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November 20, 2003

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OR2003-8349

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192497.

The Texas Health and Human Services Commission (the "commission") received a request for (1) a list of bidders under a specified Request for Proposals ("RFP"), (2) any summaries contained in the bids or otherwise provided by the companies, and (3) a list of individuals representing the competing companies and their bids at the commission. The commission has informed us that it has released information responsive to items one and three of the request, and that the requestor subsequently clarified her request concerning item two and agreed that the "Executive Summaries" submitted by the entities in response to the RFP will satisfy this part of her request. Accordingly, the only responsive information the commission has submitted for review is the requested executive summaries. Although you take no position with respect to the release of the requested summaries, you state that some of this information "may be proprietary to the suppliers of the information" and, therefore, may be excepted from disclosure under section 552.110 of the Government Code. You also state that the requested information may be excepted under section 552.101 of the Government Code.¹

¹Although the commission raises section 552.101 of the Government Code as a possible exception to disclosure, you do not explain how any of the submitted information would be so excepted. See Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments explaining why stated exceptions

You state that you have notified the interested third parties of the request for information pursuant to section 552.305 of the Government Code. *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 Public Information Act (the "Act") in certain circumstances). As of the date of this ruling, this office has received responses from the following third parties: The Harbour Group ("Harbour"); Deloitte Consulting ("Deloitte"); Trilliant Technology Group ("Trilliant"); Schumaker & Company ("Schumaker"); Specialty Underwriters LLC ("SU"); Texas Electronic Information and Computer Corporation ("TEICC"); Tier Technologies, Inc. ("Tier"); Entrust, Inc. ("Entrust"); KFW Systems, Inc. ("KFW"); Pitney Bowes Management Services, Inc. ("PBMS"); EP&P Consulting, Inc. ("EP&P"); and American Management Systems ("AMS")². The commission has submitted the requested executive summaries to this office.³ We have considered all arguments and 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, the remaining third parties have not submitted to this office their reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with 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.

apply). Further, we do not find that any of the submitted information is excepted under section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

²We note that AMS states it does not object to the release of its summary.

³The commission states that it has not submitted the requested information on behalf of the following companies because these companies indicated they do not object to the release of their respective summaries: JCFactor; EP&P Consulting; Microsoft; Future Link Technologies; UPP Business Systems; Adea Solutions; Northrop Grumman; American Management Systems, Inc.; Knowledge Tech; Accenture; Phillip J. Rodriguez; and AG Consulting Services. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). We also note, however, that EP&P and AMS have submitted briefing to this office regarding the release of their information.

We also note that although TEICC, PBMS, and EP&P have submitted briefs to this office arguing why information related to them should not be released to the requestor, the commission has not submitted responsive information related to TEICC, PBMS, or EP&P. We further note that most of the third parties who submitted briefing to this office submitted arguments for withholding information beyond that which is contained within the submitted executive summaries. Therefore, this ruling does not address information related to TEICC, PBMS, or EP&P, or information beyond that which is contained in the executive summaries, and is limited to the information submitted as responsive by the commission. *See Gov't Code § 552.301(e)(1)(D)* (governmental body requesting decision from Attorney General must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

We next note that some of the submitted information is designated as proprietary and confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract”). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

Harbour, Schumaker, Entrust, and KFW each claim that portions of their information are excepted from disclosure under section 552.104 of the Government Code. This section, however, is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to the governmental body's interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The commission has not argued that release of the submitted information would harm its interests in a particular competitive situation. Therefore, information related to Harbour, Schumaker, Entrust, and KFW may not be withheld pursuant to section 552.104 of the Government Code.

Harbour, Schumaker, SU, Deloitte, and KFW argue that portions of their information are 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[.]” 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); *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.⁴ *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

⁴The 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).

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 Deloitte has established that a portion of its executive summary constitutes a trade secret for purposes of section 552.110. We have marked the information pertaining to Deloitte that the commission must withhold. We conclude, however, that neither Harbour, Schumaker, SU, nor KFW has demonstrated that any of their information contained within the submitted executive summaries 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, no information pertaining to Harbour, Schumaker, SU, or KFW may be withheld under section 552.110. We also note that Tier has provided us with no basis to withhold any portion of its executive summary under section 552.110 or any other exception to disclosure.

Lastly, 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 commission must withhold the information that we have marked pertaining to Deloitte. The remaining executive summaries must be released 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 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,



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SIS/lmt

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