



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2010

Mark Adams
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2010-03370

Dear Mr. Adams:

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# 370822.

The Office of the Governor (the "governor") received a request for any correspondence between the governor and GlobalWatt, Inc. ("GlobalWatt") or any representative or potential representative of GlobalWatt, related to the possible location of a GlobalWatt facility within the State of Texas. You claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also indicate that the release of the submitted information may implicate the proprietary interests of GlobalWatt. Accordingly, you state you have notified GlobalWatt of the governor's receipt of the request for information and of its right to submit arguments to this office as to why the 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 GlobalWatt objecting to the release of its information. We have considered all of the submitted arguments, as well as the submitted information.

Both the governor and GlobalWatt argue that the submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code. However, section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation,

and not interests of private parties submitting information to government). Thus, we will not consider GlobalWatt's arguments under section 552.104. *See* ORD 592 at 8. However, we will address the governor's arguments under section 552.104 for the submitted information.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1987), 463, 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

You state that the information at issue involves the Texas Enterprise Fund ("TEF"), which provides monetary incentives for companies coming to Texas. You indicate that numerous businesses have requested TEF funds and, as such, are competing against each other for those funds. You claim that release of the submitted information would give an advantage to another competitor seeking TEF funds. However, we note that at the time the governor received the present request, GlobalWatt had already been denied funds from the TEF. Thus, we find that there was not a competitive situation pertinent to the records at issue occurring at the time of the request, and we determine that the governor may not withhold any of the information at issue on that basis. Furthermore, we find you have not established that the governor has specific marketplace interests with respect to GlobalWatt's corporate documents or TEF application. We, therefore, find the information at issue is not excepted on that basis. Thus, the governor may not withhold any of the submitted information under section 552.104 of the Government Code.

Turning to GlobalWatt's arguments, 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 2. 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.¹ 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 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

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 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).

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* ORD 661 at 5-6.

GlobalWatt contends that a portion of its information consists of trade secrets excepted under section 552.110(a). Having considered GlobalWatt’s arguments and the submitted information, we conclude that they have demonstrated that the information we have marked fits within the definition of a trade secret. Thus, the governor must withhold the information we have marked under section 552.110(a) of the Government Code.

GlobalWatt also argues that the submitted information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review of GlobalWatt’s arguments and the submitted information, we find GlobalWatt has established that the release of certain financial information, which we have marked, would cause it substantial competitive injury. However, we find GlobalWatt has made only general conclusory allegations that release of the remaining information would cause substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See* Gov’t Code § 552.110; ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, market studies, experience, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the governor must withhold only the information we have marked under section 552.110(b) of the Government Code.

Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business

prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because we have already disposed of GlobalWatt's claims under section 552.110, the governor may not withhold any of the remaining information under section 552.131(a) of the Government Code.

We note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the governor does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the submitted information is excepted under section 552.131(b) of the Government Code.

We also note that section 552.136 of the Government Code is applicable to some of the remaining information.² Section 552.136(b) provides that "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked a bank account and routing number that the governor must withhold under section 552.136.³

GlobalWatt also claims that the name of its bank is confidential under section 552.101. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. GlobalWatt has not directed our attention to any law under which any of the information at issue is considered to be confidential for the purposes of section 552.101. *See Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy).* Therefore, the governor may not withhold any of the submitted information pursuant to section 552.101 of the Government Code.

²Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See Gov't Code §§ 552.007, 352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).*

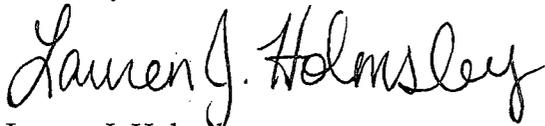
³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a bank account number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the governor must withhold the information we have marked under section 552.110(a) of the Government Code. The governor must withhold the financial information we have marked under section 552.110(b) of the Government Code. The governor also must withhold the information we have marked under section 552.136 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,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

Ref: ID# 370822

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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