



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 29, 2010

Ms. Griselda Sanchez  
Assistant City Attorney  
City of San Antonio  
9800 Airport Boulevard, MO63  
San Antonio, Texas 78216-4897

OR2010-06193

Dear Ms. Sanchez:

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# 377466 (COSA File No. 10-0112).

The City of San Antonio (the "city") received a request for specified proposals and scoring sheets of the reviewing committee. Although you take no position with respect to the submitted information, you state release of the information may implicate the proprietary interests of several third parties. Accordingly, you state you notified the interested third parties of the city's receipt of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestors.<sup>1</sup> *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 B&G stating it does not object to release of its information. We have also received arguments from HDS, Host, McDonald's, and Sbarro. We have reviewed the submitted information and considered the submitted arguments.

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<sup>1</sup>The interested third parties are: B&G Fit Food Ventures, LLC ("B&G"); Edwin Enterprise, Inc. ("Edwin"); HDS and Partners at SA, L.L.P. ("HDS"); Host International, Inc. ("Host"); JDDA Concession Management, Inc. ("JDDA"); McDonald's USA, LLC ("McDonald's"); Pacific Gateway Concessions, LLC ("Pacific"); and Sbarro America, Inc./Seven Hills, Inc. ("Sbarro").

Initially, you inform us the requestor has excluded insurance certificates, insurance policy numbers, proposal bond and bond numbers, federal identification numbers and other tax identification numbers, discretionary contracts disclosure forms, and all financial information, including historic balance sheets and historic profit and loss information, from his request. In addition, you have submitted information that does not pertain to the requested proposals. Thus, this information is not responsive to this request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note that you have not submitted information pertaining to the scoring sheets. To the extent any additional information responsive to the requested scoring sheets existed on the date the city received this request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(a), (b). We note the city received the request for information on January 24, 2010 but did not request a ruling from our office until February 23, 2010. Although you state the city sought clarification from the requestor on January 29, 2010, you do not inform us when the city received clarification of the request. *See id.* § 552.222 (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). As we have no indication that the city acted in bad faith in seeking clarification, we consider the city's ten-day period for requesting a decision under section 552.301(b) to have commenced on the date the city received the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, No. 07-0931, 2010 WL 571972, at \*3 (Tex. February 19, 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). However, we cannot determine when the city received the requestor's clarification. In this instance, we need not determine whether a procedural violation occurred because third party interests can provide a compelling reason to overcome the presumption of openness caused by the failure to comply with section 552.301. *See* Gov't Code §§ 552.301, .302. Accordingly, we will consider whether or not the information at issue is excepted under the Act.

Next, we note that a portion of the information McDonald's seeks to withhold was not submitted by the city to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is

limited to the information submitted by the city. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). However, we will address McDonald's arguments against the disclosure of the information submitted by the city.

Next, 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received any comments from Edwin, JDDA, or Pacific explaining why their proposals should not be released. Therefore, we have no basis to conclude that these companies have protected proprietary interests in their submitted 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 city may not withhold these companies' proposals on the basis of any proprietary interest Edwin, JDDA, or Pacific may have in them.

Sbarro claims its information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. In this instance, Sbarro does not present any arguments against disclosure under that section nor has Sbarro directed our attention to any law under which any of its information 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). In addition, we note this office has concluded section 552.101 does not encompass discovery privileges or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990). Accordingly, none of Sbarro's information may be withheld under section 552.101 of the Government Code.

We note a portion of HDS's proposals 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 city must withhold the tax return information we marked in HDS’s proposals pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

We understand Host to claim that its employees’ resumes are confidential under common-law privacy.<sup>2</sup> Section 552.101 also 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 determine that Host has failed to demonstrate that any of the information in its employees’ resumes is intimate or embarrassing and of no legitimate public interest. Therefore, we find the city may not withhold any portion of the information at issue under section 552.101 in conjunction with common-law privacy.

Host and Sbarro raise section 552.104 of the Government Code. This section excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of 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 city does not seek to withhold any information pursuant to this exception, no portion of Host’s or Sbarro’s information may be withheld on this basis.

