



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2009

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

OR2009-09479

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# 348377.

The Texas Department of Transportation (the "department") received a request for information related to requisition B14200902062400. You state the department is releasing some information and withholding social security numbers pursuant to section 552.147 of the Government Code.¹ You also state the department is withholding Texas driver's license numbers under section 552.130 of the Government Code pursuant to a previous determination issued to the department in Open Records Letter No. 2002-0465 (2002). *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to a previous determination). Although you raise no exceptions to disclosure of the remaining information, you state release of this information may implicate the proprietary interests of AAR Incorporated ("AAR"), Frisbie & Edwards, LLC ("Frisbie"), J. R. Ramon & Sons, Inc. ("J. R. Ramon"), Sierra Contracting ("Sierra"), and Total Demolition ("Total"). Thus, pursuant to section 552.305 of the Government Code, you have notified these companies of

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

the request and of their right to submit arguments to this office as to why their information should not be released. *See id.* § 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 arguments from Total. 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 a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from AAR, Frisbie, J. R. Ramon, or Sierra. We, thus, have no basis for concluding that 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 id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

Total raises section 552.110 of the Government Code for portions of its information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets; and (b) commercial or financial information, the release of which 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. 1957); *see also* ORD 552 at 2. 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.² 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. *See* ORD 552 at 5. 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. *Id.*; *see also* ORD 661 at 5.

After reviewing the information at issue and the submitted arguments, we find Total has made a *prima facie* case that its customer information, which we have marked, is protected as trade secret information. Therefore, the department must withhold the marked information under section 552.110(a). We determine, however, that Total has failed to demonstrate that any portion of the remaining information at issue meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Therefore, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Furthermore, we find Total has made only conclusory allegations that release of the remaining information at issue would result in substantial harm to its competitive position. Thus, Total has not demonstrated that substantial competitive injury would result from the release of the remaining information. *See* Open Record Decision Nos. 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

²The 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).

release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Therefore, the department may not withhold any portion of the remaining information under section 552.110(b) of the Government Code.

Finally, we note some of the remaining information may be subject to section 552.136 of the Government Code.³ 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. This office has determined that insurance policy numbers constitute access device numbers for purposes of section 552.136. We note the requestor has a right of access to her own company’s insurance policy numbers. *See id.* § 552.023(a)⁴; Open Records Decision No. 481 at 4 (1987). We are unable to determine if the remaining insurance policy numbers, which we have marked, are sample or actual insurance policy numbers. Therefore, we must rule conditionally. If the numbers we have marked are actual insurance policy numbers, they must be withheld under section 552.136. If the numbers we have marked are sample insurance policy numbers, then they may not be withheld under section 552.136 and must be released.

In summary, the department must withhold the information we have marked under section 552.110(a) of the Government Code. If the numbers we have marked are actual insurance policy numbers, then they must be withheld under section 552.136 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.

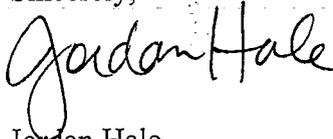
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free,

³The 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).

⁴Section 552.023(a) provides that “[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.” Gov’t Code § 552.023(a).

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,



Jordan Hale
Assistant Attorney General
Open Records Division

JH/eeg

Ref: ID# 348377

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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