



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 20, 2009

Mr. James G. Nolan  
Deputy General Counsel  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2009-14847

Dear Mr. Nolan:

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# 358752.

The Comptroller of Public Accounts (the "comptroller") received a request for all bids submitted for a specified RFP and an additional request for the winning proposal and bid tabulation for the same RFP. You state you have released a portion of the requested information to the requestors. Although you take no position on the release of the submitted information, you state that it may contain confidential and proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you notified the interested third party, Business Ink, Co. ("Business Ink"), of this request for information and of the company's right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered arguments submitted by Business Ink and have reviewed the submitted information.

Initially, we note Business Ink seeks to withhold a Dun & Bradstreet report that was not submitted to this office by the comptroller. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the comptroller. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, Business Ink asserts that some of the submitted information is confidential because it was marked as "confidential" and Business Ink provided the comptroller with a redacted version for release. We note, however, information is not made confidential under the Act simply because the party submitting 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), *cert. denied* 430 U.S. 931 (1977); see also Open Records Decision Nos. 479 (1987) (information is not confidential under the Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1987) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110 of the Government Code). Consequently, unless the responsive information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Business Ink claims that section 552.110 is applicable to portions of the submitted information.<sup>1</sup> Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 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, 776 (Tex. 1958); see also Open Records Decision No. 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 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

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<sup>1</sup>Although Business Ink also asserts the submitted information is excepted as a trade secret under section 552.101 of the Government Code, the appropriate exception for arguing trade secret protection is section 552.110.

secret factors.<sup>2</sup> This office must accept a private person's claim for exception as valid under the trade secret branch of section 552.110 if that person establishes a *prima facie* case for exception 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) 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Business Ink seeks to withhold portions of the submitted information under section 552.110 of the Government Code. Upon review of the submitted information and arguments, we find that Business Ink has established a *prima facie* case that the information we have marked under section 552.110(a) consists of trade secret information. Accordingly, the comptroller must withhold the information we have marked under section 552.110(a). However, we conclude that Business Ink has failed to establish a *prima facie* case that any of the remaining information at issue is a trade secret protected by section 552.110(a) and has also failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to the company. *See* Open Records 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 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). Thus, we conclude that the comptroller may not withhold any of the remaining information under section 552.110 of the Government Code.

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<sup>2</sup>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];
- (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;
- and
- (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).

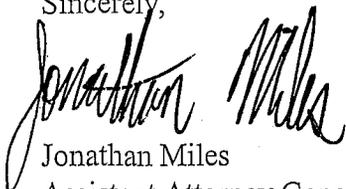
Next, Business Ink raises section 552.101 in conjunction with copyright law; however, we note that copyright law does not make information confidential under this section. *See* Open Records Decision No. 660 at 5 (1999). Upon review, we agree that some of the submitted information appears to be protected by copyright. Although a governmental body must allow inspection of copyrighted materials unless an exception applies to the information, a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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, the comptroller must withhold the information we have marked under section 552.110(a) of the Government Code. The comptroller must release the remainder of the submitted information to the requestors, but must comply with copyright law in so doing.

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, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/cc

Ref: ID# 358752

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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(w/o enclosures)