



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 3, 2016

Ms. Sol Cortez
Assistant City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

OR2016-07235A

Dear Ms. Cortez:

This office issued Open Records Letter No. 2016-07235 (2016) on March 31, 2016. We have examined this ruling and determined we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on March 31, 2016. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). This ruling was assigned ID# 616966.

The City of El Paso (the "city") received a request for all documents and information related to the winning bidder for a specified request for proposals, including scoring sheets and minutes of city council meetings. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state the release of the submitted information may implicate the interest of a third party. Accordingly, you state, and provide documentation demonstrating, you notified Delgado, Acosta, Spencer, Linebarger, and Perez, L.L.P. ("DASLP") of the request for information and of its right to submit arguments stating why its information should not be released. *See id.* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 comments from DASLP. We have reviewed the arguments and the submitted information.

Initially, you state the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-06148 (2016). In Open Records Letter No. 2016-06148, we determined the city must withhold the

submitted information under section 552.110(b) of the Government Code. There is no indication the law, facts, or circumstances on which the prior ruling was based have changed. To the extent the submitted information was the subject of this previous ruling, the city must continue to rely on Open Records Letter No. 2016-06148 as a previous determination and withhold that information in accordance with that ruling. To the extent the submitted information is not the subject of the previous ruling, we will address the submitted arguments against disclosure of the information. *See* Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

DASLP argues some of its information at issue is excepted from release under section 552.110 of the Government Code. However, the city did not submit this information for our review. This ruling does not address information beyond what the city has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Accordingly, this ruling is limited to the information the city submitted as responsive to the request for information. *See id.*

We note you have only submitted documents pertaining to the specified request for proposal. However, you have not submitted any information responsive to the remaining categories of the request, including the scoring sheets and minutes. To the extent the scoring sheets and minutes existed and were maintained by the city on the date it received the request, we assume the city has released them to the requestor. If the city has not released any such information, it must do so at this time. *Id.* §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if a governmental body concludes that no exceptions apply to the requested information, it must release information as soon as possible under circumstances).

You contend some of the submitted information is protected under common-law privacy. We also understand DASLP to raise common-privacy for some of the information. 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. Section 552.101 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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a

case-by-case basis. *See* ORD 373. Upon review, we find you and DASLP have failed to demonstrate any of the submitted information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

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. 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 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

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

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 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, 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).

DASLP contends some of its information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find DASLP has failed to establish a *prima facie* case the submitted information at issue meets the definition of a trade secret. Moreover, we find DASLP has not demonstrated the necessary factors to establish a trade secret claim for the submitted information. *See* ORD 402. Therefore, none of the submitted information may be withheld under section 552.110(a) of the Government Code.

DASLP also argues some of its information at issue consists of commercial information the release of which would cause substantial competitive harm to DASLP under section 552.110(b) of the Government Code. Upon review of DASLP’s arguments under section 552.110(b), we conclude DASLP has established the release of its credit report, which we have indicated, would cause the company substantial competitive injury. Accordingly, the city must withhold the information we have indicated under section 552.110(b).

We note portions of the remaining information are subject to section 552.136 of the Government Code.² Section 552.136 states, “Notwithstanding any other provision of this chapter, 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); *see also id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, the city must withhold the insurance policy numbers within the submitted information under section 552.136.

²The 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).

In summary, to the extent the submitted information was the subject of Open Records Letter No. 2016-06148, the city must continue to rely on the ruling as a previous determination and withhold that information in accordance with that ruling. The city must withhold the information we have indicated under section 552.110(b) of the Government Code. The city must withhold the insurance policy numbers within the remaining information under section 552.136 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.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,



Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 616966

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)