



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2005

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2005-08573

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request for rulings were assigned ID numbers 232569 and 235407. We have combined your requests for a single ruling under ID# 232569.

The Texas Health and Human Services Commission (the "commission") received eleven requests for information related to the commission's request for Proposal Number 529-04-334 and the resulting contract with Accenture, LLP, for Integrated Eligibility and Enrollment Services. You state that the commission will release some information to the requestors. Although you make no arguments and take no position as to whether the submitted information is excepted from disclosure, pursuant to section 552.305 of the Government Code, you state, and provide documentation showing, that you notified interested third parties Accenture, LLP ("Accenture"), IBM, BearingPoint, and Effective Teleservices ("Effective") of the requests and of their right to submit arguments to this office as to why the requested information relating to them should not be released to the requestors.¹ We have received comments from Accenture and IBM. We have considered these companies' arguments and reviewed the submitted information.

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

Initially, 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, BearingPoint and Effective have not submitted comments to this office in response to the section 552.305 notice; therefore, we have no basis to conclude that either of these companies has a proprietary interest in the submitted information pertaining to them. *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); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the commission may not withhold any portion of the submitted information on the basis of any proprietary interest that BearingPoint and Effective may have in this information.

Next, we note that Accenture seeks to withhold information that the commission has not submitted to this office for review.² Accordingly, we conclude that this ruling does not address the arguments submitted to us by Accenture pertaining to information that has not been submitted to us by the commission for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under Act must submit copy or representative samples of specific information requested).

Next, we note that both Accenture and IBM indicate that portions of the submitted information pertaining to them should be withheld from disclosure because it was provided to the commission with the understanding that it be treated as confidential by the commission. It is well-settled that the Act prevents a governmental body from promising to keep information confidential unless it is statutorily authorized to do so. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Furthermore, information that is subject to the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); *see also* Open Records Decision Nos. 541 at 3 (1990) (“[T]he

²Specifically, Accenture seeks to withhold all information listed in “Schedule 1: Contractor Confidential Information,” which lists, among other items, what appears to be a series of computer programs and related management tools, including “Rapid Transition Suite,” “Service Management Suite,” “Performance Management Suite,” “Application Optimization Suite,” “GRNDS,” “Delivery Methods,” “BI Designer,” BRIGHT Self Service Portal Framework,” “Visual Analyzer,” “Standard PC Desktop Tools,” “RECOVERY/1 Business Recovery Planning,” “MAXSTAR,” “Max3,” “J2EE Framework,” “Video Wall: COB Web Boards,” “Central Support Knowledge Base,” “Help Desk Reporting Architecture,” “HDS Change Management System,” “Help Desk Process/Procedures,” “EIS Production Product,” “Hosting Services Suite,” and “Accenture Learning Services Management Software,” as well as nine separate training components, methodologies and tools/templates related to training personnel on the use of the computer programs, management tools and other business-related programs.

obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, the submitted information may not be withheld unless it falls within an exception to disclosure under the Act.

Both Accenture and IBM raise section 552.110 of the Government Code for portions of the submitted information. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov’t Code § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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.); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its competitors];
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act 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, 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).

Upon review of IBM's and Accenture's briefs and each companies' information at issue, we find that IBM has established a *prima facie* case that its "Data Disclosure Statement for Cost Accounting Standards" constitutes trade secret information. We have marked this information, which the commission must withhold under section 552.110(a) of the Government Code. However, we determine that IBM has not demonstrated that any portion of its remaining information at issue meets the definition of trade secret. Further, we find that Accenture has failed to demonstrate that any portion of the information it seeks to withhold meets the definition of trade secret. *See* Open Records Decision Nos. 552 at 5-6 (1990), 661 (1999) (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business").

IBM and Accenture also assert that portions of their information are excepted from disclosure under section 552.110(b) as commercial or financial information. 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. *Id.*

Upon review, we conclude that IBM has shown that its information titled “Part 8[] Financial Approach - Business Terms” is excepted from disclosure under section 552.110(b), as its release would be likely to cause IBM substantial competitive harm. Further, we conclude that Accenture’s and its subcontractor MAXIMUS’s Cost Schedules A-1, A-2, and A-3, as submitted in the original proposal on September 30, 2004, as well as the Cost Submission #2 (dated January 17, 2005), Cost Submission #3 (dated January 26, 2005), Cost Submission #4 (dated February 7, 2005), and Cost Submission #5 (dated February 21, 2005), to the extent this information does not reflect final contract pricing, are excepted from disclosure under section 552.110(b), as the release of this information would likely cause Accenture substantial competitive harm. We note, however, that the pricing information of a winning bidder is generally not excepted under section 552.110(b).³ This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, to the extent that Accenture’s and its subcontractor MAXIMUS’s Cost Schedules A-1, A-2, and A-3, as well as the Cost Submissions #2, #3, #4, and #5 reflect pricing of the final contract, this information may not be withheld under section 552.110(b). Further, we conclude that none of the remaining information that Accenture seeks to withhold is excepted from disclosure under section 552.110(b), and it may not be withheld on that basis.

We note that the submitted information contains insurance policy numbers to which section 552.136 of the Government Code is applicable. 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 commission must, therefore, withhold insurance policy numbers under section 552.136.

Further, the submitted information contains social security numbers. Section 552.147 of the Government Code⁴ provides that “[t]he social security number of a living person is excepted

³The commission and Accenture agree that any pricing information contained in the final contract is subject to public disclosure.

⁴Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

from” required public disclosure under the Act. Therefore, the commission must withhold the social security numbers contained in the submitted information under section 552.147.⁵

Finally, we note that portions of the submitted information may be 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 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 commission must withhold the information related to IBM that we have marked under section 552.110. To the extent that Accenture’s and its subcontractor MAXIMUS’s Cost Schedules A-1, A-2, and A-3, as well as the Cost Submissions #2, #3, #4, and #5 do not reflect pricing of the final contract, this information must be withheld under section 552.110(b). The commission must withhold the insurance policy numbers under section 552.136, and the social security numbers under section 552.147. The remaining submitted information must be released in its entirety; however, in releasing information that is protected by copyright, the commission must comply with applicable 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

⁵We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

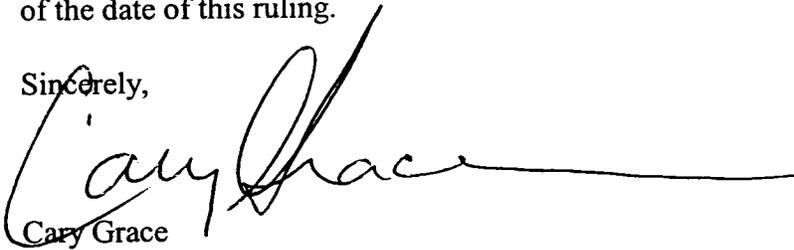
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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); *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 Office of the Attorney General 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. 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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/sdk

Ref: ID# 232569

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