



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 28, 2011

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

**The ruling you have requested has  
been amended as a result of litigation  
and has been attached to this document.**

OR2011-01511

Dear Mr. Smith:

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# 407356.

The Texas Health and Human Services Commission (the "commission") received two requests for the final contract awarded, as well as the names of bidders who submitted proposals, for request for proposals number 529-08-0208. You state you will release most of the requested information to the requestors. You also state release of this information may implicate the proprietary interests of Deloitte Consulting, LLP ("Deloitte"). Accordingly, you have notified Deloitte of the request and of its right to submit arguments to this office as to why its 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 Deloitte. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the commission's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the 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. *See* Gov't Code § 552.301(e). In this instance, you state the commission received the initial request for information on November 4, 2010. You did not, however, submit a copy of the information requested until December 22, 2010. Thus, we find the commission failed to comply with the requirements of section 552.301.

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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *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 are at stake in this instance, we will address whether the submitted information must be withheld to protect the interests of Deloitte.

Deloitte raises section 552.110 of the Government Code for portions of its information. 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 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>1</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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) 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 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).

Deloitte asserts that portions of the submitted information constitute trade secrets that are excepted from disclosure under section 552.110(a). Upon review, we find that Deloitte has failed to demonstrate how any of its information meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. *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 2 (information relating to organization, personnel, market studies, professional references,

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<sup>1</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)*.

qualifications, experience, and pricing not excepted under section 552.110). We note that 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; ORD Nos. 319 at 3, 306 at 3. Therefore, Deloitte has failed to establish that any portion of the submitted information constitutes a protected trade secret under section 552.110(a) of the Government Code, and none of the submitted information may be withheld on that basis.

Deloitte argues that release of portions of its information would cause the company substantial competitive harm. Upon review of the arguments and information at issue, we find that Deloitte has established that portions of its information, which we have marked, constitute commercial or financial information, the release of which would cause Deloitte substantial competitive injury. However, Deloitte has provided no specific factual or evidentiary showing that the release of its remaining information would result in substantial competitive injury to its company. See Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, 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. Accordingly, the commission must withhold only the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

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\\_or1.php](http://www.oag.state.tx.us/open/index_or1.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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 407356

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

Ms. Jennifer Keane  
Attorney for Deloitte Consulting, LLP  
Baker Botts, L.L.P.  
98 San Jacinto Boulevard, Suite 1500  
Austin, Texas 78701  
(Third Party w/o enclosures)

JAN 07 2014

At 1:36pm M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-11-000375

DELOITTE CONSULTING LLP,  
*Plaintiff,*

v.

GREG ABBOTT, ATTORNEY GENERAL  
OF THE STATE OF TEXAS,  
*Defendant.*

§ IN THE DISTRICT COURT OF  
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§  
§ TRAVIS COUNTY, TEXAS  
§  
§  
§ 98<sup>TH</sup> JUDICIAL DISTRICT

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**AGREED FINAL JUDGMENT**

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Deloitte Consulting LLP (Deloitte Consulting), sought to withhold certain information which is in the possession of the Health and Human Services Commission (HHSC) from public disclosure. All matters in controversy between Plaintiff, Deloitte Consulting, and Defendant Greg Abbott, Attorney General of Texas (Attorney General), arising out of this lawsuit have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of this Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(e), the Attorney General sent a certified letter to the requestors, Mr. Mike Reitz and Ms. Shari McMillian, on \_\_\_\_\_, 2013, informing each of them of the setting of this matter on the uncontested docket on this date. The requestors were informed of the parties' agreement that HHSC must withhold the designated portions of the information at issue. The requestors were also

informed of their right to intervene in the suit to contest the withholding of this information. Copies of the certified mail receipts are attached to this motion.

Neither requestor has filed a motion to intervene. Tex. Gov't Code § 552.325(d) requires the Court to allow a requestor a reasonable period to intervene after notice is attempted by the Attorney General.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED, AND DECLARED THAT:

1. Deloitte Consulting and the Attorney General have agreed that in accordance with the PIA and under the facts presented, the Attorney General will instruct HHSC that HHSC must withhold Deloitte Consulting's Cost Accounting Standards Board Disclosure Statement and certain marked numbers and percentages that constitute Deloitte Consulting's financial data (including Indirect Rates, Fringe Benefit Rates, and Profit Percentages). The financial data to be withheld is described in greater detail in Exhibit A. The Attorney General will provide HHSC with a copy of the information with the agreed-upon numbers and percentages marked as information that must be redacted.

2. The Attorney General will instruct HHSC that it must withhold (1) the information described above in Paragraph 1 and (2) the information that the Attorney General marked for withholding pursuant to Letter Ruling OR2011-01511. Letter Ruling OR2011-01511 remains valid to the extent it determined that certain information is excepted from public disclosure. However, Letter Ruling OR2011-01511 should not be

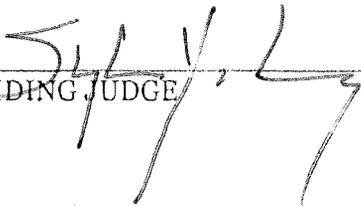
relied upon by HHSC as a prior determination of the Office of the Attorney General under Tex. Gov't Code § 552.301(f).

