



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2007

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

OR2007-05699

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# 276765.

The Texas Health and Human Services Commission (the "commission") received seven requests for proposals submitted in response to commission RFP #529-06-0425 and RFQ #000001. You state that you will release most of the responsive information. You do not raise any exception to disclosure of the submitted information on behalf of the commission. You inform us that you notified Bailit Health Purchasing, LLC ("Bailit"); Burns and Associates ("Burns"); Clifton Gunderson, LLP, ("Clifton Gunderson"); Deloitte Consulting, LLP ("Deloitte"); EP&P Consulting ("EP&P"); Fitzgerald Healthcare Consulting Services ("Fitzgerald"); Health Management Associates; Health Management Systems; MAXIMUS, Inc. ("MAXIMUS"); the Lewin Group; ResultsPositive, Inc. ("ResultsPositive"); Sellers Feinburg; and the Urban Institute of the request and of their right to submit arguments to this office as to why the submitted 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 in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially we note that Health Management Associates seeks to withhold information that was not submitted to this office by the commission. Because such information was not submitted

by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the commission. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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, we have not received any arguments from Clifton Gunderson, EP&P, Fitzgerald, Health Management Systems, the Lewin Group, MAXIMUS, ResultsPositive, and Sellers Feinburg for withholding any of the submitted information. Therefore, we have no basis to conclude that the release of any of the submitted information would harm the proprietary interests of these companies. *See id.* § 551.110(b); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, we conclude that the commission may not withhold any portion of the submitted information on the basis of any proprietary interest that these companies may have in it.

We note, however, that the submitted information includes ResultsPositive's tax returns. Section 6103 of title 26 of the United States Code makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). We have marked the tax return information that the commission must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Bailit, Burns, Deloitte, Health Management Associates, and the Urban Institute assert that some of their information is 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.

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." Gov't Code § 552.110(a). 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. 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; (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) 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." 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). However, 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 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).

Deloitte claims that its Executive Summary, Corporate Background and Experience, Resumes in RFP #529-06-0425, Cost Proposal related to RFP #529-06-0425, Proposed Approach and Possible Medicaid Reform Options, Project Management Approach, Project Staff and Key Deloitte Differentiators, Cost Proposal related to RFQ #000001, and resumes in RFQ #000001 are trade secrets. Upon review, we find that the commission must withhold the marked portions of Deloitte's Proposed Approach and Possible Medicaid Reform Options, Project Management Approach, and the customer information contained in its Executive Summary, resumes, and Corporate Background and Experience.¹ As to the remaining information at issue, however, we find that Deloitte has not demonstrated that it meets the definition of a trade secret. *See* Open Records Decision No. 319 (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). Accordingly, the commission may not withhold Deloitte's remaining information at issue under section 552.110(a) of the Government Code.

Deloitte also claims that its remaining information at issue is commercial or financial information excepted under section 552.110(b) of the Government Code. However, we note that Deloitte is a winning bidder in this instance. Further, Deloitte only makes a generalized allegation that the release of this information would result in substantial damage to the competitive position of the company. Thus, Deloitte has not demonstrated that substantial competitive injury would likely result from the release of its remaining information at issue. *See* ORD No. 509 at 5. Accordingly, the commission may not withhold any of Deloitte's remaining information under section 552.110(b) of the Government Code.

Next we address the arguments submitted by Burns. Upon review of Burn's arguments and the information at issue, we find that Burns has established that release of its income statement and balance sheet would cause the company substantial competitive harm by hampering its ability to attract qualified candidates for employment. Thus, the commission must withhold Burns' income statements and balance sheets under section 552.110(b) of the Government Code.²

¹ We have marked a representative sample of the customer information that must be withheld in Deloitte's executive summary and resumes.

² Because our determination on this issue is dispositive, we need not address Burns' remaining argument against disclosure.

With respect to the arguments submitted by Bailit, Health Management Associates and the Urban Institute, we note that Bailit and Health Management Associates are winning bidders in this instance; as noted above the public has a strong interest in the release of prices in government contract awards, and the pricing of a winning bidder is generally not excepted under section 552.110(b). *See* ORD 514. The Urban Institute provides only a general assertion that it considers some of its information proprietary and does not explain how the information constitutes a trade secret. Accordingly, we conclude that Bailit, Health Management Associates, and the Urban Institute have failed to establish that any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. We also find that Bailit, Health Management Associates, and the Urban Institute have made only conclusory allegations that release of any of the submitted information would cause the companies substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. Thus, none of the submitted information pertaining to Bailit, Health Management Associates, or the Urban Institute may be withheld pursuant to section 552.110.

We note that portions of the requested information include notice of copyright protection. 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). Thus, in releasing the requested information, the commission must comply with applicable copyright law.

In summary, the commission must withhold ResultsPositive tax information under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The commission must withhold Deloitte's Proposed Approach and Possible Medicaid Reform Options, Project Management Approach, and the customer information contained in its Executive Summary, and Corporate Background and Experience. The commission must also withhold Burns' income statement and balance sheet. The remaining information must be released to the requestors in accordance 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 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,



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Open Records Division

JLF/ma

Ref: ID# 276765

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