



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 10, 2010

Ms. Julie Renkin  
County Attorney  
Washington County  
100 East Main, Suite 200  
Brenham, Texas 77833

OR2010-13788

Dear Ms. Renkin:

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# 393159.

The Washington County Judge's Office (the "county") received a request for proposals submitted by Aramark Correctional Services, LLC ("Aramark") and Five Star Correctional Services, Inc. ("Five Star") in response to a specified request for proposals. Although you take no position with respect to the public availability of the submitted information, you state that the submitted documents may contain proprietary information of third parties subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the county notified Aramark and Five Star of the request for information and of the companies' right to submit arguments to this office as to why the submitted information should not be released. *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). Aramark and Five Star have responded to this notice. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the county's procedural obligations under the Act. Section 552.301 of the Government Code prescribes 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(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)–(D). You indicate the county received the request for information on June 23, 2010. Accordingly, the fifteen-business-day deadline was July 14, 2010. However, you did not submit the requested information to this office until August 12, 2010. *See id.* § 552.308(b) (prescribing standards for timeliness of action by United States mail, interagency mail, or common or contract carrier). Consequently, the county failed to comply with the requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third-party interests may be at stake, we will consider whether any of the requested information must be withheld on those grounds.

Five Star argues that its submitted information is confidential because it submitted its proposal to the county with the understanding that the information would remain confidential. 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.

We understand Five Star to claim that portions of its information are excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law

privacy. 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. 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). The types of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find that none of the submitted information is highly intimate or embarrassing, and it may not be withheld under section 552.101 of the Government Code on the basis of common-law privacy.

Next, we understand Five Star to claim its information is excepted from disclosure under section 552.101 of the Government Code on the basis of common-law copyright law. However, copyright law does not make information confidential for purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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. Thus, the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with copyright law, but any information that is protected by copyright may only be released in accordance with copyright law.

Aramark and Five Star claim portions of their submitted information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110(a) protects trade secrets 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. 1957); *see also* Open Records Decision 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

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.

*Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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 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).

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. *Id.*; *see also* Open Records Decision 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of Aramark’s and Five Star’s arguments, we find the information we have marked must be withheld as trade secrets under section 552.110(a) of the Government Code. We note, however, that Five Star states some of the remaining information it seeks to withhold is specifically tailored to each customer. We note that 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 (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, we find Five Star has not demonstrated that its remaining information constitutes a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (defining a trade secret as a process or device for continuous use in the operation of the business); ORD 552 at 5-6. Furthermore, we note Aramark has made some of its information it seeks to withhold publicly available on its website. Because Aramark has published this information, it has failed to demonstrate that this information is a trade secret. Upon review, we find that Aramark has failed to demonstrate how its remaining information meets the definition of a trade secret, nor has Aramark demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the county may not withhold any of the remaining information at issue under section 552.110(a).

Aramark and Five Star claim release of some of their remaining information would cause the companies substantial competitive harm. Upon review, we conclude Five Star has established that release of some of its remaining information would cause the company substantial competitive injury. Therefore, the county must withhold the information we have marked under section 552.110(b). However, Aramark and Five Star have made only general conclusory allegations that release of the remaining information at issue would cause the companies substantial competitive injury and have provided no specific factual evidence to support such allegations. We, therefore, conclude that none of the remaining information may be withheld under section 552.110(b) of the Government Code.

We note the remaining information contains 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.”<sup>1</sup> 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 purposes of section 552.136. Accordingly, the county must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>2</sup>

In summary, the county must withhold the information we have marked under sections 552.110 and 552.136 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,



Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>2</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 insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 393159

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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