



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 8, 2015

Mr. David N. Brown  
Assistant County Attorney  
Williamson County  
405 Martin Luther King Street, Box 7  
Georgetown, Texas 78626

OR2015-18686

Dear Mr. Brown:

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# 578841 (Ref. Nos. PIA-2015-123 and PIA-2015-139).

Williamson County (the "county") received two requests for all bidder responses to a specified request for proposals and the name of the firm awarded the contract. You state the county has released some responsive information. Further, we understand the county does not possess any information responsive to a portion of the request.<sup>1</sup> Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Cafaro Greenleaf; FiduciaryFirst; SageView Advisory Group, L.L.C.; Southwest Retirement Consultants; and The Retirement Store, L.L.C.<sup>2</sup> Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights to submit

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We note the county failed to comply with the procedural requirements of section 552.301 of the Government Code with respect to the first request. *See Gov't Code* § 552.301 (b). Nevertheless, because third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider whether any of the submitted information may be withheld on that basis. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977).

arguments to this office as to why the submitted information should not be released. *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 FiduciaryFirst. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-00903 (2013). Further, we note that in Open Records Letter No. 2013-00903, the county notified the third parties pursuant to section 552.305 when it received the previous request for information, and none of the third parties submitted any arguments objecting to the release of their information. Accordingly, in that ruling, we determined the submitted information must be released, but any information protected by copyright must be released in accordance with copyright law. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the county may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. We now understand FiduciaryFirst to claim portions of its information are excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Because information subject to sections 552.101 and 552.110 is deemed confidential by law, we will address FiduciaryFirst's claims under these exceptions.

We understand FiduciaryFirst to generally raise section 552.101 of the Government Code for portions of its information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, FiduciaryFirst does not cite to any confidentiality provision, nor are we aware of any, that makes any of the information at issue confidential for purposes of 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, none of FiduciaryFirst's information may be withheld under section 552.101 of the Government Code.

We further understand FiduciaryFirst to assert portions of its information are confidential under section 552.110(a) of the Government Code, which protects trade secrets 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, 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.<sup>3</sup> 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* Open Records Decision No. 552 at 5 (1990). 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). 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

As mentioned above, FiduciaryFirst's information was subject to Open Records Letter No. 2013-00903 and, in that ruling, the county notified FiduciaryFirst of the request for

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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 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).

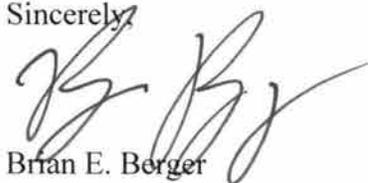
information pursuant to section 552.305 of the Government Code. In that instance, FiduciaryFirst did not object to the release of its information. Since the issuance of the previous ruling on January 15, 2013, FiduciaryFirst has not disputed this office's conclusion regarding the release of the information, and we presume the county has released the information in accordance with that ruling. In this regard, we find FiduciaryFirst has not taken any measures to protect its information in order for this office to conclude the information now qualifies as a trade secret. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b: see also ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the county may not withhold any of FiduciaryFirst's information under section 552.110(a) 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. As no further exceptions to disclosure have been raised, the submitted information must be released; however, any information protected by copyright must 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,



Brian E. Berger  
Assistant Attorney General  
Open Records Division

BB/akg

Ref: ID# 578841

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

Mr. Don Faller  
Fiduciary First  
1060 Maitland Center Commons, Suite 360  
Maitland, Florida 32751  
(w/o enclosures)

Mr. Al DiCristofaro  
The Retirement Store  
10305 Yucca Drive  
Austin, Texas 78759  
(w/o enclosures)

Mr. John McGlothlin  
SW Retirement  
9600 Mopac, Suite 220  
Austin, Texas 78759  
(w/o enclosures)

Ms. Jamie Greenleaf  
Cafaro Greenleaf  
216 Maple Avenue  
Red Bank, New Jersey 07701  
(w/o enclosures)