



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2009

Ms. Sally Jo Hahn
Attorney
Texas Parks & Wildlife Department
4200 Smith Road
Austin, Texas 78744-3291

OR2009-18141

Dear Ms. Hahn:

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# 365824 (PIR 2009-10-R22).

The Texas Parks and Wildlife Department (the "department") received a request for the winning proposal pertaining to a specified request for proposals. You state you have released some of the requested information to the requestor.¹ Although you take no position with respect to the public availability of the remaining information, you state that release of this information may implicate the proprietary interest of Wattinger Service Company, Inc. ("Wattinger"). You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the department has notified Wattinger of the request and of the company's right to submit arguments to this office explaining why the submitted information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). Pursuant to section 552.305(d), we have received comments from Wattinger objecting to the release of its information. We have considered Wattinger's arguments and reviewed the submitted information.

¹We note that a social security number has been redacted from the information that you state you will release. 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.

First, Wattinger asserts that portions of its information are confidential because the documents were marked as such when they were submitted to the department. 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 the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Wattinger asserts that its financial information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is considered to be confidential under other law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). However, Wattinger has failed to direct our attention to any law, nor are we aware of any law, under which any of the information at issue is considered to be confidential for purposes of section 552.101. Therefore, none of the submitted information may be withheld under section 552.101 of the Government Code.

Next, Wattinger asserts that its employees’ resumes are excepted from disclosure under section 552.102 of the Government Code. 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); *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 Wattinger 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 this information, and it may not be withheld on that basis.

Wattinger also asserts that portions of its information 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. We note that section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision Nos. 592 (1991) (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). As the department does not raise section 552.104, this section is not applicable to the requested information. *See* ORD 592 (section 552.104 may be waived by governmental body). Therefore, the department may not withhold any of Wattinger’s information under section 552.104 of the Government Code.

Wattinger next asserts that its information is confidential 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: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. 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* 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 secret factors.² 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

²The 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; (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).

Decision No. 402 (1983). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) of the Government Code 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* 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).

Upon review, we find that Wattinger has established a prima facie case that its customer information, which we have marked, constitutes a trade secret. Therefore, the department must withhold the information we have marked in Wattinger's information pursuant to section 552.110(a) of the Government Code. However, we find that Wattinger has failed to demonstrate how any of its remaining information meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Upon review of Wattinger's arguments under section 552.110(b), we find that Wattinger has made only conclusory allegations that the release of any of its remaining information at issue would result in substantial damage to its competitive position. Thus, Wattinger has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *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 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of Wattinger's remaining information at issue may be withheld under section 552.110(b) of the Government Code.

Wattinger asserts portions of the remaining information are excepted from disclosure under section 552.136 of the Government Code, which 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). An access device number is one that 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, and includes an account number. *Id.* § 552.136(a). Upon review, we find Wattinger has failed to demonstrate how any of the remaining information is a credit card, debit card, charge card, or access device number for the purpose of section 552.136 of the Government Code. Thus, none of the remaining information may be withheld on that basis.

In summary, the department must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released to the requestor.

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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 365824

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Mr. Bill Weatherly
Wattinger Service Company, Inc.
114 Ralph Ablanado Drive
Austin, Texas 78748
(w/o enclosures)