



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 6, 2010

Mr. R. Brooks Moore  
Deputy General Counsel  
The Texas A&M University System  
200 Technology Way, Suite 2079  
College Station, Texas 77845-3424

OR2010-06556

Dear Mr. Moore:

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# 378259.

The Texas A&M University System (the "system") received a request for all proposals submitted for a specified request for proposals along with the name of the company that was awarded the contract. Although you state the system takes no position with respect to the public availability of the submitted proposals, you state their release may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the interested third parties of the request and of their right to submit arguments to this office as to why their information should not be released.<sup>1</sup> *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received correspondence from Crosswind, Griffin, Hollinden, and RJC. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>The interested third parties are: Crosswind Communications ("Crosswind"); Griffin Communications Group ("Griffin"); Hollinden Marketing Solutions ("Hollinden"); RJC Advertising ("RJC"); Common Sense, Inc.; Double Dimond Public Relations, L.L.C.; Hill & Knowlton; Keena & Company; Marek & Company; Phillips & Company; Vollmer Public Relations, Inc.; and Weber Shandwick.

We note 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Crosswind, Griffin, Hollinden, and RJC explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in the 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 system may not withhold any portion of the submitted information on the basis of any proprietary interests that the remaining third parties may have in this information.

First, we understand Hollinden to assert that portions of its information are confidential because the documents were marked as such when they were submitted to the system. 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.

Next, Hollinden asserts that portions of its information are 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 section 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). This office has found personal financial information not relating to a financial transaction between an individual and a governmental body are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We note that common-law privacy protects the privacy interests of individuals, but not of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also U. S. v.*

*Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). However, the financial information of a company that is an individual or sole proprietorship is confidential under common-law privacy. *See Morton*, 338 U.S. at 652; ORD 620. Hollinden asserts that it is a sole proprietorship; therefore, it argues its financial information pertains to an individual. We note the information at issue consists of Hollinden's annual sales volume, which was required to be submitted to the system in response to the request for proposals. Thus, we find there is a legitimate public interest in this information. Accordingly, no portion of Hollinden's information that is at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Hollinden also asserts its financial information is excepted from disclosure under constitutional privacy. Section 552.101 also encompasses constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find Hollinden has not demonstrated how any of the remaining information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the system may not withhold any of Hollinden's information under section 552.101 on the basis of constitutional privacy.

Crosswind, Hollinden, and RJC assert that portions of their proposals are 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.<sup>2</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). 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 Huffines*, 314 S.W.2d at 776; 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

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<sup>2</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).

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).

Crosswind and Hollinden contend that various portions of their proposals contain trade secret information protected under section 552.110(a). Hollinden argues its strategic process is "the 'blueprint' by which Hollinden renders its services," and this information is held confidential by Hollinden and is not disclosed as part of its general business practices. Upon review, we find Hollinden has demonstrated its strategic process, which we have marked, constitutes a trade secret for purposes of section 552.110(a). Accordingly, the system must withhold the information we have marked in Hollinden's proposal under section 552.110(a) of the Government Code. However, Hollinden has failed to establish how any of its remaining information at issue meets the definition of a trade secret or demonstrated the necessary factors under section 552.110(a). Accordingly, no portion of Hollinden's remaining information may be withheld under section 552.110(a) of the Government Code.

Crosswind generally claims portions of its information should be withheld as trade secrets under section 552.110(a). However, Crosswind has failed to demonstrate that its information meets the definition of a trade secret under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"). Thus, no portion of Crosswind's information may be withheld under section 552.110(a) of the Government Code.

We next address Crosswind's and RJC's arguments to withhold portions of their information under section 552.110(b). Crosswind explains, and provides specific examples of how, its phase adoption pages reveal information that, if released, would give their competitors an advantage and could cause Crosswind to either fail in future bids or have to reduce its revenues in order to win such bids. Crosswind also argues against disclosure of its pricing information; however, we note Crosswind was the winning bidder 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). RJC generally states its proposal includes commercial and financial information, and it did not intend for this information to be disclosed to the public. After reviewing the submitted arguments and the information at issue, we find Crosswind has established release of portions of its information would cause the company substantial competitive injury. Therefore, the system must withhold the information we have marked in Crosswind's proposal under section 552.110(b). However, we find Crosswind and RJC have failed to demonstrate that release of any of their 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.

Next, Hollinden contends that the e-mail addresses of the company's references in its response to the request for proposals are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 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 Hollinden seeks to withhold were provided to the system by Hollinden in response to a request soliciting offers. *See id.* § 552.137(c)(3). Thus, the system may not withhold any of the e-mail addresses at issue under section 552.137. *See id.* § 552.137(c).

Griffin and Hollinden both claim that portions of their information are excepted from disclosure under section 552.147 of the Government Code. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147(a).<sup>3</sup> Thus, the system may

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<sup>3</sup>We note that section 552.147(b) authorizes a governmental body to redact a social security number of a living person from public release without requesting a decision from our office. *Id.* § 552.147(b).

withhold the social security numbers in the submitted information under section 552.147 of the Government Code. However, we find that Hollinden has failed to demonstrate that its federal employee identification number ("FEIN") constitutes a social security number for purposes of section 552.147; therefore, the system may not withhold Hollinden's FEIN on this basis.

We note that some 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 system must withhold the information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The system may withhold the social security numbers in the submitted information under section 552.147 of the Government Code. The remaining information must be released to the requestor, 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,



Adam Leiber  
Assistant Attorney General  
Open Records Division

ACL/rl

Ref: ID# 378259

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

c: Ms. Maribeth Lipscomb  
Common Sense, Inc.  
5906 Ross Avenue  
Dallas, Texas 75206  
(w/o enclosures)

Mr. Thomas Graham  
Crosswind Communications  
701 Brazos, Suite 500  
Austin, Texas 78701  
(w/o enclosures)

Ms. Margot Dimond  
DoubleDimond Public Relations, L.L.C.  
2180 North Loop West, Suite 210  
Houston, Texas 77018  
(w/o enclosures)

Ms. Patsy Thomas  
Griffin Communications Group  
3101 NASA Parkway, Suite L  
Seabrook, Texas 77586  
(w/o enclosures)

Mr. Mike Breslin  
Hill & Knowlton  
1001 Fannin Street, Suite 500  
Houston, Texas 77002  
(w/o enclosures)

Ms. Christine Hollinden  
Hollinden Marketing Solutions  
1115 Barkdull Street, Suite G  
Houston, Texas 77006  
(w/o enclosures)

Ms. Keena Collins  
Keena & Company  
9210 Stone Post Circle  
Houston, Texas 77064  
(w/o enclosures)

Ms. Annemarie Marek  
Marek & Company  
6928 Cornelia Lane  
Dallas, Texas 75214  
(w/o enclosures)

Mr. Richard J. Phillips  
Phillips & Company  
5900 Southwest Parkway, Suite 121  
Austin, Texas 78735  
(w/o enclosures)

Ms. Pamela L. Schneider  
RJC Advertising  
1120 Pennsylvania Northeast  
Albuquerque, New Mexico 87110  
(w/o enclosures)

Ms. Helen Vollmer  
Vollmer Public Relations, Inc.  
808 Travis Street Suite 501  
Houston, Texas 77002  
(w/o enclosures)

Ms. Jody Venturoni  
Weber and Shandwick  
1717 Main Street, Suite 1600  
Dallas, Texas 75201  
(w/o enclosures)