



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2008

Ms. Caroline E. Cho
Assistant County Attorney
Williamson County
405 Martin Luther King Street, Box 7
Georgetown, Texas 78626

OR2008-12013A

Dear Ms. Cho:

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# 328187.

This office issued Open Records Letter No. 2008-12013 (2008) on September 2, 2008. In that ruling we determined, among other things, that because Image Trend, Inc. ("Image Trend") did not submit comments to this office explaining why its requested information should not be released, we had no basis to withhold the information. We therefore ordered the release of Image Trend's information. Williamson County (the "county") subsequently informed this office that the county received third party arguments from Image Trend but that those arguments were not submitted to this office. Accordingly, the county asks our office to reconsider our ruling in Open Records Letter No. 2008-12013. We have considered the county's request and Image Trend's arguments, and will reconsider the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on September 2, 2008. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")).

The county received a request for information pertaining to its electronic patient care reporting software RFP. Although you raise no exception to disclosure of the requested information on behalf of the county, you state that the request may implicate the proprietary interests of third parties. Pursuant to section 552.305(d) of the Government Code, you have

notified the interested third parties of the request and of their opportunity to submit comments to this office as to why this information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances).¹ We have received arguments from Sansio and Image Trend. We have considered the submitted arguments and reviewed the submitted information.

We note that an interested third party is allowed ten business days from the date of its receipt of a 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, only Sansio and Image Trend have submitted arguments objecting to release of their information. Thus, because the other interested parties have not demonstrated that they have a proprietary interest in their proposals, the county may not withhold the remaining proposals based on any proprietary interest that these companies may have in them. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). As no other exception to disclosure of this information is raised, it must be released to the requestor.

We understand Sansio and Image Trend to raise section 552.110 of the Government Code for portions of their proposals. 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 exempting 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,

¹The interested third parties are: EMS Charts, Inc.; Open Incorporated; Image Trend; Roam Information Technologies, Inc.; ZOLL Data Systems; and Sansio.

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 exempted 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).

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. Gov’t Code § 552.110(b); *see also National*

Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review, we find that Sansio established that its pricing and customer information constitutes commercial and financial information and that Image Trend established that its pricing information constitutes commercial and financial information, the release of which would cause the companies substantial competitive harm. Accordingly, the county must withhold the information we have marked under section 552.110(b). However, we conclude that Sansio and Image Trend failed to establish that any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. We also find that Sansio and Image Trend made only conclusory allegations that release of any of the submitted information would cause the companies substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, none of the remaining information may be withheld pursuant to section 552.110.

Finally, we note that some of the submitted information appears to 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 county must withhold the information we have marked under section 552.110(b). The remaining information must be released, but any copyrighted information may only be released in accordance with 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 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). If the governmental body does not file suit over 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).

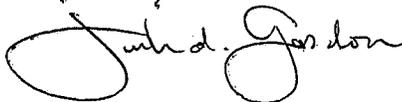
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in cursive script that reads "Justin D. Gordon". The signature is written in dark ink and is positioned above the typed name.

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 328187

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Michelle Wiklund
Sansio
11 East Superior Street, Suite 310
Duluth, Minnesota 55802
(w/o enclosures)

Mr. Peter Goutman
EMS Charts Inc.
600 Mifflin Road, Suite 102
Pittsburgh, Pennsylvania 15207
(w/o enclosures)

Mr. Mike Vukovich
Open Incorporated
11283 Eagle View Boulevard, Suite 100
Woodbury, Minnesota 55129
(w/o enclosures)

Mr. Michael McBrady
ImageTrend, Inc.
20855 Kensington Boulevard
Lakeville, Minnesota 55044
(w/o enclosures)

Ms. Katherine Briggs
Roam Information Technologies, Inc
322 Encinitas Boulevard, Suite 250
Encinitas, California 92024
(w/o enclosures)

Mr. Kevin A. Tapply
ZOLL Data Systems
12202 Airport Way, Suite 300
Broomfield, Colorado 80021
(w/o enclosures)