categories of information. You also state that the Comptroller previously received a request for one of the requested proposals and that you previously requested an opinion from this office, with respect to such information. In response, this office issued Open Records Letter No. 2003-1294 (2003), in which we ruled that you must withhold portions of the proposal in question under section 552.137, and the remainder must be released in accordance with copyright law. You indicate that the Comptroller has released to the instant requestors the information deemed public by this office in Open Records Letter No. 2003-1294. We note that you may also rely on Open Records Letter No. 2003-1294 as a previous determination to withhold the portion of the requested information we previously determined to be excepted under section 552.137 in Open Records Letter No. 2003-1294. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

The Comptroller claims exception for some of the remaining responsive information under section 552.137 and further states that release of the remaining responsive information may implicate the proprietary interests of third parties. You also state that you notified the seven

third parties whose proprietary interests may be implicated of the requests and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have considered the arguments and reviewed the submitted information.

With respect to information relating to Wright Express, Fuelman of DFW, TransMontaigne, Inc., PS Energy Group, Inc., GE Capital Financial, Inc., and Diamond Shamrock Refining and Marketing Company of Texas, we note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the above mentioned third parties have submitted any comments to this office explaining why their respective proposals should not be released to the requestors. Therefore, we have no basis to conclude that the release of their proposals would implicate the companies' proprietary interests 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). Thus, we determine that the Comptroller may not withhold any of these third parties' proposals pursuant to section 552.110 of the Government Code. We will now consider the arguments of the third party who submitted arguments for protecting its information.

Comdata Business Fleet Services ("Comdata") submitted a brief claiming that portions of its proposal should be withheld under sections 552.102, 552.104, and 552.110. Section 552.102 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 Comdata's information.

Comdata also claims exception for its information under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects the interests of governmental bodies and the Comptroller does not raise this as an exception to disclosure. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). As section 552.104 does not protect the proprietary interests of private entities such as Comdata, you may not withhold Comdata's submitted information under section 552.104.

Comdata asserts that its proposal contains confidential and proprietary information that should be withheld under section 552.110. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110. 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 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 must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no demonstration of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

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).

Section 552.110(b) protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In support of its section 552.110 claim, Comdata states only that its confidential and proprietary information is throughout the submitted documents and the requestors are Comdata’s competitors. The company has not, however, provided us with any specific facts or arguments to demonstrate that disclosure would cause them substantial competitive harm. *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). Further, Comdata did not demonstrate any of the factors necessary to establish a trade secret claim for its information under section 552.110(a). *See* Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Thus, we conclude that Comdata has not established that any of its submitted information is protected by section 552.110.

We note that the submitted information contains a social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or “related record” 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 the file 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 Comptroller pursuant to any provision of law, enacted on or after October 1, 1990.

We next note that the submitted information contains e-mail addresses. Section 552.137 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.

Unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the Comptroller must withhold the e-mail addresses that we have marked under section 552.137 of the Government Code.

The submitted information also contains account and/or credit card numbers. 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 Comptroller must, therefore, withhold the account and/or credit card numbers that we have marked under section 552.136.

Finally, we note that some of the submitted information is 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 protected by copyright. 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).

In summary, the Comptroller must withhold the marked e-mail addresses pursuant to section 552.137 of the Government Code and, prior to releasing any social security number, should ensure that no such information was obtained or is maintained by the Comptroller pursuant to any provision of law enacted on or after October 1, 1990. The Comptroller must also withhold the marked account and/or credit card numbers contained within the submitted information under section 552.136. The remainder of the submitted information must be released in compliance 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 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 181238

Enc: Submitted documents

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