



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2009

Mr. Fred O. Haiman
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Attorneys for Texas Border Sheriff's Coalition
211 West Yandell Drive
El Paso, Texas 79902

OR2009-07446

Dear Mr. Haiman:

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# 344552.

The Texas Border Sheriff's Coalition (the "coalition"), which you represent, received a request for (1) all invoices sent to the coalition from BlueServo, LLC ("BlueServo"); (2) all payments made by the coalition to BlueServo; and (3) all communications submitted through the websites BlueServo.com and BlueServo.net between February 2, 2009 and February 8, 2009. You state, and provide documentation showing, the coalition has provided some of the requested invoice and payment information to the requestor. You claim the submitted invoices are excepted from disclosure under sections 552.101, 552.104, 552.108, and 552.139 of the Government Code. Furthermore, because you state release of the submitted invoices may implicate the proprietary interests of BlueServo, the coalition was required by section 552.305 of the Government Code to notify BlueServo of the request and of its opportunity to submit comments to this office explaining why the requested information should be withheld from disclosure. *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 received comments from BlueServo. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the request for communications submitted through the named websites. To the extent information responsive to this aspect of the request existed on the date the coalition received this request, we assume you have released it. If you have not released any such information, 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 must address the coalition's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). In this instance, you state the coalition received the request for information on March 2, 2009. However, you did not request a ruling from this office until March 23, 2009. Thus, we find the coalition failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You assert portions of the submitted invoices are excepted under sections 552.104 and 552.108. These sections, however, are discretionary in nature. They serve only to protect a governmental body's interests, and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, no portion of the submitted invoices may be withheld under section 552.104 or section 552.108 of the Government Code. However, because sections 552.101 and 552.139 of the Government Code, as well as third party interests, can provide compelling reasons to overcome the presumption of openness, we will consider whether or not the submitted information is excepted under the Act.

BlueServo asserts the submitted invoices are confidential based on certain terms of the coalition's contract with BlueServo. 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 section 552.110 of the Government Code). Consequently, unless the invoices come within an exception to disclosure, they must be released, notwithstanding any expectation or agreement to the contrary.

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 exception encompasses information other statutes make confidential. As part of the Texas Homeland Security Act (the “HSA”), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. You and BlueServo assert the submitted invoices are confidential under section 418.181 of the Government Code, which states, “[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.” *Id.* § 418.181. The fact that information may relate to a governmental body’s security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under the HSA must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert the submitted invoices relate to a “virtual fence” built by BlueServo along the international border between Texas and Mexico “in an effort to combat illegal immigration, drug smuggling, and border violence.” You claim the virtual fence is critical infrastructure for purposes of section 418.181 because it is part of the State’s efforts to secure its international border. *See id.* § 421.001 (defining “critical infrastructure” to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). You explain the virtual fence “comprises a complex architecture of concealed cameras, data networks, and servers,” which you contend “enable law enforcement and civilians . . . to monitor stretches of the border where border patrols are infrequent and physical barriers have not been erected.” You contend the “location[s] of the cameras and the specifications of the data infrastructure are kept strictly confidential,” and are protected under section 418.181. Based on your representations and our review of the submitted documents, we conclude the equipment specifications and locations of the virtual fence cameras in the submitted invoices fall within the scope of section 418.181. Therefore, the coalition must withhold the information we have marked

under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.¹

BlueServo claims the remaining invoice 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: (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.” *Id.* § 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

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 Open Records Decision No. 552 at 5* (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information

¹As our ruling for this information is dispositive, we need not address the remaining arguments against disclosure for this information.

meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *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).

BlueServo contends its vendor information in the submitted invoices constitutes a trade secret under section 552.110(a). Upon review of BlueServo's arguments and the remaining information, we find BlueServo has established its vendor information, which we have marked, constitutes a trade secret and must be withheld under section 552.110(a).

BlueServo claims the remaining invoice information is excepted under section 552.110(b). We find, however, BlueServo has provided no specific factual or evidentiary showing release of the remaining general information in the invoices would cause the company substantial competitive injury. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence substantial competitive injury would result from release of particular information at issue). Therefore, the coalition may not withhold the remaining invoice information under section 552.110(b).

In summary, the coalition must withhold the marked information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code, and under section 552.110(a) of the Government Code. The remaining information must be released.

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

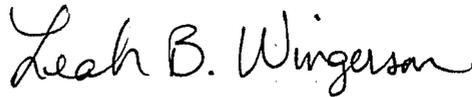
- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information 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).

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, 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 344552

Enc. Submitted documents

c: Requestor
(w/o enclosures)