



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 26, 2013

Mr. Timothy E. Bray  
Deputy General Counsel  
Office of General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
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OR2013-12959

Dear Mr. Bray:

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# 494401 (DSHS File No. 21607/2013, 21735/2013 ).

The Texas Department of State Health Services (the "department") received two requests from different requestors for information pertaining to RFP# 537-13-0112645 Disaster Plan Writer. Although you take no position with respect to the public availability of the requested information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified CNA Analysis and Solutions ("CNA"), Deloitte & Touche, LLP ("Deloitte"), Early Alert, Inc. ("Early Alert"), Hagerty Consulting, Inc. ("Hagerty"), The Litaker Group ("Litaker"), O'Brien Response Management, Inc. ("O'Brien"), Project and Vendor Management Advisors, LLC ("PVMA"), Science Applications International Corporation ("SAIC"), SNA International ("SNA"), Strategic Management Associates ("Strategic"), and Yale New Haven Health System Center for Emergency Preparedness and Disaster Response ("Yale Center") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (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 statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from CNA, Litaker, O'Brien, SNA, and Strategic. Thus, we have considered their arguments and reviewed the submitted information.

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 letter, we have not received arguments from the remaining third parties. Thus, Deloitte, Early Alert, Hagerty, PVMA, SAIC, and Yale Center have failed to demonstrate that they have 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 department may not withhold the submitted information on the basis of any proprietary interests Deloitte, Early Alert, Hagerty, PVMA, SAIC, and Yale Center may have in the information.

We note all of the information SNA seeks to withhold, and a portion of the information Litaker seeks to withhold, were not submitted by the department for our review. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the department, this ruling does not address the arguments by SNA and Litaker against the disclosure of that information.

Rule 26 of the Federal Rules of Civil Procedure contains general provisions that govern discovery and the duty to disclose information in civil proceedings. *See* FED. R. CIV. P. 26. Strategic generally asserts rule 26 for a portion of its information. Upon review, we find Strategic has failed to explain how or why rule 26 is applicable to the information at issue. Accordingly, the department may not withhold any of the information at issue under rule 26 of the Federal Rules of Civil Procedure.

Strategic asserts some of its information is protected by the federal Privacy Act of 1974 (the "Privacy Act") and section 552(b)(4) of title 5 of the United States Code, the Freedom of Information Act ("FOIA"). Our office and the courts have stated FOIA and the Privacy Act only apply to federal agencies and not to state or local agencies. *See St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); *Shields v.*

*Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); Attorney General Opinion MW-95 (1979) (neither FOIA nor Privacy Act applies to records held by state or local governmental bodies in Texas). In this instance, the information at issue is held by a state agency, which is subject to the laws of the State of Texas. Thus, the department may not withhold the information at issue on the basis of the Privacy Act or FOIA.

Strategic also asserts the information at issue is protected by Homeland Security Management Directive 11042.1 ("MD-11042.1"). MD-11042.1 establishes a policy for the Department of Homeland Security ("DHS") to identify and safeguard sensitive information that originated within or was received by DHS. *See Department of Homeland Security Management Directive 11042.1: Safeguarding Sensitive but Unclassified (For Official Use Only) Information* § 1 (J.M. Loy, January 6, 2005). We note MD-11042.1 applies only to information maintained by DHS. *See id.* Upon review, we find Strategic has failed to explain how MD-11042.1 applies to the information at issue. Accordingly, the department may not withhold any of the information at issue on the basis of MD-11042.1.

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. While CNA generally asserts a portion of its information is subject to section 552.101, it has not directed our attention to any confidentiality provision that would make any of its information confidential under section 552.101. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the department may not withhold any portion of the information at issue under section 552.101 of the Government Code.

Section 552.101 of the Government Code encompasses information other statutes make confidential. Prior decisions of this office have held 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). 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 Treasury] 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). Thus, the submitted 1120S form, which we have marked, constitutes tax return

information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code on that basis.

Strategic claims some of its information is excepted under section 552.108 of the Government Code, which excepts from disclosure information held by a law enforcement agency or prosecutor. Gov't Code § 552.108(a), (b). Neither the department nor Strategic is a law enforcement agency or prosecutor. Accordingly, Strategic has failed to demonstrate section 552.108 applies to the information at issue. *But see* Open Records Decision No. 474 (1987) (predecessor statute to section 552.108(a)(1) may be invoked by a proper custodian when a criminal incident is still under active investigation or prosecution and law enforcement entity represents that release of records will interfere with investigation or prosecution). Therefore, the department may not withhold any of the information at issue under section 552.108 of the Government Code.

CNA, Litaker, O'Brien, and Strategic raise section 552.110 of the Government Code for some of their information. 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." Gov't Code § 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. 1958); *see also* ORD 552 at 2. Section 757 provides 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.<sup>1</sup> See RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. See 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.” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. See ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CNA, Litaker, O’Brien, and Strategic argue some of their information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find CNA, Litaker, O’Brien, and Strategic have not demonstrated how any of the information at issue meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim. See RESTATEMENT OF TORTS § 757 cmt. b; 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). We note pricing 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 the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b; see *Huffines*, 314 S.W.2d at 776;

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<sup>1</sup>The 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).

ORDs 319 at 3, 306 at 3. Accordingly, the department may not withhold any of the information at issue under section 552.110(a).

CNA, Litaker, and Strategic also contend some of their information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find Strategic has established the information we have marked constitutes commercial or financial information, the release of which would cause Strategic substantial competitive harm. Therefore, the department must withhold this information under section 552.110(b) of the Government Code. We note the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Upon review, we find CNA, Litaker, and Strategic have not demonstrated how any of the remaining information at issue constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Therefore, the department may not withhold any of the remaining information at issue under section 552.110(b).

CNA also raises section 552.131 of the Government Code for a portion of its information. Section 552.131 of the Government Code relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (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.

Gov't Code § 552.131(a). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.*

§ 552.110(a). Because we have already disposed of CNA's claims under section 552.110, the department may not withhold any of CNA's information under section 552.131(a) of the Government Code.

Section 552.101 of the Government Code 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered highly 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 also has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Upon review, we find some of the remaining information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Litaker claims some of its information is excepted from disclosure pursuant to federal copyright law. However, we note copyright law does not make information confidential. *See* Open Records Decision No. 660 at 5 (1999). 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 department must withhold the 1120S form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The department must withhold the information we have marked under section 552.110(b) of the Government Code. The department must withhold the

information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/som

Ref: ID# 494401

Enc. Submitted documents

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