ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2009

Mr. James Mu
Assistant General Counsel
TDCJ - Office of the General Counsel
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2009-12534

Dear Mr. Mu:

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# 354496.

The Texas Department of Criminal Justice (the "department") received six requests for information related to a specified RFO. You state that some of the requested information has been or will be made available to the requestors. You claim portions of the submitted information are excepted from disclosure under section 552.136 of the Government Code.[1] You also state that the submitted information may be excepted from disclosure under section 552.110 of the Government Code, but you take no position as to whether the information is excepted under this section. You provide documentation showing that the department notified BI Incorporated ("BI"); G4S Justice Services, Inc. ("G4S"); Pro Tech Monitoring, Inc., aka Elmo Tech, Inc. ("Pro Tech"); Satellite Tracking of People, LLC ("STOP"); and Sentinel Offender Services ("Sentinel") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision 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 comments from Pro Tech, STOP, and Sentinel. We have

[1]In regard to one of the requests, you did not timely raise section 552.136 of the Government Code. However, this provision constitutes a compelling reason to withhold information; thus, we will consider your arguments under this exception. *See* Gov't Code §§ 552.301, .302.

also received comments from Omnilink, a subcontractor of G4S. We have considered the submitted arguments and reviewed the submitted information.

Section 552.136 of the Government Code provides 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. We note that the requestors have a right of access to their own companies' insurance policy numbers. *See* Gov't Code § 552.023(a) ("[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."); Open Records Decision No. 481 at 4 (1987). Therefore, with the exception of the insurance policy numbers of the requestors' companies, the department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

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, BI and G4S have not submitted comments to this office explaining why any portion of the submitted information relating to them should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of BI or G4S. Accordingly, none of the information pertaining to BI or G4S may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

Pro Tech argues that the "information contained in [its] proposals is exempt from disclosure" because the documents at issue are "clearly mark[ed] . . . as proprietary and confidential[.]" We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that 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). Consequently, unless Pro Tech's information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Gov't Code § 552.101. This exception encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. A compilation of an individual's criminal history is also highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. STOP argues that the submitted results of the background investigation of one of its employees are protected by common-law privacy. However, we note that this information was supplied by STOP as part of its proposal submitted to the department. Thus, this information is not criminal history information compiled by the department. Furthermore, we find that none of STOP's submitted information is intimate or embarrassing, or it is of legitimate public concern. Therefore, the department may not withhold any of STOP's submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Pro Tech claims that its submitted information is excepted from disclosure under section 552.108 of the Government Code. We note that section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests, as distinguished from exceptions that are intended to protect the interests of third parties, and may be waived by the governmental body. *See* Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). As the department does not seek to withhold any information pursuant to section 552.108, none of Pro Tech's submitted information may be withheld on this basis.

Omnilink, Pro Tech, Sentinel, and STOP assert that section 552.110 of the Government Code excepts from disclosure portions of their respective information. Section 552.110 of the Government Code 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. 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

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;
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> (2) the extent to which it is known by employees and others involved in the company's business;
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> (3) the extent of measures taken by the company to guard the secrecy of the information;
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> (4) the value of the information to the company and its competitors;
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> (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.

Id.; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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 Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

Upon review of the arguments submitted by Omnilink, Pro Tech, Sentinel, and STOP, and the information at issue, we find the information we have marked relating to Pro Tech's and Sentinel's customers must be withheld under section 552.110(a). Although Pro Tech's and Sentinel's documents contain other customer information, those customers are also identified on the companies' websites. We are unable to conclude that information published on Pro Tech's or Sentinel's websites constitutes trade secrets of either company. Furthermore, we find that Omnilink, Pro Tech, Sentinel, and STOP have failed to demonstrate how any portion of the remaining information meets the definition of a trade secret, nor have they shown the necessary factors to establish a trade secret claim. *See* ORD Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110).

Sentinel argues that release of its salary information in the submitted documents would expose Sentinel to "possible external recruitment of [its] staff from competitors." Based on this representation and our review, we conclude Sentinel has established the release of its salary information would cause it substantial competitive injury; therefore, the department must withhold this information, which we have marked, under section 552.110(b). Omnilink, Pro Tech, Sentinel, and STOP have not demonstrated that substantial competitive injury would likely result from the release of any of the remaining information. *See* ORD 661 at 5-6. Consequently, none of the remaining submitted information may be withheld under section 552.110 of the Government Code.

We note that portions of the remaining submitted information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990).

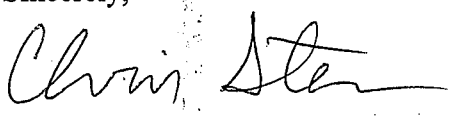
In summary, (1) with the exception of the insurance policy numbers of the requestors' companies, the department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code; and (2) the department must withhold the information we have marked under subsections 552.110(a) and (b) of the Government Code. The department must release the remaining information to the requestors, but must do so in accordance with copyright law.[2]

Finally, we note that some of the requestors stated they preferred to receive electronic copies of the requested information. Section 552.228 of the Government Code requires a governmental body to provide a copy of the public information in the requested medium if it has the technological ability to do so without the purchase of software or hardware. *See* Gov't Code § 552.228(b)(1), (2). Accordingly, if the department has the technological capability to provide the information at issue to the requestors at issue in the requested electronic format, it must do so; however, if the department does not have the technological capability, it may release the information at issue in the submitted paper format or in another medium acceptable to the requestors. *See* Gov't Code 552.228(c).

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

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[2]We note the remaining information contains social security numbers. Section 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.

Ref: ID# 354496

Enc. Submitted documents

c: Requestor (7)
(w/o enclosures)

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