



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 25, 2005

Mr. Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2005-01679

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 219341.

The Health and Human Services Commission (the "commission") received a request for copies of proposal evaluations, the winning proposal, and the contract issued for RFP #529-04-302. You state that the commission has provided most of the requested information to the requestor. Although you take no position with respect to the submitted information, you claim that the information may contain proprietary information subject to exception under the Public Information Act (the "Act"). Pursuant to section 552.305(d) of the Government Code, the commission notified the interested third party, Clifton Gunderson L.L.P. ("Clifton Gunderson"), of the commission's receipt of the request and of its right to submit arguments to us as to why any portion of the submitted 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have considered arguments received from Clifton Gunderson and have reviewed the submitted information.

Initially, we note that Clifton Gunderson argues that the responsive resumes are excepted under section 552.102 of the Government Code. In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for

information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Information is protected under the common law right to privacy when (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. The submitted resumes of Clifton Gunderson employees do not contain information considered highly intimate or embarrassing. In addition, we note that telephone numbers, addresses, and personal information are ordinarily not private information subject to section 552.101. *See Open Records Decision Nos. 554 (1990), 448 (1986)*. Therefore, the resumes of Clifton Gunderson personnel may not be withheld under sections 552.101 or 552.102 in conjunction with the common law right to privacy. Further, section 552.102 applies only to the personnel records of public employees, not the records of private employees. *See Open Records Decision No. 455 (1987)*. The submitted resumes pertain to private employees and, as such, section 552.102 is inapplicable to that information.

Section 552.110 of the Government Code 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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, 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). After reviewing Clifton Gunderson's arguments and the information at issue, we conclude that the company has established a *prima facie* case that the submitted customer list on pages 153-155, salary information on page 46, overhead calculations on page 48-50, and benefits summary on pages 51-60 are trade secrets.² Because we have received no argument to rebut the company's claim as a matter of law, the commission must withhold this information under section 552.110(a).

Section 552.110(b) of the Government Code 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 section 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* 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).

After carefully reviewing the information at issue and the arguments presented to us by Clifton Gunderson, we conclude that the company has established that the financial

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).

²Clifton Gunderson does not argue that the submitted resumes are excepted under section 552.110(a).

statements found on pages 86-109 of the proposal are excepted under section 552.110(b). The submitted resumes of Clifton Gunderson employees on pages 42-85 are not, however, excepted under section 552.110(b), and must be released. *See* Open Records Decision No. 319 at 2 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110).

In summary, the commission must withhold the submitted customer list (pages 153-155), salary information (page 46), overhead calculations (pages 48-50), and benefits summary (pages 51-60) under section 552.110(a). The commission must also withhold the submitted financial statements (pages 86-109) under section 552.110(b). The remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 219341

Enc. Submitted documents

c: Mr. Rob Thrash
Deloitte Services
400 West 15th Street, 17th Floor
Austin, Texas 78701
(w/o enclosures)

Mr. Roger E. Gordon
Counsel to Clifton Gunderson
Buford & Associates
400 West 15th Street, Suite 300
Austin, Texas 78701
(w/o enclosures)

Mr. Carl J. Varley
Director of Governmental Services
Clifton Gunderson, L.L.P.
2700 Westown Parkway, Suite 400
West Des Moines, Iowa 50266
(w/o enclosures)