



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 24, 2009

Ms. Katherine R. Fite  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
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OR2009-10303

Dear Ms. Fite:

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# 350119.

The Office of the Governor (the "governor") received a request for all Texas Enterprise Fund (the "TEF") annual compliance verification reports for specified entities awarded grants from the TEF. You state you are releasing some of the requested information.<sup>1</sup> You claim that the remaining submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also indicate that the release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state you have notified the third parties of the governor's receipt of the request for information and of their right to submit arguments to this office as to why the information should not be released to the requestor.<sup>2</sup> See Gov't Code § 552.305(d); see also Open Records Decision

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<sup>1</sup>You state that you are withdrawing your request for a ruling with respect to the responsive information of Sematech because it has agreed to release its information to the requestor. Accordingly, this ruling does not address the information of Sematech.

<sup>2</sup>The third parties are as follows: Albany Engineered Composites ("Albany"); Cabela's; Countrywide Home Loans; Gulfstream; Fidelity Global Brokerage Group, Inc. ("Fidelity"); HelioVolt ("Helio"); Hilmar Cheese Company; The Home Depot and HD Supply (collectively the "Home Depot"); Huntsman; KLN Steel Products, L.L.C. ("KLN"); Lone Star Education and Research Network; Lee Container Corp.; Lockheed Martin

No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from representatives of twelve third parties. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us that a portion of Exhibit G is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the governor is not required to release that information in response to the request.

Next, we note that the submitted information does not include compliance and verification reports for Hewlett-Packard, Scott & White, and Caterpillar. We therefore assume that the governor has released any information that is related to these entities, to the extent that such information existed when the governor received the request. If not, then the governor must release any such information at this time. *See* Gov't Code §§ 552.301, .302; 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).

The governor and KLN inform us KLN's requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-06144 (2009). You state that there has been no change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that the governor must dispose of KLN's requested information in accordance with Open Records Letter No. 2009-06144. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We note, and T-Mobile and WAMU claim, that this office has issued two prior rulings that would encompass portions of their responsive information. In Open Records Letter Nos. 2009-01479A (2009) and 2009-08319 (2009), we concluded that the governor must withhold portions of the annual compliance verification reports for several companies under section 552.110(b) of the Government Code and section 552.101 of the Government Code in conjunction with common-law privacy. Therefore, to the extent the submitted information is encompassed by our previous rulings and as we have no indication that the law, facts, and circumstances on which those decisions were based have changed, the governor must continue to rely on our decisions in Open Records Letters Nos. 2009-01479A

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Space Systems Company ("Lockheed"); Maxim Integrated Products, Inc.; Rackspace US, Inc.; Raytheon Company ("Raytheon"); Ruiz Foods; Samsung Austin Semiconductor; Santana Textiles, L.L.C.; Texas Instruments; T-Mobile USA, Inc. ("T-Mobile"); Vought Aircraft Industries, Inc. ("Vought"); Washington Mutual Bank ("WAMU"); Hewlett-Packard; Scott & White Memorial ("Scott & White"); and Caterpillar.

and 2009-08319 and withhold the information encompassed by those rulings under section 552.110(b) of the Government Code and section 552.101 of the Government Code in conjunction with common-law privacy. *See* Gov't Code § 552.301(a); ORD 673 at 6-7 (listing elements of first type of previous determination under Gov't Code § 552.301(a)). To the extent the submitted information is not encompassed by our previous rulings, or to the extent that the information was previously ruled upon but there has been a change in the law, facts, or circumstances on which the previous rulings were based, we will consider the submitted arguments.

We note that 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 decision, we have only received arguments from Albany, Fidelity, Gulfstream, Home Depot, Huntsman, Lockheed, Raytheon, T-Mobile, Vought, and WAMU explaining why their information should not be released. On behalf of the interested third parties, you assert that the submitted information is excepted under section 552.110 of the Government Code. However, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Because we have yet to receive comments from the remaining third parties, we find they have not demonstrated that any of their submitted information is confidential or proprietary for purposes of the Act. *See id.* §§ 552.101, .110; Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). Accordingly, the governor may not withhold any portion of the remaining interested parties' information on the basis of the proprietary interests of these companies. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (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 (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We will however, address the governor's remaining arguments against the disclosure of this information.

