



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 22, 2010

Mr. Mario R. Gutierrez  
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Alamo Area Council of Governments  
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OR2010-09064

Dear Mr. Gutierrez:

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# 383655.

The Alamo Area Council of Governments ("AACOG") received two requests for proposals submitted in response to RFP 2010-001 and RFP 2009-002 relating to the Weatherization Assistance Program (the "WAP"). The first requestor only seeks two responses to RFP 2010-001. The second requestor seeks all responses to both RFPs, copies of both RFPs, copies of contracts awarded under the RFPs, certain information pertaining to the WAP, and recordings of two specified meetings. You state AACOG does not possess any information in response to the request for certain information pertaining to the WAP and contracts awarded for the 2010-001 RFP.<sup>1</sup> You further state some information will be released to the second requestor. You claim portions of the submitted information are excepted from disclosure under section 552.137 of the Government Code. You also claim release of the submitted information may implicate the proprietary interests of Bratton Construction, Inc. ("Bratton"); Glenn's A/C Service & Consulting, Inc.; Business World Company; A.D. Willems Construction, Inc.; M&M Weatherization Company; Ram's Weatherization & Construction; Efficient Attic Systems; American GI Forum; Tidewater, LLC; and Williams Insulation (collectively, the "third parties"). Accordingly, you notified the third parties of

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

the requests and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received arguments from Bratton. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you requested and received clarification from the first requestor and requested clarification from the second requestor regarding a portion of his request seeking contract information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). We understand AACOG has not yet received a response from the second requestor to its request for clarification as of the date you requested this decision. Accordingly, AACOG has no obligation at this time to release any information that might be responsive to this portion of the request. But if AACOG receives clarification and wishes to withhold any of the information encompassed by the clarified request, then you must request another decision from this office. *See id.* §§ 552.301, .302; *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that 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).

Next, 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, this office has only received comments from Bratton. None of the remaining third parties have submitted comments explaining why their proposals should not be released. Therefore, we have no basis to conclude these third parties have a protected proprietary interest 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, AACOG may not withhold any portion of the submitted proposals based upon the proprietary interests of the remaining third parties.

Next, we address Bratton's arguments against release of its proposal submitted in response to RFP 2010-001. Bratton raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or

bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As AACOG does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Bratton's proposal. *See* ORD 592 (governmental body may waive section 552.104). Accordingly, none of Bratton's proposal may be withheld under section 552.104.

Bratton also raises section 552.110 of the Government Code for portions of its proposal. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5. However, we cannot conclude section 552.110(a) applies unless it has been shown 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) of the Government Code excepts from disclosure “[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). 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 requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Bratton contends its letter of transmittal, company profile, pricing, materials information, work experience, financial and technical resources, insurance information, certification information, and its own request to be added to AACOG’s bidder list qualify as trade secret information under section 552.110(a). We note pricing information pertaining to a particular proposal or 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3. Although Bratton states this information is closely guarded by its company and contends disclosure of this information would allow competitors to tailor their bids, we find Bratton has failed to demonstrate any portion of its proposal meets the definition of a trade

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<sup>2</sup>The 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 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).

secret. Therefore, AACOG may not withhold any portion of Bratton's proposal under section 552.110(a).

Bratton also claims the above listed portions of its proposal are excepted from disclosure under section 552.110(b). Upon review of Bratton's arguments and the information at issue, we find Bratton has failed to provide specific factual evidence demonstrating that release of any of its information would result in substantial competitive harm to the company. *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), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder, such as Bratton, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *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). Accordingly, AACOG may not withhold any portion of Bratton's proposal pursuant to section 552.110(b).

We note portions of the submitted proposals are subject to sections 552.101, 552.130, and 552.136 of the Government Code.<sup>3</sup> 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. Section 552.101 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. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to,

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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, . . . of 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). Thus, we find AACOG must withhold the tax return information we have marked pursuant to federal law.

The submitted information also contains copies of permanent resident cards, subject to section 1304(b) of title 8 of the United States Code, which is also encompassed by section 552.101 of the Government Code. Section 1304(b) of title 8 of the United States Code addresses the confidentiality of the registration documentation of aliens under section 1301 of the United States Code and provides:

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

- (1) pursuant to section 1357(f)(2) of this title, and
- (2) to such persons or agencies as may be designated by the Attorney General.

8 U.S.C. § 1304(b). Permanent resident cards are listed in section 264.1(b) of title 8 of the Code of Federal Regulations as documents that constitute evidence of registration. 8 C.F.R. § 264.1(b). We therefore conclude the copies of permanent resident cards, which we have marked, are registration records subject to the confidentiality provision of section 1304(b) of title 8 of the United States Code.

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which makes criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center confidential. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Gov’t Code § 411.083. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. See *id.* Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See

*generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with Government Code chapter 411, subchapter F. We have marked information AACOG must withhold pursuant to section 552.101 in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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 the financial transaction between an individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523(1989), 373 (1983). The submitted information contains the ownership percentages and incomes of individual partners of a partnership. We therefore conclude AACOG must withhold the partners' personal financial information, which we have marked, under section 552.101 in conjunction with common-law privacy.

Next, we note the submitted information also contains Texas motor vehicle record information. Section 552.130 of the Government Code provides "[i]nformation is excepted from [required public disclosure] if the information relates to . . . a motor vehicle operator's or driver's license [or] motor vehicle title or registration issued by an agency of this state[.]" Gov't Code § 552.130(a)(1), (2). We note section 552.130 does not apply to out-of-state driver's license information. We have marked Texas motor vehicle record information within the submitted documents. Accordingly, AACOG must withhold the information we have marked under section 552.130.

The submitted proposals also contain bank account and insurance policy numbers. Section 552.136 of the Government Code 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." *Id.* § 552.136. This office has concluded bank account and insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, AACOG must withhold the bank account and insurance policy numbers we have marked under section 552.136.

You raise section 552.137 of the Government Code for e-mail addresses within the submitted documents. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Subsection (c)(3) provides subsection (a) does not apply to an e-mail address contained in a response to a request for

bids or proposals[.]” *Id.* § 552.137(c)(3). The e-mail addresses you seek to withhold are specifically excluded by subsection (c). Consequently, AACOG may not withhold any e-mail addresses within the submitted information under section 552.137(a).

We also note portions of the submitted proposals 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, AACOG must withhold (1) the tax return information we have marked under section 552.101 of the Government Code in conjunction section 6103(a) of title 26 of the United States Code; (2) copies of the permanent resident cards we have marked under section 552.101 in conjunction with section 1304(b) of title 8 of the United States Code; (3) the information we have marked under section 552.101 in conjunction with chapter 411 of the Government Code; and (4) the partners’ personal financial information we have marked under section 552.101 in conjunction with common-law privacy. AACOG must also withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code and the bank account and insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>4</sup> The remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.<sup>5</sup>

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

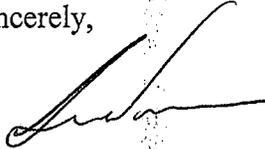
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<sup>4</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: Texas driver’s license numbers and copies of Texas driver’s licenses under section 552.130 of the Government Code, and bank account and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>5</sup>We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code §552.147.

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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 383655

Enc. Submitted documents

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