



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 29, 2003

Ms. Julie Joe  
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Travis County Attorney  
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OR2003-6850

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188395.

The Travis County Purchasing Office (the "county") received a request for the winning proposal submitted in response to a particular RFP and all other responses and other information relating to the RFP. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.136, and 552.137 of the Government Code. Additionally, you claim that information pertaining to third parties may be confidential, but make no arguments and take no position as to whether this information is excepted from disclosure. You inform this office and provide documentation showing that you have notified eight interested third parties (InterVoice-Brite, Frank Solutions, TeleWorks, Affiliated Telephone, Centurion, EPOS, Sonant, and Sprint), 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Public Information Act in certain circumstances). We assume that the county has released the remaining requested information that is non-proprietary, to the extent that it exists. If not, it must do so at this time. *See* Gov't Code §§ 552.021, .301, .302; Open Records Decision

No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances).

We first note that this office issued Open Records Letter Ruling No. 2003-5076 (2003) in relation to this request, as well as in relation to three requests also seeking the winning proposal. In that ruling, we found that the county had failed to submit responsive information of InterVoice-Brite, Affiliated Telephone, Centurion, EPOS, Sonant, Sprint, or Tele-Works, and therefore, we did not rule on the information of these interested third parties. It has been brought to our attention that the county had submitted documents prior to the issuance of Open Records Letter Ruling No. 2003-5076, although the county mistakenly associated an incorrect identification number in relation to these documents. In light of this fact, we now reconsider our ruling in Open Records Letter Ruling No. 2003-5076.

We next 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 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, InterVoice-Brite, Frank Solutions, Affiliated Telephone, Centurion, EPOS, and Sprint have not submitted to this office their reasons explaining why their information should not be released. Therefore, these parties have provided us no basis to conclude that their information is excepted from disclosure. *See, e.g.*, 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.<sup>1</sup> However, Sonant and Tele-Works have submitted comments to this office. We have considered all exceptions claimed and have reviewed the submitted information, some of which consists of representative samples.<sup>2</sup>

We next address the county's obligations under section 552.301 of the Government Code. Section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the

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<sup>1</sup> We note that although you have not submitted Sprint's information to this office, you have stated that Sprint informed you that it does not object to the release of its information.

<sup>2</sup> We assume that the "sample" of records submitted to this office is truly representative of those requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not submit comments stating why the claimed exceptions apply within the fifteen day period specified in section 552.301(e). Under section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). Section 552.107 is a discretionary exception, intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties, and does not constitute a compelling reason to overcome the presumption of openness. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 (1989) (discretionary exceptions in general). Therefore, the county may not withhold any of the submitted information under section 552.107. However, as the application of sections 552.101, 552.136, and 552.137 provide compelling reasons to overcome the presumption of openness, we will address the county's arguments under these exceptions. Furthermore, because third party interests can provide a compelling reason to withhold information, we will consider whether any of the information must be withheld to protect third party interests.

We first turn to the arguments of the responding third parties. Sonant claims that some of its information is excepted 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." Sonant has not directed our attention to any law, nor are we aware of any law, under which any of the submitted information is deemed to be confidential. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the submitted information pertaining to Sonant may be withheld from disclosure under section 552.101 of the Government Code. *See also* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

Tele-Works claims that some of its information is excepted from disclosure under section 552.104 because release would give advantage to a competitor or bidder. Section 552.104 states that information is excepted from required public disclosure if release

of the information would give advantage to a competitor or bidder. However, the purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See id.* at 8-9. Therefore, we do not consider Tele-Works' claim under section 552.104, and because the county does not contend that the requested information is excepted under section 552.104, none of it may be withheld on this basis.

Sonant and Tele-Works both claim that portions of their proposal information are excepted from required public disclosure 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[.]" 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>3</sup>

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<sup>3</sup> The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

*See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

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

Upon considering the submitted arguments and the information at issue, we conclude that neither Sonant nor Tele-Works has demonstrated that any of their information constitutes either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause substantial competitive harm under section 552.110(b). Therefore, neither of these parties' information may be withheld under section 552.110.

We now turn to the county's arguments in relation to the submitted information. As you assert, section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. *See* 26 U.S.C. § 6103(a). Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, *received by, recorded by, prepared by, furnished to, or collected by the Secretary* [of the

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- (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).

Internal Revenue Service] with respect to *a return* . . . or the determination of the existence, or possible existence, of *liability* . . . for any tax, . . . penalty, . . . , or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A) (emphasis added). We find that Form W-9 does not fall within the purview of section 6103 because it does not constitute return information as contemplated by section 6103. Therefore, the county may not withhold Forms W-9 under section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

The county also claims that some of the submitted information is subject to section 552.136. Section 552.136 makes certain account numbers confidential. It provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. Upon review of the submitted account numbers, however, we conclude that these numbers are not used to obtain money, goods, services, or another thing of value, or to initiate a transfer of funds. Therefore, the account numbers are not access device numbers for purposes of section 552.136, and may not be withheld under this exception.

Finally, you claim that some information is excepted under section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., ch. 1089, § 1 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. Based on our review of the submitted information, we find that the e-mail addresses you have marked within the submitted information are excepted from disclosure under section 552.137(a). We have marked two additional e-mail addresses that are excepted under section 552.137(a). You indicate that the county does not have affirmative consent for the release of the e-mail addresses at issue. Accordingly, we conclude that the county must withhold these e-mail addresses pursuant to section 552.137(a) of the Government Code.

Finally, we note that portions of the submitted materials are copyrighted. 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).

In summary, the e-mail addresses that you have marked and the e-mail addresses that we have marked must be withheld under section 552.137. The remaining submitted information, as well as Sprint's responsive information, must be released in accordance with applicable copyright laws.

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).

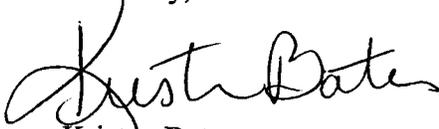
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Kristen Bates  
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Open Records Division

KAB/lmt

Ref: ID# 188395

Enc. Submitted documents

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