



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2010

Ms. Susan Camp-Lee
Sheets & Crossfield, P.C.
For City of Round Rock
309 East Main Street
Round Rock, Texas 78664-5246

OR2010-09719

Dear Ms. Camp-Lee:

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# 384945 (W000420-041310).

The City of Round Rock (the "city"), which you represent, received a request for all proposals and related information pertaining to a specified request for proposals ("RFP"), as well as the evaluation forms and rankings for all bidders. You state some information will be released to the requestor. Although you take no position on the public availability of the submitted information, you state that the information at issue may implicate the interests of third parties.¹ Accordingly, you state, and submit documentation showing, that you notified these third parties of the request for information and of their right to submit arguments to this office as to why their submitted 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); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from HyperGen and Oracle. We have considered the submitted arguments and reviewed the submitted information.

¹The interested third parties are as follows: CIBER, Inc.; Empower Solutions; ERP Analysts, Inc.; eVerge Group of Texas, Ltd.; HyperGen, Inc. ("HyperGen"); Integrated Technology Partners; Mahindra Satyam; Mo'mix Solutions; Neos Consulting Group; Oracle USA, Inc. ("Oracle"); Peak Performance Technologies; Plante & Moran, PLLC; PMCS Services, Inc.; Sierra Systems; Smart ERP Solutions; Synch-Solutions; Synthasys; and Varsun eTechnologies.

Initially, we note that 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from CIBER, Inc., Empower Solutions, ERP Analysts, Inc., eVerge Group of Texas, Ltd., Integrated Technology Partners, Mahindra Satyam, Mo'mix Solutions, Neos Consulting Group, Peak Performance Technologies, Plante & Moran, PLLC, PMCS Services, Inc., Sierra Systems, Smart ERP Solutions, Synch-Solutions, Synthasys, or Varsun eTechnologies. We, thus, have no basis for concluding that any portion of the submitted information constitutes the proprietary information of these third parties. *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 any of the submitted information based on any proprietary interests these companies may have in it.

Next, we note the submitted proposal pertaining to Empower Solutions was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-06547 (2010). In that decision, we ruled that the city must withhold a portion of the proposal at issue under section 552.136 of the Government Code, and release the remaining information. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the city must continue to rely on that ruling as a previous determination and continue to treat any previously ruled upon information in accordance with that prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address the submitted arguments for the submitted information not previously ruled on.

Oracle raises section 552.102(a) of the Government Code for a portion of its information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In this instance, the information at issue is related to a private entity, Oracle. Therefore, the city may not withhold any portion of Oracle's information under section 552.102(a) of the Government Code.

HyperGen raises section 552.101 of the Government Code for a portion of its submitted information. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101; *see* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). However, HyperGen has not directed our attention to, nor are we aware of, any law under which any of its information is considered to be confidential for the purposes of section 552.101. We, therefore, conclude that the city may not withhold any of HyperGen's information under section 552.101 of the Government Code.

Oracle also argues that a portion of its information implicates privacy interests. Common-law privacy is encompassed by section 552.101 of the Government Code and protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Oracle has not demonstrated that any of the information at issue is intimate or embarrassing and of no legitimate public interest. Likewise, Oracle has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of its submitted information confidential under section 552.101. Therefore, the city may not withhold any portion of Oracle's information on that basis under section 552.101.

HyperGen also asserts that portions of its information are excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the city, not the proprietary interests of private parties such as HyperGen. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the city does not raise section 552.104 as an exception to disclosure. Therefore, the city may not withhold any of HyperGen's information under section 552.104 of the Government Code.

HyperGen and Oracle also assert that portions of their information are excepted under section 552.110 of the Government Code. 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exception is made, and no argument is submitted that rebuts the claim as a matter of law. ORD 552. 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. *See* 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 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. *See* ORD 661.

HyperGen and Oracle argue that portions of their information constitute protected trade secrets. Upon review, we find that HyperGen and Oracle have established *prima facie* cases that portions of their respective customer information and Oracle’s methodologies and technical approaches, which we have marked, constitute trade secrets. Accordingly, the city must withhold the information we have marked pursuant to section 552.110(a). However, we note that Oracle has made some of the customer information they seek to withhold publicly available on their website. Because Oracle has published this information, Oracle has failed to demonstrate that release of this information would cause substantial competitive injury. *See* ORD 402. In addition, HyperGen and Oracle have failed to demonstrate that any portion of their remaining information at issue constitutes a trade secret. Thus, no portion of their remaining information may be withheld under section 552.110(a) of the Government Code.

HyperGen and Oracle also seek to withhold portions of their submitted information under section 552.110(b). Upon review, we conclude HyperGen and Oracle have established the release of their respective pricing information would cause them substantial competitive injury; therefore, the city must withhold this information, which we have marked, under section 552.110(b). However, we find that HyperGen and Oracle have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *See* Open Records Decision No. 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, therefore, conclude that the city may not withhold any of their remaining information under section 552.110(b) of the Government Code.

HyperGen asserts that portions of its remaining information are excepted under section 552.131 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 HyperGen's claims under section 552.110, the city may not withhold any of HyperGen's 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 city does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of HyperGen's information is excepted under section 552.131(b) of the Government Code.

We note the remaining information contains insurance policy numbers.² Section 552.136(b) of the Government Code states 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). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, the city must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code.³

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

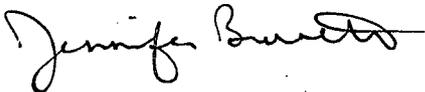
Finally, we note that portions of the submitted information appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow 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 continue to rely on Open Records Letter No. 2010-06547 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. The city must withhold the information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The city must also withhold the information we have marked under section 552.136 of the Government Code. The city must release the remaining information, 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, 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 384945

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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