



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 5, 2012

Mr. Stephen A. Cumbie  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street, 3<sup>rd</sup> Floor  
Fort Worth, Texas 76102

OR2012-15963

Dear Mr. Cumbie:

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# 467059 (CFW PIR Nos W018578, W019693, W020169).

The City of Fort Worth (the "city") received three requests for information related to RFP 12-0129. The first requestor seeks all submitted proposals, and the other two requestors seek vendor evaluations and the winning proposal. You state you are releasing the vendor evaluations. You further state you will redact information subject to section 552.136 of the Government Code.<sup>1</sup> Although you take no position as to the public availability of the submitted information, you state release of this information may implicate the proprietary interests of third parties. Thus, pursuant to section 552.305 of the Government Code, you state you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released.<sup>2</sup> Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to

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<sup>1</sup>Section 552.136 authorizes a governmental body to redact the information described in section 552.136(b) without the necessity of seeking an attorney general decision. *See* Gov't Code § 552.136(b). If a governmental body redact such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

<sup>2</sup>The third parties notified pursuant to section 552.305 are: Allied International Credit Corp; GC Services Limited Partnership; Gila LLC d/b/a Municipal Services Bureau; Harris & Harris, LTD; Linebarger, Goggan, Blair & Sampson; McCreary, Veselka, Bragg & Allen, P.C.; National Action Financial Services, NRA Group, LLC d/b/a National Recovery Agency; Penn Credit Corporation; Perdue, Brandon, Fielder, Collins & Mott, LLP; and TaxServ Capital Services VA, LLC.

section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received briefs submitted by GC Services Limited Partnership ("GC"), NRA Group, LLC d/b/a National Recovery Agency ("NRA"), Penn Credit Corporation ("Penn"), and TaxServ Capital Services VA, LLC ("TaxServ"). We have considered the submitted briefs and reviewed the submitted information.

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 ruling, we have received comments only from GC, Penn, NRA, and TaxServ. Thus, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in any of the 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 any of the information at issue on the basis of any proprietary interest any of the remaining third parties may have in the information.

Next, we note information subject to the Act is not confidential simply because the parties submitting the information anticipate or request that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, governmental bodies or third-parties 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 section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure (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. *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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 defines 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) (citation omitted); *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>3</sup> This office will accept a claim that information subject to the Act is excepted as a trade secret under section 552.110(a) if a *prima facie* case for the exception is made, 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. 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. *See* ORD 661 at 5-6 (business must show by specific factual evidence that release of particular information at issue would cause substantial competitive injury).

Penn, GC, and NRA assert that portions of their information constitute protected trade secrets under section 552.110(a) of the Government Code. Upon review, we find Penn, GC, and NRA have established a *prima facie* case that their customer information constitutes

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<sup>3</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).

trade secrets. We also find that NRA and GC have demonstrated portions of their information relating to their collection process and methodology constitute trade secrets.<sup>4</sup> Accordingly, the city must withhold the information we have marked under section 552.110(a) of the Government Code. However, we find GC, NRA, and Penn have failed to demonstrate how any of their remaining information constitutes a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for their remaining information. ORDs 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, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the city may not withhold any of the remaining information under section 552.110(a) of the Government Code.

GC, NRA, and TaxServ assert portions of their information constitute protected commercial and financial information under section 552.110(b) of the Government Code. Upon review, we find NRA has demonstrated some of its financial information and TaxServ has demonstrated its customer information, which we have marked, constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the city must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find NRA and TaxServ have failed to establish by a factual or evidentiary showing that release of the remaining information they seek to withhold would cause the companies substantial competitive injury. Additionally, we find GC has failed to establish by a factual or evidentiary showing that release of any of the information it seeks to withhold would cause GC substantial competitive injury. *See* ORD 661. Accordingly, the city may not withhold any of the remaining information under section 552.110(b).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”<sup>5</sup> Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The type 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 found that personal financial information not relating to a financial transaction between an

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<sup>4</sup>As our ruling is dispositive for this information, we do not address GC’s remaining argument against its disclosure.

<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find some of the submitted information consists of personal financial information. We are unable to determine whether this information pertains to actual living individuals or fictitious individuals created as samples for purposes of responding to the city's request for proposal by the companies that submitted the information. Therefore, to the extent the information we have marked pertains to living individuals, the city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

GC raises section 552.102 of the Government Code for portions of its information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). However, section 552.102 applies only to information in the personnel file of a government employee. *See id.* Therefore, we find section 552.102 is not applicable to GC's information, and the city may not withhold any of the remaining information on that basis.

TazServ raises section 552.104 of the Government Code for portions of its information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the city does not raise 552.104, we will not consider TaxServ's claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the city may not withhold any of the remaining information under section 552.104 of the Government Code.

We note some of the submitted information 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 city must withhold the information we have marked under section 552.110 of the Government Code. To the extent the information we have marked under common-law privacy pertains to living individuals, the city must withhold this information under section 552.101 of the Government Code. The remaining information must be released, but any information subject to 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,



Kristi L. Wilkins  
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Open Records Division

KLW/ag

Ref: ID# 467059

Enc. Submitted documents

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