



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 20, 2009

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2009-00793

Dear Ms. Alexander:

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# 332477.

The Texas Department of Transportation (the "department") received two requests for information pertaining to a specified solicitation for bids, to include the ranking of the companies' proposals, the proposals sent for the solicitation, and all feedback regarding the bid of one of the requestor's company. You claim portions of the requested information are excepted from disclosure under sections 552.101 and 552.136 of the Government Code. In addition, you state that the remaining information may implicate the proprietary interests of third parties. You also state, and provide documentation showing, that you have notified Touch Them All, Inc. d/b/a First Check Applicant Screening ("First Check"); Accusource; Advanced Screening Research ("ASR"); B&B Reporting; ChoicePoint Workplace Solutions; Inc.; Court Check, Inc. ("Court Check"); CSI Identity Corporation; Inquiries, Inc. ("Inquiries"); Kelmar and Associates ("Kelmar"); Mainland Testing Center; and Screening One, Inc. ("Screening One") of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *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 the Act in certain circumstances). Court Check, Kelmar, Screening One, First Check, ASR, and

Inquiries have submitted comments to our office.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted arguments.

Initially, we note that you have not submitted information pertaining to the ranking of the companies' proposals or any feedback regarding one of the requestor's company's bid. To the extent any information responsive to these categories of information existed on the date the department received this request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note 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, Accusource, B&B Reporting, ChoicePoint WorkPlace Solutions, Inc., CSIdentity Corporation, and Mainland Testing Center have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of these companies, 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).

Section 552.101 of the Government Code excepts 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 made confidential by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993

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<sup>1</sup>We note that First Check, in its comments to our office, stated that it would be submitting arguments at a later date. As of the date of this ruling, First Check has not submitted any arguments.

F.2d 1111 (4th Cir. 1993). Thus, the department must withhold the tax return information you have marked, and the additional information we have marked, pursuant to federal law.

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. Upon review, we find that the department must withhold the insurance policy and account numbers you have marked, and the additional information we have marked, under section 552.136 of the Government Code. We will now address the arguments made by the responding third parties.

Kelmar asserts that it stated on its proposal that the information contained within the proposal “shall not be disclosed outside the Government.” Thus, we understand Kelmar to assert that it claimed its proposal to be confidential and proprietary. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests 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 overrule or repeal provisions of the Act through an agreement or contract. *See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990)* (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless Kelmar’s bid proposal comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Court Check raises section 552.110 of the Government Code for its bid proposal. Further, we understand Kelmar, Screening One, and Inquiries to assert that their bid proposals are also excepted under section 552.110 of the Government Code.<sup>2</sup> Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial 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.” *See Gov’t Code § 552.110(a)-(b).*

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 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

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<sup>2</sup>Although Screening One also raises section 552.101 of the Government Code, it makes no arguments under this exception.

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. 1958). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.<sup>3</sup> 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

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<sup>3</sup> The Restatement of Torts lists the following six factors 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).

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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we conclude release of Screening One’s, Kelmar’s, and Court Check’s pricing and some of their customer information would cause them substantial competitive harm. We also conclude that the release of Inquiries’ customer information would cause it substantial competitive harm. Therefore, the department must withhold the information we have marked in Screening One’s, Kelmar’s, Court Check’s, and Inquiries’ proposals under section 552.110(b). However, we find that Screening One, Kelmar, Court Check, and Inquiries have not made the specific factual and evidentiary showing required by section 552.110(b) that release of their remaining information would cause them substantial competitive harm. *See* ORD 661 at 5-6 (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). Further, we find none of the responding third parties have demonstrated how any portion of its remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for its information. Therefore, none of the responding third parties’ remaining information may be withheld under section 552.110.

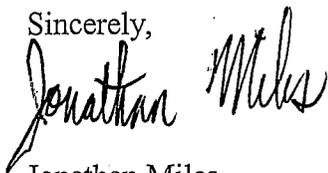
In summary, the department must withhold (1) the tax return information you have marked, and the additional information we have marked, under section 6103(a) of title 26 of the United States Code in conjunction with section 552.101 of the Government Code; (2) the insurance policy and account numbers you have marked and the additional information we have marked under section 552.136 of the Government Code; and (3) the information we have marked pursuant to section 552.110(b) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script that reads "Jonathan Miles". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/cc

Ref: ID# 332477

Enc. Submitted documents

c: Requestor  
(w/o enclosures)