



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Ms. Janet I. Monteros  
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OR2012-04556

Dear Ms. Monteros:

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# 448876.

El Paso County (the "county") received two requests for the bid tabulation, including vendor pricing, and all bid responses for RFP 11-042. You state some information has been released to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.136 of the Government Code. You further state release of the requested information may implicate the interests of third parties. Accordingly, you notified the following third parties of the requests for information and of their right to submit arguments stating why their information should not be released: Confirm BioServices ("Confirm"); Syntron Bioresearch ("Syntron"); True Result Screening Services ("True Result"); Redwood Toxicology Laboratory ("Redwood"); MEDTOX Laboratories ("Medtox"); Branan Medical Corporation ("Branan"); American Screening Corporation ("American"); and Phamatech Laboratories ("Phamatech"). *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received comments from Phamatech, Redwood, Medtox, and

Syntron. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.104 of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not exempt information from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated that the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates that public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (1982) (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

In this instance, you inform us the submitted information concerns a specific competitive procurement for which the contract has now been executed; thus, this information does not pertain to a currently competitive bidding situation. However, you claim the county solicits bids for the same types of services at issue in the submitted information on a regular and ongoing basis. You do not indicate the frequency with which the county solicits bids for the types of services at issue in the submitted information. Further, you have not specified how release of the information you have marked, the majority of which pertains to a bidder other than the winning bidder, would harm the county’s negotiating position in future bidding situations. Thus, you have failed to demonstrate the applicability of section 552.104 to the marked information.

Section 552.136 provides “[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.” Gov’t Code § 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

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<sup>1</sup>We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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). Although you claim the tax identification number constitutes an access device number, you have not submitted any arguments explaining how this number can be used to obtain money, goods, services, or another thing of value. Therefore, the county may not withhold the tax identification number on the basis of section 552.136 of the Government Code.

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 id.* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from Confirm, True Results, Branam or American. Thus, we have no basis to conclude Confirm, True Results, Branam or American has a protected proprietary interest in their proposals. *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 the 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 county may not withhold any of the information at issue on the basis of any proprietary interest Confirm, True Results, Branam or American may have in the information.

Both Phamatech and Redwood raise section 552.104 of the Government Code as an exception to disclosure. However, section 552.104 protects the competitive interests of a governmental body such as the county, not the interests of private parties such as Phamatech and Redwood. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitted information to government), 552 (1989) (discretionary exceptions generally). As previously addressed, the county failed to demonstrate the applicability of section 552.104 of the Government Code.

Phamatech, Redwood, and Medtox raise section 552.110 of the Government Code for portions of their proposals. Section 552.110 protects the proprietary interests of private parties by exempting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (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.” *See* Gov’t Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument 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 the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.<sup>2</sup> Open Records Decision No. 402 (1983). Medtox raises section 552.110(a) and states its references, training information, and course offerings are trade secrets. We find Medtox has established a *prima facie* case that the customer information, which we have marked constitutes a trade secret. However, we find Medtox has failed to establish a *prima facie* case that its training information and course offerings constitute trade secrets. Accordingly, the county must withhold the customer information under section 552.110(a) but may not withhold Medtox's training information or course offerings on the basis of section 552.110(a) of the Government Code.

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

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<sup>2</sup>The Restatement of Torts lists the following six factors 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).

§ 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); 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). Phamatech, Redwood, and Medtox each raise section 552.110(b) of the Government Code.

Phamatech and Redwood both argue disclosure of the requirements sections of their bids, and other portions of the bids indicating turnaround time, contents of collection kits, capability to provide supplies, time for providing test results, and composition of testing devices would cause substantial harm to their competitive positions. In advancing this argument, Phamatech and Redwood rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, in making a determination under subsection 552.110(b), we will consider only the third party's interest in withholding its information.

Phamatech, Redwood, and Medtox each raise section 552.110(b). We find Medtox has demonstrated release of its pricing information, which we have marked, would cause substantial competitive injury. We find Phamatech has demonstrated release of its customer and pricing information, which we have marked, would cause substantial competitive injury. However, Phamatech has failed to demonstrate how release of information indicating its turnaround time, contents of collection kits, capability to provide supplies, time for providing test results, and composition of testing devices would cause substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by 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). We find Redwood has established release of its customer information, which we have marked, would cause substantial

competitive injury. Accordingly, Redwood's customer information must be withheld under section 552.110(b). However, we find Redwood has failed to demonstrate how release of information indicating its turnaround time, contents of collection kits, capability to provide supplies, time for providing test results, and composition of testing devices would cause substantial competitive injury. Redwood also raises section 552.110(b) as an exception to disclosure of its pricing information. We note the contract at issue was awarded to Redwood. This office considers the price charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the county may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Phamatech and Redwood generally raise section 552.101 as an exception to disclosure of information indicating their turnaround times, contents of collection kits, capability to provide supplies, times for providing test results, and compositions of testing devices. However, Phamatech and Redwood do not cite to any specific law, and we are not aware of any, that makes such information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating information shall not be released to the public). Phamatech and Redwood also claim this information is private. Phamatech and Redwood are both corporations. The right to privacy is primarily designed to protect human sensibilities rather than business interests. Corporations do not have a right to privacy. *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 United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Therefore, we conclude the county may not withhold Phamatech's or Redwood's information indicating turnaround time, contents of collection kits, capability to provide supplies, time for providing test results, and composition of testing devices under section 552.101 of the Government Code.

Syntron also raises section 552.101 of the Government Code as an exception to disclosure of its federal tax identification number and information regarding its laboratory vendors and internal procedures. Syntron does not cite to any specific law, and we are not aware of any, that makes such information confidential. *See* ORD 478. Therefore, we conclude the county may not withhold Syntron's tax identification number or information regarding its laboratory vendors and internal procedures under section 552.101 of the Government Code.

You state some of the information 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.

In summary, the county must withhold Medtox's customer information under section 552.110(a) of the Government Code. The following information we have marked must be withheld under section 552.110(b) of the Government Code: Medtox's pricing information, Phamatech's customer and pricing information, and Redwood's customer information. The remaining information must be released; however, any information 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,



Jessica Marsh  
Assistant Attorney General  
Open Records Division

JM/som

Ref: ID# 448876

Enc. Submitted documents

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