

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 14, 2007

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

OR2007-02845

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 was assigned ID# 273430.

The Texas Health and Human Services Commission (the "commission") received a request for responses to the questionnaire titled "Final Review of Over-the-Phone Interpretation Services." Although you take no position with respect to the requested information, you indicate that release of the information at issue may implicate the proprietary interests of Language Line Services ("LLS"), Language Services Associates ("LSA"), NetworkOmni Multilingual Communications ("NetworkOmni"), and TeleTech. Accordingly, you state and provide documentation showing that you notified these companies of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d) (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 to disclosure under Act in certain circumstances). We have reviewed the submitted arguments and the information at issue.

Initially, we note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code 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 TeleTech. Thus, TeleTech has not demonstrated that any of the submitted information is confidential or proprietary for the purposes of the Act, and the commission may not withhold any of the information at issue on the basis of any interest that TeleTech may claim in the information. *See* Gov't Code §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

LLS, LSA, and NetworkOmni each assert that section 552.110 excepts from disclosure some of the information disclosed in their responses to the questionnaire. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. *See* Gov't Code §§ 552.110(a)-(b).

Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). 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.), *cert. denied*, 358 U.S. 898 (1958). 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). The 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; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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) 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). 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).

We note that NetworkOmni’s argument why its section 552.110(b) claim is meritorious relies on the test enunciated in *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) pertaining to the applicability of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. *See Nat’l Parks*, 498 F.2d 765; *see also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (commercial information is excepted from required public disclosure if information is voluntarily submitted to government and information is of a kind that the provider would not customarily make available to the public). Although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, *pet. denied*). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature).

Upon review of the submitted information, we find that LSA has made a *prima facie* case that a portion of its information constitutes a trade secret for purposes of section 552.110(a) of the Government Code. We have received no arguments to rebut this claim as a matter of

law. Accordingly, the commission must withhold the information we have marked in LSA's response under section 552.110(a). Although LLS also raises section 552.110(a), we find that the company has failed to demonstrate that any portion of its information meets the definition of a trade secret. Further, we also note that pricing information pertaining to a particular contract is generally not a trade secret because 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." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Therefore, no portion of the remaining information may be withheld on this basis.

LSA, LLS, and NetworkOmni all raise section 552.110(b) of the Government Code. We find that LLS has made the specific factual or evidentiary showing that the release of a portion of its information, which we have marked, would cause the company substantial competitive harm. Thus, this marked information must be withheld pursuant to section 552.110(b). We conclude, however, that LSA, LLS, and NetworkOmni have failed to demonstrate that any other portion of the information at issue constitutes commercial or financial information, the release of which would cause each company substantial competitive harm. Additionally, we note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also 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). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors). Accordingly, pursuant to section 552.110(b), the commission must only withhold the portion of the information at issue that we have marked.

In summary, the commission must withhold the information we have marked under section 552.110 of the Government Code. 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).

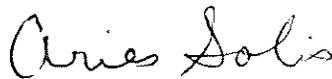
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Aries Solis  
Assistant Attorney General  
Open Records Division

AS/eb

Ref: ID# 273430

Enc. Submitted documents

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LM SEP 23 2008

At 8:42A M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-07-001039

LANGUAGE LINE, L.L.C.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
GREG ABBOTT, ATTORNEY GENERAL	§	
OF TEXAS,	§	
Defendant.	§	200 <sup>th</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Language Line, L.L.C. and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Rena Schrader, was sent reasonable notice of this setting and of the parties' agreement that the Texas Health and Human Services Commission must withhold the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, the specific entries under the columns, "Availability" and "Average connect time in seconds," and related text in the first footnote relating to "Net Effective Price," as marked by the Attorney General, in Language Line, L.L.C.'s questionnaire response, titled

"Final Review of Over-the-Phone Interpretation Services," is excepted from disclosure by Tex. Gov't Code § 552.110(b).

2. The Texas Health and Human Services Commission must withhold from the requestor the information described in Paragraph 1 of this Agreement.

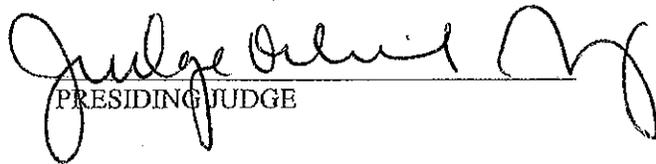
3. Language Line, L.L.C. represents that it no longer contests the disclosure of the remaining information in its response. Accordingly, if it has not already done so, the Texas Health and Human Services Commission must release to the requestor Language Line, L.L.C.'s response, with the information described in Paragraph 1 of this Agreement redacted.

4. All costs of court are taxed against the parties incurring the same;

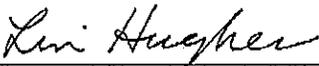
5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 23<sup>rd</sup> day of September, 2008.

  
PRESIDING JUDGE

APPROVED:

  
\_\_\_\_\_  
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