



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2013

Ms. Patricia Fleming
Assistant General Counsel
Office of General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2013-03055

Dear Ms. Fleming:

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# 479470.

The Texas Department of Criminal Justice (the "department") received a request for the staffing plan in the department's contract with Correctional Corporations of America ("CCA") for the Dawson State Jail (the "jail") and information regarding staff turnover at the jail. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ Additionally, you state release of this information may implicate the proprietary interests of CCA. Accordingly, you state, and provide documentation showing, you notified CCA of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released.

¹Pursuant to section 552.303(c) of the Government Code, this office sent a notice to the department requesting that you provide additional information necessary for this office to render a decision. *See* Gov't Code § 552.303(c)-(d), (f) ((if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We received your response on February 15, 2013. We note that the department did not raise section 552.101 of the Government Code within the ten-business-day deadline mandated by section 552.301(b) of the Government Code. *See id.* § 552.301(b). However, because the applicability of section 552.101 can provide a compelling reason to overcome the presumption of openness, we will consider the department's arguments under that section. *See id.* § 552.302, *see also* Open Records Decision No. 150 at 2 (1977).

See Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (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). We have received comments from CCA. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted any information related to staff turnover at the jail. Therefore, to the extent such information existed and was maintained by the department on the date the department received the request for information, we assume it has been released. If you have not released such information, you must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release the information as soon as possible).

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, including sections 418.176 and 418.177 of the Texas Homeland Security Act, chapter 418 of the Government Code (the "HSA"). Section 418.176(a) provides the following:

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Gov't Code § 418.176(a). Section 418.177 provides the following:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or

vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body's security concerns or emergency management activities does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

CCA and the department claim the submitted staffing plan is excepted from disclosure under section 552.101 in conjunction with sections 418.176 and 418.177 of the Government Code. CCA argues that the "relative staffing strength of correctional facility locations is critical security information" which "terrorists and those plotting related criminal activities, if given this information, could estimate the levels and types of resistance and security existing at each housing unit and post in the facility." Additionally, the department states the submitted staffing plan "denotes placement of certain correctional officers within the unit and whether a particular post is manned on particular shifts" and "denotes how many days during the week a certain post is manned." The department also states the submitted information "reflects staffing requirements developed specifically for the purpose of preventing, detecting and responding to acts of terrorism or related criminal activity" and "relates directly to [the department's] tactical plans." The department further states release of this information would identify those employees "whose removal or blockage would facilitate hostage taking, arson, mayhem, riots, and other acts of terrorism or related criminal activity known to have occurred within [the department's] units."

Based upon these representations and our review, we find the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. However, we find CCA and the department have failed to establish that the remaining information is maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Thus, CCA and the department have not established the applicability of sections 418.176 and 418.177 of the Government Code to the remaining information and the department may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of these statutes.

CCA also claims the remaining information is excepted under section 552.110 of the Government Code, which 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. *See id.* § 552.110. 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 trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception 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 that 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. *See* 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

²The 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 other 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).

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.*; *see also* Open Records Decision No. 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).

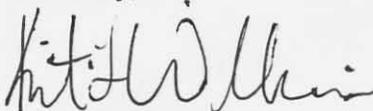
Upon review, we find CCA has failed to demonstrate the information at issue meets the definition of a trade secret. We note information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of business,” rather than “a process or device for continuous use in the operation of the business.” *See* Restatement of Torts § 757 cmt. b; *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Accordingly, the department may not withhold any of the remaining information under section 552.110(a). Additionally, we find CCA has failed to establish by a factual or evidentiary showing that release of the information at issue would cause the company substantial competitive injury. *See* ORD 661. Accordingly, the department may not withhold any of the remaining information under section 552.110(b).

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 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_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
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 479470

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)