



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2010

Mr. Ronald J. Bounds
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2010-04466

Dear Mr. Bounds:

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# 374086.

The City of Corpus Christi (the "city") received a request for the prospective vendors' submissions and other information relating to a specified request for proposals. You state that some of the requested information either has been or will be released. You take no position on the public availability of the submitted information. You believe, however, that the submitted information may implicate the interests of third parties.¹ You state that the third parties concerned were notified 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.²

¹You inform us that the third parties concerned are Great-West Retirement Services ("Great-West"); The Hartford Insurance Company ("Hartford"); ICMA Retirement Corporation ("ICMA"); ING Life Insurance and Annuity Company ("ING"); and Lincoln Financial Group Advisors Corporation ("Lincoln").

²See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

We received correspondence from Hartford and ING. We have considered their arguments and reviewed the information you submitted.³

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Great-West, ICMA, or Lincoln. Thus, because those parties have not demonstrated that any of the information at issue is proprietary for the purposes of the Act, none of the submitted information may be withheld on the basis of any proprietary interest that Great-West, ICMA, or Lincoln may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address Hartford's and ING's claims under section 552.110 of the Government Code.⁴ This exception 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

³We note that the submitted records include information that the requestor's company submitted to the city. Because we assume that the requestor does not seek access to his company's information, this decision does not address the public availability of that information.

⁴We note that Hartford also cites section 552.305 of the Government Code, which is not an exception to disclosure. Section 552.305 permits a governmental body that requests a decision to rely on interested third parties to claim and argue exceptions. *See* Gov't Code § 552.305(a)-(c).

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 private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.⁵ *See* ORD 552 at 5. We cannot conclude that section 552.110(a) is applicable, however, 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).

^We note that pricing information is generally not a trade secret under section 552.110(a) 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Both Hartford and ING contend that some of the information they submitted to the city should be withheld under section 552.110. Having considered the parties' arguments and reviewed the information at issue, we have marked information contained in their proposals and in the CD labeled "Additional Info[r]mation] at Issue" that must be withheld under section 552.110(b). We find that neither Hartford nor ING has demonstrated that any of the remaining information at issue constitutes a trade secret under section 552.110(a). We also find that neither of the parties has made the specific factual or evidentiary showing required

⁵The 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).

by section 552.110(b) that release of any of the remaining information would cause substantial competitive harm. We therefore conclude that the city may not withhold any of the remaining information under section 552.110. *See* Gov't Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 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 was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

We note that section 552.136 of the Government Code is applicable to some of the remaining information.⁶ 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.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded that insurance policy numbers constitute access device numbers for the purposes of this exception. We have marked insurance policy numbers the city must withhold under section 552.136.⁷

We also note that some of the remaining information appears to be protected by copyright law. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the city must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The rest of the submitted information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.

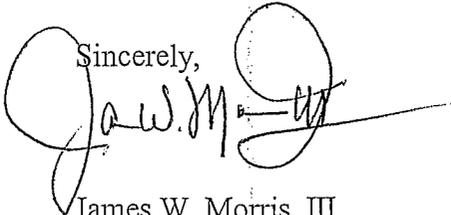
⁶Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁷We note that 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 an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 374086

Enc: Submitted information

c: Requestor
(w/o enclosures)

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