



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2011

Ms. YuShan Chang
Assistant City Attorney
City of Houston Legal Department
P.O. Box 368
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OR2011-12884

Dear Ms. Chang:

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# 429042 (ORR# 18696).

The City of Houston (the "city") received a request for information pertaining to a request for proposal bid number TS-EW0320101 Advertising, Marketing and Public Relations Services. You state some of the requested information is confidential under section 552.101 of the Government Code, but do not take a position as to whether the remaining information is excepted from disclosure under the Act. You inform us you notified the following third parties of the city's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: Airport Access, Inc.; Artisan Field Visual Communications; Berning Marketing, LLC ("Berning"); Burson-Maisteller, LLC; Carreño Group, Inc.; Creatis, Inc.; Edelman; Fleishman-Hillard, Inc. ("Fleishman"); Griffin Communications Group ("Griffin"); Hill & Knowlton Texas; Limb Design ("Limb"); Marion Montgomery, Inc.; Pierpont Communications, Inc. ("Pierpont"); Richards/Carlberg ("Richards"); Steel Advertising & Interactive, Inc.; Vollmer Public Relations, Inc.; Weber Shandwick Worldwide ("Weber"); and Yaffe Deutser ("Yaffe").¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (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). In correspondence to this office, Berning, Fleishman, Griffin, Limb, Pierpont, Richards, Weber, and Yaffe assert some of their requested information is

¹You inform us the city awarded the contract at issue to Burson-Maisteller, LLC.

excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.147 of the Government Code. We have reviewed the submitted arguments and information.

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 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 arguments from any of the remaining third parties explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of the remaining companies, and the city may not withhold any portion of the submitted information on that basis. *See* 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, 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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including section 6103(a) of title 26 of the United States Code, which renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or 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 (the "IRS") regarding a taxpayer's liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589 F.2d 827, 840-41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). The submitted information contains federal tax forms that fall under the definition of tax return information. *See* 26 U.S.C. § 6103(b). Thus, the city must withhold these forms, which we have marked, under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.² Pierpont also seeks to withhold information regarding its revenue on this ground because it is "supported by the tax return information" at issue. Limb also asserts

²As our ruling is dispositive, we do not address the remaining arguments to withhold this information.

some of its remaining information is tax return information. However, we find the remaining information does not contain tax return information that is confidential under section 6103. Therefore, the city may not withhold any of the remaining information under section 552.101 on that ground.

Section 552.101 also 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 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. This office has also found the personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *E.g.*, Open Records Decision Nos. 600 (1992), 545 (1990). We note, however, the names, addresses, and telephone numbers of members of the public are not excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers not protected under privacy). In addition, the doctrine of common-law privacy protects the privacy interests of individuals, 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 FCC v. AT&T Inc.*, 131 S.Ct. 1177, 1185 (2011) ("The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations."). Upon review, we find none of the remaining information is highly intimate or embarrassing. Therefore, the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

Fleishman argues some of its information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 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 a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). The city did not assert section 552.104; therefore, the city may not withhold any of the information at issue pursuant to that section. *See* ORD 592 (governmental body may waive section 552.104).

Berning, Fleishman, Limb, Richards, Weber, and Yaffe claim some of their remaining information is excepted from disclosure 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: 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.” 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person’s claim for exception as valid under that branch 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 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) 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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or

³The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6.

Berning asserts its financial information is excepted from disclosure under section 552.110 of the Government Code. However, it has provided no arguments explaining the applicability of this section to its information. *See* Gov't Code § 552.305. Thus, we conclude Berning has not established any of its information is excepted from disclosure on that ground. We also note Fleishman and Yaffe have made some of their customer information publicly available on their websites. Because these companies themselves published this information, we are unable to conclude such information is proprietary. In addition, some of the information Limb seeks to withhold pertains to customers who appear in testimonials or are references for that company. Thus, we find Limb has not established the information pertaining to these customers is excepted from disclosure under section 552.110. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to professional references). However, upon review of the submitted arguments, we find Artison, Fleishman, Limb, and Weber have established release of some of the information at issue would cause substantial competitive injury. Therefore, city must withhold this information, which we have marked, under section 552.110(b). However, although Fleishman, Limb, and Weber assert some of the remaining information is confidential under section 552.110(a), we conclude none of these companies has shown any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.110(a). In addition, although Fleishman, Limb, Richards, Weber, and Yaffe assert some of the remaining information is excepted from disclosure under section 552.110(b), these companies have each made only conclusory allegations that release of the information at issue would cause substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See id.* § 552.110(b). Thus, the city may not withhold any of the remaining information from release pursuant to section 552.110(a) or (b).

The submitted information contains insurance policy numbers. Section 552.136(b) 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.”⁴ The city must withhold the insurance policy numbers we have marked under section 552.136.⁵

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

⁵We note this office 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 opinion.

Finally, we note some of the materials at issue may 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. Open Records Decision No. 180 at 3 (1977). 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.

To conclude, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code and under sections 552.110 and 552.136 of the Government Code. The city must release the remaining information, but any copyrighted information 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,



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Open Records Division

JLC/dls

Ref: ID# 429042

Enc. Submitted documents

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