



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2008

Ms. Patricia Fleming
Assistant General Counsel
TDCJ-Office of the General Council
P.O. Box 4004
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OR2008-06235

Dear Ms. Fleming:

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# 310318.

The Texas Department of Criminal Justice (the "department") received a request for all responses, excluding the requestor's, to RFP 696-PS-7-P045, the scoring forms of all applicants, and the funding award. You state that the department is withholding or releasing Volumes 2 and 3 of all of the proposals, except the proposal of Turning Point, Inc. ("Turning Point"), pursuant to the previous determination set forth in Open Records Letter No. 2008-01677 (2008). You claim that some of the submitted information is excepted from disclosure under sections 552.104 and 552.136 of the Government Code. You do not take a position as to whether the Volume 1 proposals and Turning Point's Volume 2 and 3 proposals are excepted under the Act; however, you state, and provide documentation showing, that you notified the following third parties of the department's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: CEC Civigenics; Cenikor Foundation ("Cenikor"); David & Ivory Ministries; Gateway; Travis County Counseling & Education; Turning Point; and WestCare California. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). Cenikor asserts that its information is

excepted under sections 552.104, 552.110, and 552.136 of the Government Code. We have reviewed the submitted arguments and information.¹

You assert that the submitted scoring and evaluation forms are excepted under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990).

Section 552.104 generally does not except information relating to competitive bidding situations once a contract has been awarded. *See* Open Records Decision Nos. 306 (1982), 184 (1978). You inform us that contracts were awarded in response to this RFP; however, you assert that the scoring and evaluation forms related to these contracts are excepted under section 552.104 because they "will be employed in connection with a new Request for Proposals [for similar substance abuse programs] that will be [made] in 6 months or less." You also assert that "[d]isclosure of this information would allow third party bidders to tailor their bids to specific evaluation criteria, undermining the quality of proposals and undermining competition among bidders, all to the detriment of the Agency." Based on your representations and our review of the submitted documents, we agree that the department may withhold the information you have marked under section 552.104 of the Government Code. Cenikor also seeks to withhold its information under section 552.104; however, this section is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the department does not seek to withhold Cenikor's information pursuant to section 552.104, we find this section does not apply to Cenikor's information. *See* ORD 592 (governmental body may waive section 552.104). Therefore, Cenikor's information may not be withheld under section 552.104.

You assert that some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136(b) of the Government Code provides that

¹The department acknowledges that it failed to comply with section 552.301 in regards to Volume 1 of the submitted proposals. *See* Gov't Code § 552.301(b), (e). However, because the interests of third parties are at stake, we will address whether this information is excepted under the Act. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302).

“[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.” We have marked the insurance policy numbers the department must withhold under section 552.136.

We next 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 it should be withheld from disclosure. See Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, Cenikor is the only third party that has submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of the remaining third parties, and the department may not withhold any portion of the submitted information on that basis. See 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).

Cenikor asserts that its information is excepted 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.” 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 ORD 552 at 2. 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.² 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. ORD 552 at 5-6. 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 ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

We find Cenikor has established that the release of some of the information at issue would cause substantial competitive injury; therefore, the department must withhold this information, which we have marked, under section 552.110(b). But Cenikor has made only conclusory allegations that release of the remaining information at issue would cause substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. In addition, we conclude Cenikor has failed to establish a *prima facie* case that any of the remaining information is a trade secret. See ORD 402. Thus, the remaining information may not be withheld under section 552.110.

Finally, we note that some of the materials at issue 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

²The 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).

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).

To conclude, the department may withhold the information marked under section 552.104 of the Government Code. The department must withhold the information we have marked under section 552.110 of the Government Code and the insurance policy numbers marked under section 552.136 of the Government Code. The department must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.³

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge that decision by suing the governmental

³We note that the submitted information contains a social security number. 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.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 310318

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