



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2006

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
Hays Consolidated Independent School District
P.O. Box 460606
San Antonio, Texas 78246

OR2006-13717

Dear Ms. Rodriguez:

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 was assigned ID# 265031.

The Hays Consolidated Independent School District (the "district") received a request for the proposals submitted in response to the Negley Elementary and Science Hall requests for proposals. Although you take no position regarding the public availability of the requested information, pursuant to section 552.305 of the Government Code you have notified Extend-A-Care, Inc. ("Extend-A-Care"), YMCA of Austin ("YMCA"), and Rocking Horse Academy ("Rocking Horse") of the request and of each company's right to submit arguments to this office as to why the 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 Act in certain circumstances). We have considered the arguments and reviewed the submitted information.

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 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, YMCA has not submitted to this office any reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of their requested information constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g.*, Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that

party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

However, we note that a portion of YMCA's information is confidential under federal law. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that another statute makes confidential. Some of the information contained in the submitted federal tax Form 990 is confidential under federal law. Federal tax returns and tax return information are confidential under section 6103 of title 26 of the United States Code. See 26 U.S.C. § 6103(a); see also *id.* § 6104(b)(1)-(2) (defining "return" and "return information"). Section 6104 of title 26 provides in relevant part as follows:

(b) Inspection of annual information returns. – The information required to be furnished by section[] 6033 . . . shall be made available to the public at such times and in such places as the Secretary may prescribe. *Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527) which is required to furnish such information. . . .*

...

(d) Public inspection of certain annual returns[.]

(1) In general. – In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501(a) or an organization exempt from taxation under section 527(a) –

(A) a copy of –

(i) the annual return filed under section 6033 . . . by such organization,

...

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and . . .

(B) upon request of an individual made at such principal office . . . a copy of such annual return . . . shall be provided

to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

...

(3) Exceptions from disclosure requirement. –

(A) Nondisclosure of contributors, etc. – In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, *paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization. . . .*

26 U.S.C. § 6104 (emphasis added). Assuming that none of the contributors listed in the submitted Form 990 is a private foundation or political organization that is excluded from the scope of subsections (b) and (d) of section 6104, we conclude that the names of contributors that we have marked must be withheld from disclosure under section 552.101 of the Government Code in conjunction with sections 6103 and 6104 of title 26 of the United States Code. *See also Stanbury Law Firm, P.A. v. Internal Revenue Service*, 221 F.3d 1059 (8th Cir. 2000).

Extend-A-Care and Rocking Horse both responded to the section 552.305 notice by asserting that portions of their proposals were marked as confidential. Information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (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). Consequently, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Rocking Horse and Extend-A-Care also claim that information in their proposals is protected by common law privacy. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses the doctrine of common law privacy. Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. Prior decisions of this office have determined that personal financial information not related to a transaction between an individual and a governmental body is generally not subject to a legitimate public interest and is therefore protected by common law privacy. *See Open Records Decision No. 600* (1992). Extend-A-Care claims that its financial information in its proposal is subject to common law privacy as a private financial transaction not involving a governmental entity. However, we note that

common law privacy protects the interests of individuals, not those of corporations and other types of business organizations. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), see also *U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy).

We also understand Rocking Horse to claim that the resumes and reference information contained in its proposal are subject to common law privacy. However, we do not find any of the resumes or reference information to be intimate or embarrassing. See Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common law privacy under statutory predecessors to section 552.101 and section 552.102). Therefore, none of the submitted information may be withheld under section 552.101 in conjunction with common law privacy.

Rocking Horse and Extend-A-Care also claim that portions of their proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Gov't Code § 552.110. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” *Id.* 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. 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); see also *Huffines*, 314 S.W.2d at 776. 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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). However, we cannot conclude that section 552.110(a) applies 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) excepts from disclosure “[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). 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 requested information. *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).

Although Rocking Horse asserts that its information is a trade secret, Rocking Horse neither explains how the information at issue meets the definition of trade secret nor discusses the necessary factors to establish a trade secret claim. After reviewing Extend-A-Care’s arguments and the information at issue, we find that Extend-A-Care has not shown that any of the information it seeks to withhold meets the definition of a trade secret. *See* Open Records Decision No. 552 at 5-6 (1990). Thus, we conclude that section 552.110(a) does not apply to any of the submitted information. *See* Open Records Decision No. 402 (1983). Further, although both Rocking Horse and Extend-A-Care assert that release of portions of their information would cause them substantial competitive injury, neither company has provided this office with any evidence to support this claim. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, no portion of Rocking Horse or Extend-A-Care’s information may be withheld pursuant to section 552.110(b).

¹The following are the six factors that the Restatement gives 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).

However, we note that Rocking Horse's proposal contains Texas motor vehicle information. Section 552.130 of the Government Code exempts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Thus, the district must withhold the Texas motor vehicle information we have marked in accordance with section 552.130.

We also note that the proposals contain insurance policy numbers. 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. Therefore, the district must withhold the marked insurance policy numbers under section 552.136.

In summary, the names of contributors that we have marked in YMCA's proposal must be withheld from disclosure under section 552.101 of the Government Code in conjunction with sections 6103 and 6104 of title 26 of the United States Code. The district must withhold the Texas motor vehicle information we have marked in accordance with section 552.130. The district must withhold the marked insurance policy numbers under section 552.136. 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); *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,



José Vela III
Assistant Attorney General
Open Records Division

JV/eb

Ref: ID# 265031

Enc. Submitted documents

c: Mr. Timothy Day
c/o Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
Hays Consolidated Independent School District
P.O. Box 460606
San Antonio, Texas 78246
(w/o enclosures)