



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2009

Mr. James Mu
Assistant General Counsel
TDCJ - Office of the General Counsel
P.O. Box 4004
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OR2009-12837A

Dear Mr. Mu:

This office issued Open Records Letter No. 2009-12837 (2009) on September 10, 2009. In that ruling, we concluded, among other things, the Texas Department of Criminal Justice (the "department") may not withhold the submitted score sheets under section 552.104 of the Government Code because the department failed to demonstrate how the score sheets pertain to same or similar goods or services for which the department solicits bids on a recurring basis. You have asked us to review your original arguments and our ruling again because you contend we overlooked a crucial portion of your arguments. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on September 10, 2009. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 363618 (previous ID# 354823).

The department received a request for all bid proposals and score sheets pertaining to RFP# 696-PF-9-P006. You claim portions of the submitted bid proposals and score sheets are excepted from disclosure under sections 552.104, 552.136, and 552.137 of the

Government Code. Furthermore, you state release of the submitted bid proposals may implicate the proprietary interests of several third parties. Accordingly, you state, and have provided documentation showing, you notified The Turning Point, Inc. ("TP"), Cenikor Foundation, Inc. ("Cenikor"), Phoenix Houses of Texas, Inc. ("PHT"), David & Ivory Ministries, Inc. ("DIM"), Community Education Centers ("CEC"), and Human Resources Development Institute, Inc. ("HRDI") of the department's receipt of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestor. *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 Cenikor. We have considered the submitted arguments and reviewed the submitted information.

You claim the submitted score sheets are excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Section 552.104 generally does not except information relating to competitive bidding after a contract has been awarded and executed. *See* Open Records Decision No. 541 (1990). However, this office has determined that in some circumstances section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5.

In this instance, you inform us the submitted score sheets relate to a contract that has already been awarded and executed; thus, the score sheets do not pertain to a currently competitive bidding situation. You state, however, the department will begin a re-bid process in a few years for the same programs at issue in the score sheets, and the department will use the same score sheets to evaluate the future bids. You contend the release of the score sheets and their detailed evaluation criteria would give vendors an advantage in the bidding process and have a detrimental effect on the department's negotiating ability. Based on your representations, we conclude the department may withhold the submitted score sheets under section 552.104 of the Government Code.

Cenikor also argues that some of its information is excepted under section 552.104 of the Government Code. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* ORD 592 (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). Because the department did not assert section 552.104 for Cenikor's information, none of Cenikor's information may be withheld pursuant to section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

You claim the insurance policy numbers in the submitted bid proposals are excepted under section 552.136 of the Government Code, which provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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 conclude the insurance policy numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the department must withhold the marked insurance policy numbers in the submitted bid proposals under section 552.136 of the Government Code.

You and Cenikor contend some of the remaining information is excepted under section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137(c)(2) states an e-mail address "provided to a governmental body by a vendor who seeks to contract with the governmental body" is not excepted from public disclosure. *Id.* § 552.137(c)(2). You claim the e-mail addresses in the remaining information, and Cenikor claims the e-mail addresses in its information, are excepted under section 552.137. In this instance, however, the e-mail addresses at issue were provided to the department by vendors who sought to contract with the department, and are, thus, specifically excluded by section 552.137(c)(2). As such, the e-mail addresses at issue may not be withheld under section 552.137 of the Government Code. Cenikor also asserts its board of directors' cellular telephone numbers and home addresses contained in its information are confidential under section 552.137. We note, however, that section 552.137 does not apply to telephone

numbers or physical addresses. Thus, this information may not be withheld from Cenikor's information under section 552.137 of the Government Code.

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have received comments only from Cenikor explaining why its information at issue should not be released. Therefore, we have no basis to conclude any of the remaining notified companies have protected proprietary interests in their submitted information. *See id.* § 552.110; 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). Accordingly, the department may not withhold these companies' proposals on the basis of any proprietary interest they may have in them.

Cenikor claims the financial statements in its remaining information are excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (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." *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 a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.¹ Open Records Decision No. 402 (1983).

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 information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Cenikor indicates its financial statements are protected as trade secret information under section 552.110(a). Cenikor, however, has not provided any arguments explaining how its financial statements meet the definition of a trade secret. Furthermore, Cenikor has not provided any arguments demonstrating the factors necessary to establish a trade secret claim. Consequently, Cenikor has failed to demonstrate its financial statements are protected as a trade secret. Accordingly, the department may not withhold Cenikor's financial statements under section 552.110(a) of the Government Code.

Cenikor argues its financial statements are confidential commercial and financial information, the release of which would harm the company's future business dealings. Upon review, we find Cenikor has failed to provide specific factual evidence demonstrating release of the financial statements would result in substantial competitive harm to the company. *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,

¹The 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 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).

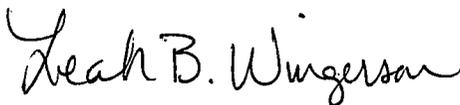
we determine Cenikor's financial statements may not be withheld under section 552.110(b) of the Government Code.

In summary, the department may withhold the submitted score sheets under section 552.104 of the Government Code, and must withhold the marked insurance policy numbers 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, 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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 363618

Enc. Submitted documents

c: Requestor
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