



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2012

Ms. Tiffany N. Evans
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OR2012-01537

Dear Ms. Evans:

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# 443940 (GC No. 19116).

The City of Houston (the "city") received a request for the names of vendors that were awarded a specified contract and the winning proposals submitted by those vendors. Although you take no position on whether the requested information is excepted from disclosure, you state release of this information may implicate the proprietary interests of A-1 Personnel of Houston, Inc. ("A-1"); Also Temps, Inc. ("Also Temps"); Bergaila & Associates, Inc. ("Bergaila"); ExecuTeam Staffing L.P. ("ExecuTeam"); Lane Staffing, Inc. ("Lane"); Logan Britton, Inc. ("Logan"); ObjectWin Technology, Inc. ("ObjectWin"); Precision Task Group ("Precision"); Silver & Associates Consulting, Inc. ("Silver"); S&R Professionals, Inc. ("S&R"); and Topp Knotch Personnel, Inc. ("Topp Knotch"). Accordingly, you notified these companies of the request and of their right to submit arguments to this office as to why the 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 ExecuTeam, ObjectWin, Precision, S&R, and Topp Knotch. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge the city failed to meet the deadline prescribed by section 552.301(e) of the Government Code in requesting an open records decision from this office. *See* Gov't Code § 552.301(e). 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 the governmental body demonstrates a compelling reason 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). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because third party interests are at stake, we will address whether the submitted information must be withheld to protect the interests of the third parties.

Next, we note the proposals submitted by A-1, ExecuTeam, ObjectWin, Precision, and S&R were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-03195 (2011). In that ruling, we determined the city must withhold the information we marked under section 552.110(b) of the Government Code, section 552.101 of the Government Code in conjunction with (1) section 6103 of title 26 of the United States Code and (2) common-law privacy, and section 552.136 of the Government Code, and release the remaining information in accordance with copyright law. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling as to A-1 and S&R's proposals was based, we conclude the city must rely on Open Records Letter No. 2011-03195 as a previous determination for A-1 and S&R's proposals and continue to withhold or release that information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (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). With regard to the proposal submitted by ObjectWin, we note ObjectWin previously objected to the release of sections H, I, J, L, O, and Q of its proposal. Thus, as we have no indication that there has been any change in the law, facts, or circumstances on which that portion of our previous ruling as to the proposal submitted by ObjectWin was based, we also conclude the city must continue to rely on Open Records Letter No. 2011-03195 as a previous determination for sections H, I, J, L, O, and Q of ObjectWin's proposal, and withhold or release that information in accordance with the previous ruling. *See* ORD 673 at 6-7. However, we note that in Open Records Letter No. 2011-03195, ObjectWin did not raise any exceptions for sections E.1, N, and V of its proposal. Furthermore, we note the city notified ExecuTeam and Precision pursuant to section 552.305 when the city received the previous request for information, and ExecuTeam and Precision failed to submit any arguments objecting to the release of their proposals. Accordingly, we determine in our previous ruling that, except for information subject to sections 552.101 and 552.136 of the Government Code, the city must release, among other

things, sections E.1, N, and V of ObjectWin's proposal and the proposals submitted by ExecuTeam and Precision. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. ExecuTeam now claims portions of its proposal are excepted under sections 552.101, 552.104, and 552.128 of the Government Code, and both ExecuTeam and Precision claim portions of their proposals are excepted under section 552.110 of the Government Code. Further, ObjectWin now claims sections E.1, N, and V of its proposal are excepted under sections 552.101 and 552.110. Section 552.104 is a discretionary exception that protects a governmental body's interests and does not make information confidential under the Act. *See* Gov't Code § 552.104; Open Records Decision 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to section 552.104 could be waived). Thus, the city may not now withhold under section 552.104 any information that was previously released. However, because information subject to sections 552.101, 552.110, and 552.128 is deemed confidential by law, we will address ExecuTeam's, ObjectWin's, and Precision's respective claims under these exceptions.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received comments from Also Temps, Bergaila, Lane, Logan, or Silver. Thus, these companies have not demonstrated that they have protected proprietary interests in any of their submitted information. *See id.* § 552.110(a)-(b); 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 the submitted information on the basis of any proprietary interests Also Temps, Bergaila, Lane, Logan, or Silver may have in the information.

