



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 16, 2009

Ms. Ashley D. Fourt  
Assistant District Attorney  
Tarrant County District Attorney's Office  
401 West Belknap  
Fort Worth, Texas 76196-0201

OR2009-17816

Dear Ms. Fourt:

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# 364386.

The Tarrant County Purchasing Department (the "department") received two requests for information pertaining to request for proposals no. 2009-111.<sup>1</sup> You state the department does not have any information responsive to the request for information submitted by Anacomp, Inc. or Brown's River.<sup>2</sup> The department takes no position on whether the submitted information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of ACS Government Records Services, Inc.; Digital Data; DocuData Solutions, LC ("DocuData"); ImageBASE, LLC; Louisiana Binding Service, Inc. ("Louisiana"); Reprographics Fort Worth; Scantiva, LLC; TELA Technologies ("TELA"); U.S. Imaging, Inc. ("U.S. Imaging"); and The Windward Group ("Windward"); (collectively, the "third parties"). Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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

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<sup>1</sup>We note that one of the requestors requested only the responses of six named companies. The other requestor requested all of the responses to the request for proposals.

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

circumstances). We have received comments from representatives for DocuData, Louisiana, TELA, U.S. Imaging, and Windward. We have considered the submitted arguments and have reviewed the submitted information.

Initially, 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it 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 any arguments from ACS Government Records Services, Inc.; Digital Data; ImageBASE, LLC; Reprographics Fort Worth; or Scantiva LLC. We, thus, have no basis for concluding that any portion of these companies' submitted information constitutes their proprietary 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. Accordingly, the department may not withhold any of the submitted information based on the proprietary interests of ACS Government Records Services, Inc.; Digital Data; ImageBASE, LLC; Reprographics Fort Worth; or Scantiva LLC.

Louisiana asserts that a portion of its information may not be disclosed because it was marked as confidential and provided to the department as confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released; notwithstanding any expectations or agreement specifying otherwise.

We understand Louisiana to assert its information is excepted under section 552.008(b) of the Government Code, which provides in part as follows:

[A] governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting individual member, agency, or committee . . . if the requesting member, agency or committee states that the public information is requested under [the Act] for legislative purposes. . . . The governmental body may require the requesting individual member of the

legislature, the requesting legislative agency or committee, or the members of employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

...

(2) the information be labeled as confidential[.]

Gov't Code § 552.008(b)(2). We note section 552.008(b) is not an exception to disclosure; rather, it provides for the release of information to an individual member, agency, or committee of the legislature who is seeking the requested information for "legislative purposes." Thus, no information may be withheld under section 552.008(b).

Louisiana also indicates its submitted information is confidential under section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code. 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 information protected by other statutes. Section 262.030(c) of the Local Government Code provides a competitive proposal procedure for the purchase of high technology items by a county, and states in pertinent part:

(c) If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such.

Local Gov't Code § 262.030(c). In general, section 552.101 only excepts information from disclosure where the express language of a statute makes certain information confidential or states that information shall not be released to the public. Open Records Decision No. 478 (1987). The plain language of section 262.030(c) does not expressly make bid proposals confidential. Section 262.030(c) only requires a governmental body to take adequate precautions to protect bid proposals from competing bidders. Accordingly, we determine that Louisiana's information is not confidential pursuant to section 262.030(c). Thus, the department may not withhold any portion of Louisiana's information pursuant to section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code.

We note the submitted information includes tax return information. Section 552.101 also encompasses information made confidential by section 6103(a) of title 26 of the United States Code, which provides that tax return information is confidential. *See* 26 U.S.C.

§ 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See, e.g.*, Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Therefore, the department must withhold the return information we marked pursuant to federal law.

We understand DocuData to claim information contained in its personnel resumes is excepted under section 552.101 in conjunction with common-law privacy. 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. We note that education, prior employment, and personal information are not ordinarily private information subject to section 552.101. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Upon review, we find that DocuData has failed to demonstrate that any of the information in its personnel resumes is intimate or embarrassing and of no legitimate public interest. Accordingly, the department may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Louisiana raises section 552.102 of the Government Code, which 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); *see also* *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Section 552.102 only applies to information in a personnel file of an employee of a governmental body. The information Louisiana seeks to withhold is not contained in the personnel file of a governmental employee. Thus, we determine that section 552.102 does not apply to any of Louisiana's information, and it may not be withheld on that basis.

