



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2013

Mr. James G. Nolan
Open Records Attorney
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2013-20928

Dear Mr. Nolan:

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# 507350 (CPA ORTS# 9474453136 and CPA ID# 9499093038).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for the responses to and scoring matrix from request for proposals number 206g. The comptroller's office received a second request from a different requestor for the responses to request for proposals number 206g and the current contract with Business Ink, Co. ("Business Ink") for mail services. You inform us you have released some information to both requestors. Although you take no position on the public availability of the submitted information, you state the submitted information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified Business Ink and PrintMailPro.com ("PrintMailPro") of the request and of their right to submit comments to this office as to why the submitted information should not be released to the requestor. *See* Gov't Code § 552.305(d); *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 under the Act in certain circumstances). We have received comments from Business Ink. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge, and we agree, the comptroller's office did not comply with the procedural requirements of section 552.301 of the Government Code in regards to the first request for information. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 of the Government Code results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *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). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third-party interests and section 552.136 of the Government Code can provide compelling reasons to withhold information, we will consider whether any of the responsive information may be excepted under the Act.¹

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from PrintMailPro on why the company's submitted information should not be released. Therefore, we have no basis to conclude PrintMailPro has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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 comptroller's office may not withhold any portion of the submitted information on the basis of any proprietary interest PrintMailPro may have in it.

Business Ink asserts portions of its submitted information are marked confidential. However, 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 section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Business Ink raises section 552.101 of the Government Code. 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. However, Business Ink has not directed our attention to any law, nor are we aware of any

¹The 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).

law, under which any of the submitted information is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Accordingly, none of Business Ink's submitted information may be withheld on the basis of section 552.101 of the Government Code.

Section 552.110 of the Government Code 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* 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 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 This office must accept a claim that

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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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. 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.*; see also ORD 661 at 5-6.

Business Ink contends some of its information is commercial or financial information, release of which would cause the company substantial competitive harm. Upon review, we find Business Ink has established some of its information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the comptroller’s office must withhold the information we have marked under section 552.110(b) of the Government Code.³ However, upon review, we find Business Ink has not established any of its remaining information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the comptroller’s office may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Further, we also find Business Ink has failed to demonstrate how any portion of its remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for the remaining information. 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). Therefore, the comptroller’s office may not withhold any of Business Ink’s remaining information pursuant to section 552.110(a) of the Government Code.

Section 552.136(b) of the Government Code states “[n]otwithstanding any other provision of [the Act], 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). This office has determined an insurance policy number is an access device for purposes of section 552.136. See Open Records Decision No. 684 at 9 (2009). Therefore,

³As our ruling is dispositive, we need not address Business Ink’s remaining argument against disclosure of this information.

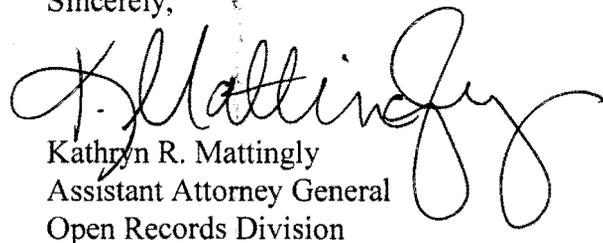
the comptroller's office must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

In summary, the comptroller's office must withhold the information we have marked under section 552.110(b) of the Government Code and the insurance policy numbers we have marked under section 552.136 of the Government Code. The comptroller's office must release the remaining information to the requestors.

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, 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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/som

Ref: ID# 507350

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

⁴Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

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Sc NOV 23 2015 At 9:14 A.M. Velva L. Price, District Clerk

CAUSE NO. D-1-GN-14-000019

BUSINESS INK, COMPANY, Plaintiff,

v.

SUSAN COMBS, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, and GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Defendants.

§ IN THE DISTRICT COURT OF § § § § 353rd JUDICIAL DISTRICT § § § § TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Plaintiff Business Ink, Company (Business Ink) filed suit against Defendants Ken Paxton, Attorney General of Texas (the Attorney General),¹ and Glenn Hegar, Texas Comptroller of Public Accounts (the Comptroller),² challenging Attorney General Open Records Letter Ruling OR2013-20928 (2013). Business Ink sought the withholding of certain information held by the Comptroller. All matters in controversy arising out of this lawsuit have been resolved, and the parties agree to the entry and filing of an agreed final judgment.

Texas Government Code section 552.325(d) requires the Court to allow the requestor of information a reasonable period of time to intervene after receiving notice of the proposed settlement. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice by certified letter to requestor Mr. Keith Daboub on October 26, 2015, providing

¹ Greg Abbott was named defendant in his official capacity as Texas Attorney General. Ken Paxton became Texas Attorney General on January 5, 2015, and is now the appropriate defendant in this cause.

² Susan Combs was named defendant in her official capacity as Texas Comptroller of Public Accounts. Glenn Hegar became Texas Comptroller on January 5, 2015, and is now the appropriate defendant in this cause.



reasonable notice of this setting. The requestor was informed of the parties' agreement that the Comptroller must withhold portions of the information at issue in this suit, as agreed upon between the parties. The requestor was also informed of his right to intervene in the suit to contest the withholding of the information. The requestor has neither informed the parties of his intention to intervene, nor has a plea in intervention been filed.

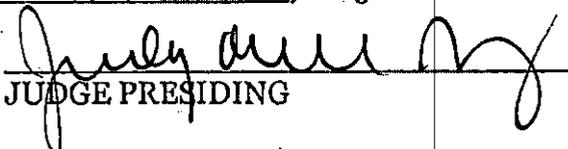
After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties in this suit.

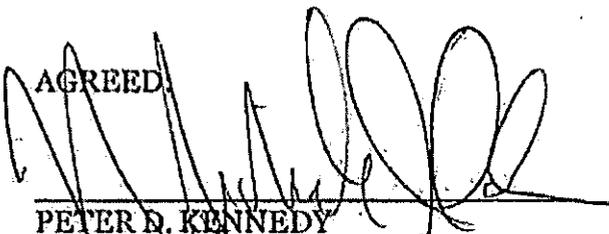
IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. Business Ink, the Attorney General, and the Comptroller have agreed that, in accordance with the PIA and under the facts presented, portions of the information at issue, as indicated by a redacted copy of the information at issue provided to the Comptroller by Business Ink, are excepted from disclosure pursuant to Tex. Gov't Code § 552.104 (hereinafter, the Excepted Information);
2. The Comptroller must withhold the Excepted Information described in Paragraph 1 of this order, as well as those portions of the information at issue found to be confidential by Open Records Letter Ruling OR2013-20928, and release the remaining information at issue to the requestor;
3. All court costs and attorney fees are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Business Ink, the Attorney General, and the Comptroller in this cause, and is a final judgment.

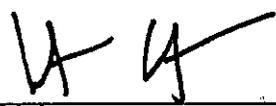
SIGNED this 23 day of November, 2015.


JUDGE PRESIDING

AGREED 

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