The governor and several of the third parties raise section 552.104 of the Government Code. Section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties; therefore we will not consider the various third parties' claims under section 552.104. *See* Open Records Decision No. 592 at 8 (1991). However, because section 552.104 is potentially the most encompassing exception raised, we will now address the governor's claim under section 552.104 of the Government Code for the submitted information. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the

marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1987), 463, 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

In this case, we find you have not established that the governor has specific marketplace interests with respect to the annual progress reports of companies that have received funds from the TEF. We therefore find the information at issue is not excepted under section 552.104 on that basis. Furthermore, we note that at the time the governor received the present request, the third parties at issue had already been selected and had received funds from the TEF. Thus, we find that there was not a competitive situation pertinent to the records at issue occurring at the time of the request, and we determine that the governor may not withhold any of the information at issue under section 552.104 of the Government Code.

Albany, Fidelity, Gulfstream, Home Depot, Huntsman, Lockheed, Raytheon, T-Mobile, Vought, and WAMU all contend that portions of their information at issue are excepted under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which 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 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.<sup>3</sup> 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 5-6.

Albany, WAMU, and Home Depot all contend that their information consists of trade secrets excepted under section 552.110(a). Having considered Albany’s, WAMU’s, and Home Depot’s claims, we conclude that they have failed to demonstrate that any portion of their respective information fits within the definition of a trade secret. Albany, WAMU, and Home Depot have also not sufficiently established any of the trade secret factors with respect

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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 other 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).

to their information at issue. Thus, no portion of Albany's, WAMU's, and Home Depot's information at issue may be withheld under section 552.110(a) of the Government Code.

Albany argues the release of their information would harm the governor's ability to obtain annual compliance reporting from companies participating in the TEF. In advancing its arguments, Albany appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Albany's interest in its information.

Upon review of the arguments of Albany, Gulfstream, and Vought and the information at issue, we find these companies have made only conclusory allegations that the release of their information at issue would result in substantial damage to their competitive position. Thus, Albany, Gulfstream, and Vought have not demonstrated that substantial competitive injury would result from the release of their information at issue. *See id.* Accordingly, no portion of these companies' information at issue may be withheld under section 552.110(b).

However, we find that Fidelity, Huntsman, Lockheed, Raytheon, T-Mobile, and WAMU have established that the portions of their information revealing the average or actual salaries for specific job descriptions or individuals, which we have marked, constitute commercial or financial information, the release of which would cause these companies substantial competitive injury. However, we find that Fidelity, Home Depot, Huntsman, Lockheed, Raytheon, T-Mobile, and WAMU have failed to demonstrate that substantial competitive injury would result from the release of their remaining information at issue. *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). Accordingly, the

governor must only withhold the information we have marked in Fidelity's, Huntsman's, Lockheed's, Raytheon's, T-Mobile's, and WAMU's information under section 552.110(b).<sup>4</sup>

Fidelity and Gulfstream also raise section 552.102 of the Government Code for portions of their information. Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). This office has found that section 552.102 only applies to information in a personnel file of an employee of a governmental body. The information the third parties at issue seek to withhold is not contained in the personnel file of a governmental body employee. Therefore, we determine that section 552.102 does not apply to these companies' information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Some of the remaining information contains personal financial information of identified individuals that we find is intimate and embarrassing and of no legitimate public interest. Accordingly, the governor must withhold the information we have marked in the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

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<sup>4</sup>As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Albany, Gulfstream, Home Depot, and Vought have failed to explain how their information relates to economic development negotiations involving their respective companies and the state. *See id.* § 552.131. Accordingly, we conclude that the governor may not withhold any portion of their information pursuant to section 552.131(a) of the Government Code. Furthermore, we note that section 552.131(b) is designed to protect the interest of governmental bodies, not third parties. As the governor does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the submitted information is excepted under section 552.131(b) of the Government Code.

In summary, the governor must dispose of KLN's requested information in accordance with Open Records Letter No. 2009-06144. To the extent any of the submitted information is encompassed by our previous rulings and as we have no indication that the law, facts, and circumstances on which those decisions were based have changed, the governor must continue to rely on our decisions in Open Records Letters Nos. 2009-01479A and 2009-08319 and withhold or release such information in accordance with those rulings. The governor must withhold the information we have marked under section 552.110(b) of the Government Code. The governor must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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,



Greg Henderson  
Assistant Attorney General  
Open Records Division

GH/rl

Ref: ID#350119

Enc. Submitted documents

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