



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2004

Ms. Angela K. Washington
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2004-6940

Dear Ms. Washington:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207139.

The Town of Addison (the "town"), which you represent, received a request for responses to core and due diligence questions that were submitted in response to a request for proposals ("RFP"). The town takes no position with regard to the public availability of the requested information. You believe, however, that the request for this information implicates the proprietary interests of the private parties from which it was obtained. You identify those parties as AIG VALIC ("AIG"), Fidelity Investments ("Fidelity"), The Hartford ("Hartford"), Nationwide Retirement Solutions ("Nationwide"), Prudential Retirement ("Prudential"), and the Security Benefit Group of Companies ("Security"). You have submitted the information at issue. You also notified the interested parties of this request for information and of their right to submit arguments to this office as to why the information should not be released.¹ We received correspondence from AIG, Nationwide, and Prudential. We have considered all of the submitted arguments and have reviewed the submitted information.

We first note that an interested third party is allowed ten business days from 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 decision, this office has received no correspondence from Fidelity, Hartford, or Security. Consequently, none of those parties has demonstrated that any of the submitted information is proprietary for purposes of section 552.110 of the Government Code. *See*

¹*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Section 552.110 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) “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.” See 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.² See Open Records

²The 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 other 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).

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. *See* 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. *See also* 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).

AIG contends that portions of its response to the RFP qualify as trade secret information under section 552.110(a). AIG also argues that this same information is excepted from disclosure under section 552.110(b). We find that AIG has made a *prima facie* claim with regard to its customer information under section 552.110(a). We have received no arguments that rebut this claim as a matter of law. Therefore, the town must withhold AIG's customer information under section 552.110(a). We have marked that information accordingly. We also conclude that AIG has made the necessary showing under section 552.110(b) that the release of the remaining information encompassed by its arguments would be likely to cause AIG substantial competitive harm. The town must withhold that information, which we also have marked, under section 552.110(b).

Nationwide contends that a log-in ID and password that provide access to a proprietary website qualify as a trade secret under section 552.110(a) and as confidential commercial or financial information, the release of which would substantially harm Nationwide, under section 552.110(b). Nationwide also contends that its pricing information is excepted from disclosure as a trade secret under section 552.110(a) and as confidential commercial or financial information under section 552.110(b). Based on the company's arguments and supporting affidavit, we conclude that Nationwide has demonstrated that its log-in ID, password, and pricing information are excepted from disclosure under section 552.110(b). We have marked the information that the town must withhold.

Prudential contends that its entire response to the RFP is excepted from disclosure under section 552.110(b). Having considered the company's arguments, we conclude that Prudential's customer list and pricing information must be withheld under section 552.110(b). We have marked that information. We find that Prudential has failed to make the specific demonstration required by section 552.110(b) that the release of any other information contained in its response to the RFP would be likely to cause the company substantial competitive harm. We therefore conclude that none of the remaining information that relates to Prudential is excepted from disclosure under section 552.110.

In summary, the marked portions of the AIG, Nationwide, and Prudential responses must be withheld under section 552.110. The rest of the submitted information must be released.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 207139

Enc: Submitted documents

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