We understand ExecuTeam to argue its submitted information is confidential because ExecuTeam expected the information to be confidential. We note information is not confidential under the Act simply because the party submitting 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, through an

agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 Gov’t Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

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 section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders “tax return information” confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). “Tax return information” is defined 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[.]” 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). Consequently, the city must withhold the tax return information we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.¹

We note the remaining records contain information subject to common-law privacy. Section 552.101 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. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600, 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction

¹As our ruling is dispositive for this information, we do not address the remaining arguments against its disclosure.

between individual and governmental body protected under common-law privacy). Upon review, we find a portion of the remaining information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold this information pursuant to section 552.101 in conjunction with common-law privacy.

ExecuTeam raises section 552.101 of the Government Code for its remaining information. Further, we understand ObjectWin raises section 552.101 for some of its remaining information. However, neither ExecuTeam nor ObjectWin has directed our attention to any law, nor are we aware of any law, under which any of this information is considered to be confidential for purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold any of the remaining information under section 552.101.

ExecuTeam, ObjectWin, Precision, and Topp Knotch each assert some of the remaining information is 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). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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 also Huffines*, 314 S.W.2d at 776; 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 the 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 (1939); *see also* 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 exemption 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.* § 552.110(b); *see also* ORD 661 at 5 (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).

As mentioned above, ExecuTeam’s, ObjectWin’s, and Precision’s proposals were subject to Open Records Letter No. 2011-03195. In the prior ruling, the city notified ExecuTeam, ObjectWin, and Precision of the request for information pursuant to section 552.305 of the Government Code. Both ExecuTeam and Precision failed to submit any arguments objecting

to the release of their proposals. Additionally, ObjectWin did not object to the release of sections E.1, N, and V of its proposal. Since the issuance of the previous ruling on March 7, 2011, ExecuTeam, ObjectWin, and Precision have not disputed this office's conclusion regarding the release of the information in their proposals, and we presume that, in accordance with that ruling, the city has released the proposals. In this regard, we find ExecuTeam, ObjectWin, and Precision have not taken necessary measures to protect their proposals in order for this office to conclude that any portion of that information now qualifies as either a trade secret or commercial or financial information, the release of which would cause ExecuTeam, ObjectWin, and Precision substantial competitive harm. *See* Gov't Code § 552.110, RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the city may not withhold any information in ExecuTeam's, ObjectWin's, or Precision's proposals under section 552.110 of the Government Code.

Upon review of Topp Knotch's arguments, we find Topp Knotch has not demonstrated the remaining information it seeks to withhold constitutes trade secrets for purposes of section 552.110(a). *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). Thus, the city may not withhold any of the remaining information under section 552.110(a). Further, we conclude Topp Knotch has not established by a factual or evidentiary showing that release of the remaining information it seeks to withhold would cause it substantial competitive injury for purposes of section 552.110(b). *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show 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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

ExecuTeam also raises section 552.128 of the Government Code for portions of its remaining information. Section 552.128 is applicable to "[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]" Gov't Code § 552.128(a). However, ExecuTeam does not indicate it submitted its proposal in connection with an application for certification under such a program. Moreover, section 552.128(c) provides:

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on

a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, ExecuTeam submitted its proposal to the city in connection with a specific proposed contractual relationship with the city. We therefore conclude the city may not withhold any portion of ExecuTeam's information under section 552.128.

Section 552.136 of the Government Code states "[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(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we find the city must withhold the account numbers, credit card numbers, and insurance policy numbers we have marked in the remaining information under section 552.136.

We note some of the remaining information appears 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. 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.

In summary, with regards to the proposals submitted by A-1 and S&R, the city must rely on Open Records Letter No. 2011-03195 as a previous determination and continue to withhold or release the proposals submitted by A-1 and S&R in accordance with that ruling. With regards to sections H, I, J, L, O, and Q of ObjectWin's proposal, the city must rely on Open Records Letter No. 2011-03195 as a previous determination and continue to withhold or release that information in accordance with that ruling. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with (1) section 6103(a) of title 26 of the United States Code and (2) common-law privacy. The city must also withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright may be released only 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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ACV/dls

Ref: ID# 443940

Enc. Submitted documents

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