HDS, Host, McDonald’s, and Sbarro claim portions of their proposals are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the

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<sup>2</sup>Although Host cites to section 552.305 of the Government Code, we understand Host to raise section 552.101 of the Government Code, as that is the proper exception for the substance of its argument. We further note that section 552.305 is not an exception to disclosure. See Gov’t Code § 552.305. Section 552.305 addresses the procedural requirements for notifying third parties that their interests may be affected by a request for information. See *id.*

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.<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 necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

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<sup>3</sup>The 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).

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).

HDS, Host, McDonald’s, and Sbarro contend that various portions of their proposals contain trade secret information protected under section 552.110(a). Upon review of the submitted information and arguments, we determine the companies have failed to demonstrate any portion of the information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. We 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 business,” rather than “a process or device for continuous use in the operation of the business.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Accordingly, the city may not withhold any of the submitted information on the basis of section 552.110(a) of the Government Code.

We next address HDS’s, Host’s, McDonald’s, and Sbarro’s argument to withhold portions of their information under section 552.110(b). Upon review, we find that McDonald’s has established that release of its pricing information would cause it substantial competitive injury. Therefore, this pricing information, which we have marked, must be withheld under section 552.110(b). Although HDS, Host, and Sbarro all argue against disclosure of their pricing information, we note these companies were winning bidders in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Furthermore, we find HDS, Host, McDonald’s, and Sbarro have failed to provide specific factual evidence demonstrating that release of any of the remaining information at issue would result in substantial competitive harm to their interests. *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), 319 at 3 (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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, we determine

that no portion of the remaining information at issue is excepted from disclosure under section 552.110(b) of the Government Code.

Host claims that portions of its information are confidential under section 552.128 of the Government Code. Section 552.128 is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). However, Host does not indicate it submitted its proposal in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

*Id.* § 552.128(c). In this instance, Host submitted its proposal to the city in connection with a specific proposed contractual relationship with the city. We therefore conclude that the city may not withhold any portion of Host’s proposal under section 552.128 of the Government Code.

Host indicates that certain e-mail addresses in its proposal are confidential. Section 552.137 of the Government Code provides in relevant part the following:

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

Finally, we note a portion 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 (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 city must withhold the tax return information we marked in HDS's proposals pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the pricing information we have marked in McDonald's proposal under section 552.110(b) of the Government Code. The remaining responsive information must be released, but 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.

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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/eeg

Ref: ID# 377466

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Greg Hamer Jr.  
B&G Fit Food Ventures, LLC  
P.O. Drawer 3608  
Morgan City, Louisiana 70381  
(w/o enclosures)

Edwin Enterprises, Inc.  
c/o Griselda Sanchez  
Assistant City Attorney  
City of San Antonio  
9800 Airport Boulevard, MO63  
San Antonio, Texas 78216-4897  
(w/o enclosures)

Mr. Rob Killen  
Kaufman & Killeen, Inc.  
Counsel for HDS & Partners at SAT LLC  
1250 Frost bank Tower  
100 West Houston Street  
San Antonio, Texas 78205  
(w/o enclosures)

Mr. Bernard N. Brown  
Host International, Inc.  
Law Department, Mail Stop 7-1  
6805 Rockledge Drive  
Bethesda, Maryland 20817  
(w/o enclosures)

JDDA Concessions Management, Inc.  
c/o Griselda Sanchez  
Assistant City Attorney  
City of San Antonio  
9800 Airport Boulevard, MO63  
San Antonio, Texas 78216-4897  
(w/o enclosures)

Mr. Mark A. Meister  
McDonald's USA, LLC  
2915 Jorie Boulevard  
Oak Brook, Illinois 60523  
(w/o enclosures)

Pacific Gateway Concessions, LLC  
c/o Griselda Sanchez  
Assistant City Attorney  
City of San Antonio  
9800 Airport Boulevard, MO63  
San Antonio, Texas 78216-4897  
(w/o enclosures)

Mr. Stuart M. Steinberg  
Sbarro American Inc./Seven Hills, Inc.  
401 Broadhollow Road  
Melville, New York 11747  
(w/o enclosures)