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ATTORNEY GENERAL OF TEXAS

October 13, 2015

Mr. Craig Purifoy
Open Records Coordinator
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2015-21439

Dear Mr. Purifoy:

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# 582865 (DFPS ORR# 07242015U3D).

The Texas Department of Family and Protective Services (the "department") received a request for information pertaining to a specified request for proposals, namely, all successful proposals and any scoring documents, scoring summaries, comments, or feedback generated from review of the successful proposals. You state the department is releasing some responsive information. Although you take no position as to whether the submitted information is excepted from disclosure under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified BCFS Health and Human Services ("BCFS") and Child Crisis Center of El Paso of the request for information and of their rights to submit 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 BCFS. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 letter, we have not received arguments from Child Crisis Center of El Paso.

Thus, we find Child Crisis Center of El Paso has failed to demonstrate it 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), 552 at 5 (1990), 542 at 3. Accordingly, the department may not withhold any of the submitted information on the basis of any proprietary interest Child Crisis Center of El Paso may have in the information.

BCFS contends some of its information is not responsive to the present request for information because it is not “relevant to the request for ‘contracts’ for the . . . grant [at issue].” Upon review, however, we find the information at issue is part of a successful proposal pertaining to the specified request for proposals and, thus, is responsive to the request for information. As no exceptions to disclosure for this information have been raised, it must be released.

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 that other statutes make confidential. Section 6103 of title 26 of the United States Code makes certain federal tax returns and tax return information confidential. *See* 26 U.S.C. § 6103(a); *see also id.* § 6103(b)(1)–(2) (defining “return” and “return information”). However, section 6104 of title 26 provides for the disclosure of tax returns in certain situations:

(d) Public inspection of certain annual returns[.]--

(1) In general.--In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501(a) or an organization exempt from taxation under section 527(a) --

(A) a copy of --

(i) the annual return filed under section 6033 . . . by such organization,

. . .

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and . . .

(B) upon request of an individual made at such principal office . . . , a copy of such annual return . . . shall be provided to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

...

(2) 3-year limitation on inspection of returns.--Paragraph (1) shall apply to an annual return filed under section 6011 or 6033 only during the 3-year period beginning on the last day prescribed for filing such return (determined with regard to any extension of time for filing).

Id. § 6104(d)(1)–(2); *see* 26 C.F.R. § 301.6104(d)-1(a). Thus, a section 501(c) or (d) tax-exempt organization must generally make its annual returns available for public inspection for a period of three years from the last day prescribed for filing.

We note the submitted information contains tax returns and return information. This information includes Form 990 and Form 990-T tax returns that were filed by a section 501(c) tax-exempt organization. We note the submitted information reflects these tax returns were filed more than three years prior to the date the department received the request for information. Thus, the three-year inspection period has lapsed with regard to those returns, and the requestor does not have a right of inspection under section 6104. Accordingly, the department must withhold BCFS's Form 990 and Form 990-T tax returns under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The submitted information also contains tax return information that is not subject to section 6104(d). Thus, Forms 4562 and 8879-EO are also confidential under section 6103(a) of title 26 of the United States Code, and the department must withhold this information pursuant to section 552.101 of the Government Code on that basis.

BCFS also argues some of its information is privileged under the attorney work product privilege found in Texas Rule of Civil Procedure 192.5. Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A party seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; Open Records Decision No. 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

BCFS argues its financial statements consist of privileged attorney work product created “in anticipation of possible litigation” with the Internal Revenue Service (the “IRS”). BCFS states the IRS routinely audits non-profit organizations for compliance and litigates perceived deficiencies in non-profit organizations’ financial statements. Upon review, however, we find BCFS has not demonstrated any of the information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by BCFS or its representatives. Therefore, we conclude the department may not withhold any of the information at issue under Texas Rule of Civil Procedure 192.5.

BCFS contends some of its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Section 552.101 also encompasses information made confidential by section 261.201 of the Family Code, which provides, in relevant part, as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review of BCFS’s arguments and the remaining information, we find BCFS has failed to demonstrate any of its information consists of a report of alleged or suspected abuse or neglect of a child made under chapter 261 or information used or developed in an investigation of alleged or suspected child abuse or neglect under chapter 261. *See id.* §§ 101.003(a) (defining “child” for the purposes of this section as a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes); Act of May 21, 2015, 84th Leg., R.S.,

ch. 432, § 1, 2015 Tex. Sess. Law Serv. 1686, 1686-87 (to be codified as an amendment to Fam. Code § 261.001(4)) (defining “neglect” for purposes of chapter 261 of the Family Code); Act of June 1, 2015, 84th Leg., R.S., ch. 1273, § 4, 2015 Tex. Sess. Law Serv. 4310, 4312 (to be codified as an amendment to Fam. Code § 261.001(1)) (defining “abuse” for purposes of chapter 261 of the Family Code). Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

BCFS asserts some of its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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.¹ 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 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. *Id.*; *see also* ORD 661 at 5 (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 BCFS has failed to establish a *prima facie* case that any portion of the remaining information meets the definition of a trade secret. We further find BCFS has failed to demonstrate the necessary factors to establish a trade secret claim for the remaining information. *See* 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 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Consequently, the department may not withhold any of the remaining information under section 552.110(a) of the Government Code.

¹The 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).

Further, we find BCFS has failed to demonstrate release of any of its remaining information would cause BCFS substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision Nos. 661 at 5-6 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

BCFS also contends some of its information is excepted under section 552.138(b)(4) of the Government Code. Section 552.138 provides, in relevant part:

(a) In this section:

(1) “Family violence shelter center” has the meaning assigned by Section 51.002, Human Resources Code.

(2) “Sexual assault program” has the meaning assigned by Section 420.003.

(3) “Victims of trafficking shelter center” means:

(A) a program that:

(i) is operated by a public or private nonprofit organization; and

(ii) provides comprehensive residential and nonresidential services to persons who are victims of trafficking under Section 20A.02, Penal Code; or

(B) a child-placing agency, as defined by Section 42.002, Human Resources Code, that provides services to persons who are victims of trafficking under Section 20A.02, Penal Code.

(b) Information maintained by a family violence shelter center, victims of trafficking shelter center, or sexual assault program is excepted from [required public disclosure] if it is information that relates to:

...

(4) the provision of services, including counseling and sheltering, to a current or former client of a family violence shelter center, victims of trafficking shelter center, or sexual assault program[.]

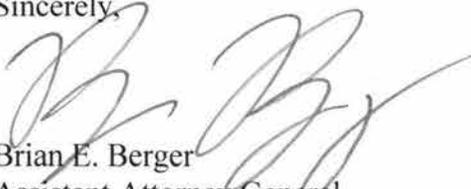
Gov't Code § 552.138(a), (b)(4). Section 552.138 applies only to information maintained by a family violence shelter center, victims of trafficking shelter center, or sexual assault program. *See id.* § 552.138. We note the information at issue is maintained by the department, and not by a family violence shelter center, victims of trafficking shelter center, or sexual assault program. Accordingly, we find the department may not withhold any of the remaining information under section 552.138 of the Government Code.

In summary, the department must withhold BCFS's Form 990 and Form 990-T tax returns and Forms 4562 and 8879-EO 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 552.101 of the Government Code in conjunction with common-law privacy. 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.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# 582865

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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