DocuData, Louisiana, TELA, U.S. Imaging, and Windward all raise 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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

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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).

necessary factors have been demonstrated to establish a trade secret claim. *See* 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.* § 552.110(b); *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

DocuData, TELA, U.S. Imaging, and Windward all claim that portions of the submitted information consist of their trade secrets, excepted under section 552.110(a). Having considered these companies’ arguments, we find that DocuData and TELA have established a *prima facie* case that some of the customer information each company seeks to withhold, which we have marked, constitutes trade secrets. Therefore, the department must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note that DocuData has published the identities of some of its customers on its website. Thus, DocuData has failed to demonstrate that the information it has published on its website is a trade secret. Further, DocuData, TELA, U.S. Imaging, and Windward have failed to demonstrate that any of the remaining information each company seeks to withhold meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

DocuData, Louisiana, TELA, U.S. Imaging, and Windward contend that portions of the remaining information are excepted under section 552.110(b). Among other things, Louisiana argues the release of its information at issue would harm the department’s ability to obtain financial statements in response to future requests for proposals. In advancing this argument, Louisiana 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). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that 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). Thus, the ability of a governmental body

to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the third parties' interests in their information.

Upon review of the arguments of DocuData, Louisiana, TELA, U.S. Imaging, and Windward and the remaining information at issue, we find these companies have made only conclusory allegations that the release of the remaining information they seek to withhold would result in substantial damage to each company's competitive position. Thus, DocuData, Louisiana, TELA, U.S. Imaging, and Windward have not demonstrated that substantial competitive injury would result from the release of any of the remaining information at issue. *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), 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), 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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

We note that a portion of the submitted information is excepted under section 552.136 of the Government Code.<sup>4</sup> 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(b). Upon review, we find that the insurance policy numbers in the submitted information are access device numbers under section 552.136. Accordingly, the department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>5</sup>

Next, DocuData indicates that certain e-mail addresses in its response to the request for proposals are confidential. Section 552.137 of the Government Code provides in relevant part the following:

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>5</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . .[.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses DocuData seeks to withhold were provided to the department by DocuData in response to a request for proposals. *See id.* § 552.137(c)(3). Thus, the department may not withhold any of the e-mail addresses at issue under section 552.137.

Finally, we note that some of the remaining information appears to be 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. 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, the department must withhold the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The department must also withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released in accordance with copyright law.

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,



Laura Ream Lemus  
Assistant Attorney General  
Open Records Division

LRL/jb

Ref: ID# 364386

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

Ms. Marlyse Bassett  
DocuData Solutions  
7777 John Carpenter Freeway  
Dallas, Texas 75247  
(w/o enclosures)

Ms. Dalia Daly  
Scantiva, LLC  
930 North Belt Line Road, Suite 106  
Irving, Texas 75061  
(w/o enclosures)

Mr. Jim Snowden  
Digital Data Imaging  
2225 109<sup>th</sup> Street  
Grand Prairie, Texas 75050  
(w/o enclosures)

Mr. Jaime Flores  
TELA Technologies  
1110 North Post Oak, Suite 250  
Houston, Texas 77055  
(w/o enclosures)

Mr. Patrick R. Williams  
Louisiana Binding Service, Inc.  
300 Ampacet Drive  
DeRidder, Louisiana 70634  
(w/o enclosures)

Mr. Joseph Burke  
ImageBASE, LLC  
9145 East Kenyon Avenue, Suite 201  
Denver, Colorado 80237  
(w/o enclosures)

Mr. Kenneth Coomes  
Reprographics Fort Worth  
2220 West Peter Smith  
Fort Worth, Texas 76102  
(w/o enclosures)

Mr. Reed Roach  
ACS Government Records Services, Inc.  
2800 Mockingbird Lane  
Dallas, Texas 75235  
(w/o enclosures)

Mr. Chad Zerangue  
The Windward Group  
12901 Nicholson Road, #260  
Farmer Branch, Texas 75234  
(w/o enclosures)