



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 29, 2010

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002

OR2010-01427

Dear Mr. Swope:

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# 368743 (C.A. File No. 09GEN 2242).

The Harris County Purchasing Agent (the "county") received a request for copies of all responses received by Harris County with regard to request for proposals number 08/0511 for pre- and post-employment screening. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also explain that the submitted information may implicate the interests of K-Griff Investigations, Inc. ("K-Griff"), E-Verifile.com, Inc. ("E-Verifile"), and Prime Information Center ("Prime"). You inform us that you notified K-Griff, E-Verifile, and Prime of this 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); 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 the exceptions you claim and reviewed the submitted information. We have also considered comments from K-Griff, E-Verifile, and Prime.¹

Initially, we must address the county's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(b). Section 552.301(e) states,

¹We note that K-Griff, E-Verifile, and Prime submitted arguments regarding information beyond that which the county submitted to this office for our review. This ruling does not address such information, and is limited to the information submitted as responsive to the request by the county. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

within fifteen business days of receiving the request, the governmental body must submit to this office a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(D). You state that the county received the present request for information on October 5, 2009. However, you did not request a decision from this office or submit the information at issue until November 18, 2009. Consequently, the county failed to comply with the requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo, 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Forth Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-81 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.101 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will consider the applicability of this section to the submitted information. Further, because third party interests are at stake, we will consider whether the county must withhold any of the submitted information to protect the interests of K-Griff, E-Verifile, and Prime.

The county claims that the submitted information is excepted from disclosure 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." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 262.030(c) 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. Accordingly, we determine the submitted information is not confidential pursuant to section 262.030(c). Thus, the county may not withhold any portion of the

submitted information pursuant to section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code.

Although the county argues that the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we will address only K-Griff, E-Verifile, and Prime's arguments under section 552.110.

Turning to the arguments we received from third parties, K-Griff asserts that its information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the county, not the proprietary interests of private parties such as K-Griff. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the county did not raise section 552.104 as an exception to disclosure. Therefore, the county may not withhold any of the responsive information under section 552.104 of the Government Code.

K-Griff asserts that its information is excepted from disclosure pursuant to section 552.110 of the Government Code. E-Verifile and Prime assert that portions of their information are proprietary and, thus, excepted from disclosure. We will consider their arguments under section 552.110 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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).

The Supreme Court of Texas 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 single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a third party's claim for exception as valid under section 552.110(a) if the third party establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990). 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. *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).

E-Verifile contends that its client contact and pricing information constitutes proprietary information and requests that the information not be released. Based on E-Verifile's arguments and our review of the submitted information, we find that the county must withhold the information we have marked under section 552.110(b) of the Government Code.

K-Griff contends that portions of the responsive information are excepted from disclosure under section 552.110. Having considered K-Griff's arguments, we conclude that K-Griff has not established that the information at issue constitutes a trade secret under

²The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

section 552.110(a). We also find that K-Griff has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the responsive information would cause K-Griff substantial competitive harm. Furthermore, although Prime asserts that its information is proprietary in nature, Prime does not make any argument that the information at issue constitutes a trade secret or that the release of its information would cause it substantial harm. Accordingly, the county may not withhold any of the remaining information under section 552.110 of the Government Code.

We note some of the submitted bid information is excepted from disclosure under section 552.136 of the Government Code, which 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.”³ Gov’t Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Therefore, the county must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code.⁴

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, the county must withhold the information we have marked under section 552.110(b) of the Government Code. The county also must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code. The county must release the remaining information; however, any information that is protected by copyright may only be released in accordance with copyright law.

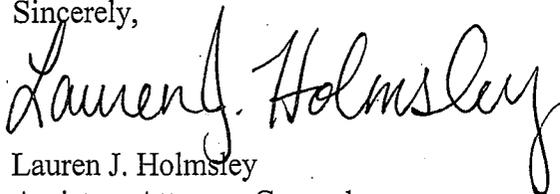
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

³The 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).

⁴We 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.

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,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

Ref: ID# 368743

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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