



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 30, 2009

Ms. Caroline E. Cho  
Assistant County Attorney  
Williamson County  
405 MLK #7  
Georgetown, Texas 78626

OR2009-09042

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# 347527.

Williamson County (the "county") received a request for the responses, tally sheets, and resulting contract from a specified request for proposals ("RFP"). You state that the county does not have any information responsive to the portion of the request seeking tally sheets.<sup>1</sup> Although we understand you to take no position as to whether the submitted information must be released to the requestor, you indicate that the submitted documents may contain proprietary information subject to exception under the Act. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the county has notified the interested third parties of the request and of their right to submit arguments to this office explaining why this information should not be released.<sup>2</sup> See Gov't

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<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>The notified third parties are: American Express Merchant Services; A Business Store; Merchants Group, Inc.; Metavante Corp.; Merchant Multiservice, L.L.C.; Bank of America Merchant Services; Hamer Enterprises; Certified Payments; Quality Merchant Services, Inc.; Certegy; Official Payments; JP Morgan Chase Bank; Wachovia Merchant Services; and, Heartland Payment Systems.

Code § 552.305 (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 in certain circumstances). We have received comments from Hamer Enterprises ("Hamer"). We have considered the submitted arguments and reviewed the submitted information.

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, only Hamer has submitted to this office reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of the remaining third parties' records constitutes proprietary information. *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). Therefore, the county may not withhold the remaining third parties' records on the basis of any proprietary interest they may have in them.

Hamer asserts that portions of its proposal are excepted from disclosure under section 552.110. 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* 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.<sup>3</sup> Restatement of Torts § 757 cmt. b. 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). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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).

Hamer claims section 552.110(a) for portions of its information. Having considered Hamer's arguments, we conclude Hamer has established a *prima facie* case that its intellectual property statement and a portion of its client list, which we have marked, constitute trade secret information. Therefore, the county must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that Hamer publishes the identities of some of its clients on its website. In light of Hamer's own publication of such information, we cannot conclude that the identities of these published clients qualify as trade secrets. In addition, Hamer has failed to demonstrate any portion of its remaining information constitutes a trade secret. Accordingly, the county may not

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<sup>3</sup>The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

withhold the remaining information under section 552.110(a). Hamer also argues section 552.110(b) for some of its remaining information. Upon review, we determine that Hamer has demonstrated, based on a specific or factual evidentiary showing, that the release of some of its information would result in substantial competitive harm. Accordingly, we have marked the information that must be withheld under section 552.110(b). However, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

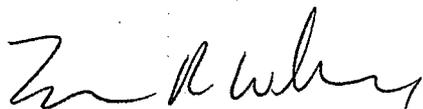
We note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must also comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the county must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.

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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/eeg

Ref: ID# 347527

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Belinda Rodriguez  
A Business Store  
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Bastrop, Texas 78602  
(w/o enclosures)

Ms. Annie Ecklund  
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Austin, Texas 78746  
(w/o enclosures)

Tanzeel Merchant  
Merchants Group, Inc.  
8303 S. W. Freeway, Suite 855  
Houston, Texas 77074  
(w/o enclosures)

Mr. Mark Koran  
Metavante Corp.  
1 Burton Hills Boulevard, Suite 300  
Nashville, Tennessee 37215  
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Mr. Ric Bunger  
Merchant Multiservice, LLC  
3280 Spring Branch Road  
Spring Branch, Texas 78070  
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Mr. Brain D. Hoffman  
Bank of America Merchant Services  
901 Main Street, 8<sup>th</sup> Floor  
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Mr. William C. Hamer  
Hamer Enterprises  
4200-A North Bicentennial Drive  
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Ms. Kate Lynch  
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Mr. Jerome Zhu  
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Richardson, Texas 75080  
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Ms. Peggy Compton  
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Mr. Jeremy G. Krahl  
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