3. All court costs and attorney fees are taxed against the parties incurring the same.

4. All relief not expressly granted is denied.

5. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between Deloitte Consulting and the Attorney General and is a final judgment.

SIGNED the 7 day of Jan, 2014.

  
PRESIDING JUDGE

AGREED:

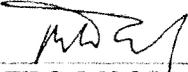


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*Attorney for Plaintiff, Deloitte Consulting LLP*

CAUSE NO. D-1-GN-11-000375

DELOITTE CONSULTING LLP,  
*Plaintiff,*

§ IN THE DISTRICT COURT OF  
§  
§  
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§ TRAVIS COUNTY, TEXAS  
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§  
§ 98<sup>TH</sup> JUDICIAL DISTRICT

v.

GREG ABBOTT, ATTORNEY GENERAL  
OF THE STATE OF TEXAS,  
*Defendant.*

**SETTLEMENT AGREEMENT**

This Settlement Agreement (Agreement) is made by and between Deloitte Consulting LLP (Deloitte Consulting) and Greg Abbott, Attorney General of Texas (the Attorney General). This Agreement is made on the terms set forth below.

**Background**

On November 4, 2010, Mike Reitz made a request for Deloitte Consulting's contract with the Health and Human Services Commission (HHSC) for TIERS Software Development and Technical Support Services under the Public Information Act (PIA). A second request was made for the same information by Shari McMillian on December 27, 2010. HHSC made Deloitte Consulting aware of both requests.

HHSC asked for an open records ruling from the Attorney General, pursuant to the PIA, Tex. Gov't Code § 552.301. Deloitte Consulting submitted comments to the Attorney General, asserting, in pertinent part, that the information was excepted from disclosure by Tex. Gov't Code § 552.110.

In Letter Ruling OR2011-01511, the Open Records Division of the Attorney General (ORD) allowed Deloitte Consulting to withhold limited information under § 552.110, but required it to release the remaining information Deloitte Consulting claims is proprietary. The Attorney General found that Deloitte Consulting failed to

meet its burden of showing that the information met the definition of a trade secret and that Deloitte Consulting's claim that it would suffer substantial competitive harm was not supported by a specific factual or evidentiary showing.

Deloitte Consulting disputed the ruling and filed the above-styled and captioned lawsuit to preserve its rights under the PIA.

Deloitte Consulting submitted additional information to the Attorney General establishing that the information described below was confidential under Tex. Gov't Code § 552.110. The Attorney General has reviewed Deloitte Consulting's request and agrees to the settlement.

Tex. Gov't Code § 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

#### **Terms**

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Pursuant to Tex. Gov't Code § 552.110, the Attorney General will instruct HHSC that HHSC must withhold (1) Deloitte Consulting's Cost Accounting Standards Board Disclosure Statement and (2) certain marked numbers and percentages that constitute Deloitte Consulting's financial data (the "Financial Data"). The Financial Data consists of Deloitte Consulting's Indirect Rates, Fringe Benefit Rates, and Profit Percentages. Deloitte Consulting submitted the Financial Data to HHSC in connection with HHSC's TIERS proposal. Within Deloitte Consulting's submissions to HHSC, the Financial Data can be found in Deloitte Consulting's best and final offer ("BAFO") at Exhibits D-1, D-2, and D-3 of the worksheet titled "1. Total Price Summary," and in

Section 2 of Deloitte Consulting's Price Proposal, Addendum 5, p. 3-6. The Attorney General will provide HHSC with a copy of the information with the agreed upon numbers and percentages marked as information that must be redacted.

2. The Attorney General will instruct HHSC that it must withhold (1) the information described above in Paragraph 1 and (2) the information that the Attorney General marked for withholding pursuant to Letter Ruling OR2011-01511. Letter Ruling OR2011-01511 remains valid to the extent it determined that certain information is exempted from public disclosure. However, Letter Ruling OR2011-01511 should not be relied upon by HHSC as a prior determination of the Office of the Attorney General under Tex. Gov't Code § 552.301(f).

3. Deloitte Consulting and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney and attached hereto. The agreed final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestors.

4. The Attorney General agrees that he will notify the requestors, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of their right to intervene to contest Deloitte Consulting's right to have HHSC withhold the information.

5. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

6. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

7. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as

an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

8. Deloitte Consulting warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that Deloitte Consulting has against the Attorney General out of the matters described in this Agreement.

9. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against Deloitte Consulting arising out of the matters described in this Agreement.

10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

DELOITTE CONSULTING LLP

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS

By: Aldila Lobo  
name: Aldila Lobo  
title: Principal

By: Kimberly Fuchs  
name: Kimberly Fuchs  
title: Assistant Attorney General,  
Administrative Law Division

Date: 11/19/2013

Date: 12/11/13