



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2009

Mr. J. Greg Hudson and Mr. Tom O'Leary
Hudson & O'Leary, L.L.P.
1717 West Sixth Street, Suite 258
Austin, Texas 78703

OR2009-09409

Dear Mr. Hudson and Mr. O'Leary:

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# 348245.

The Newton County Detention Center (the "center"), through Geo Group, Inc. ("Geo"), which you represent, received a request for "a copy of the current Inmate Telephone Service, Commissary Contract and any amendment thereto." Although you take no position with respect to the public availability of the submitted information, you indicate that the release of this information may implicate the proprietary interests of Encartele, Inc. ("Encartele") and Mid-States Services, Inc. ("Mid-States").¹ Accordingly, pursuant to section 552.305 of the Government Code, you have notified Encartele and Mid-States of the request and of their right to submit arguments to this office as to why the requested information should not be released. *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 in certain circumstances). We have received comments from Encartele and Mid-Services. We have considered the submitted comments and reviewed the submitted information.

¹Although you raise sections 552.104 and 552.110 of the Government Code, you provide no arguments explaining how these exceptions are applicable to the submitted information. Furthermore, we note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body.

We first address Encartele's contention that its contract with Geo is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987). Encartele contends the submitted information is held by Geo, which is not a governmental body under the Act. *See id.* § 552.003(1) (defining "governmental body" for purposes of the Act). However, Geo has responded to the request because it states that, by contract, it manages and operates the center "in virtually all aspects as an agent [of Newton County (the "county")] on the [c]ounty's behalf[.]" and as such, performs a governmental function for the county. *See* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by private third party if the information relates to the governmental body's official duties or business, private third party acts as agent of governmental body in collecting the information, and governmental body has or is entitled to access the information). Accordingly, we find that the contract between Encartele and Geo is information collected, assembled, or maintained in connection with the transaction of official business for the county, and the county has a right of access to such information. *See* Gov't Code § 552.002(a)(2). Thus, the information at issue constitutes public information subject to the Act under section 552.002(a). *Id.*; *see also* *Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268, 271 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (governmental body that was entitled to inspect books and records of contracting party had right of access to its own payroll account records).

Encartele also contends that the requestor, as a competitor, should not be allowed to request its competitive information under the Act. However, this office has determined the Act does not permit the consideration by a governmental body or this office of a requestor's intended use of information when responding to open records requests. *See* Gov't Code §§ 552.222(a) (stating governmental body may not inquire into purpose for which information will be used), 552.223 (requiring uniform treatment of all open records requests); *see* Open Records Decision Nos. 508 (1988) at 2 (motives of a person seeking

information under the Act are irrelevant), 51 (1974). Therefore, the center may only withhold the information at issue if it is excepted from disclosure under the Act or made confidential by law.

Encartele raises section 552.104 of the Government Code as an exception to disclosure. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which 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 center, through Geo, did not submit any arguments in support of withholding any information pursuant to section 552.104, the center may not withhold any of Encartele's information pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Encartele and Mid-States raise section 552.110 of the Government Code for their information.² Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. 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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision 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

²Although Mid-States raises section 552.101 of the Government Code, it argues its commissioner contract constitutes trade secret information, thus, we understand Mid-States to raise section 552.110(a) of the Government Code.

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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made 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) of the Government Code 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. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

Having considered the arguments of Encartele and Mid-States, we find that Mid-States has made a *prima facie* case that its customer list is protected as trade secret information. However, we find that Encartele and Mid-States have failed to establish that any of the remaining information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We note that pricing information pertaining to a particular proposal or 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." *See* RESTATEMENT OF TORTS § 757 cmt.

³The 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).

b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3 (1982). Therefore, we determine that the center must only withhold the information we have marked under section 552.110(a) of the Government Code.

Encartele also claims that its information is excepted from disclosure under section 552.110(b). Upon review of Encartele's arguments, we find it has made only conclusory allegations that release of its information would result in substantial damage to its competitive position. *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 that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note that the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Consequently, no portion of Encartele's information may be withheld under section 552.110(b) of the Government Code.

We note that the submitted information contains insurance policy numbers that are subject to section 552.136 of the Government Code.⁴ Section 552.136 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. Accordingly, the center must withhold the insurance policy numbers we have marked under section 552.136.

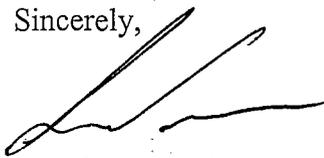
In summary, the center must withhold the information we have marked under section 552.110(a) of the Government Code. The center must also withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eb

Ref: ID# 348245

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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