



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 24, 2015

Ms. Hadassah Schloss
Director, Open Government
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2015-15092

Dear Ms. Schloss:

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# 572863.

The Texas General Land Office (the "GLO") received two requests from different requestors for proposals and information pertaining to a specified RFP. You state you have released some information to the requestors. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Asher Media, Inc., & Avalanche Media Group, LLC ("Asher"); Creative Civilization ("Creative"); GDC Marketing & Ideation ("GDC"); Rocket Red, Ltd. ("Rocket"); Steel Branding ("Steel"); TKO Advertising, Inc. ("TKO"); and The Ward Group ("Ward"). Accordingly, you state, and provide documentation showing, you notified the interested third parties of the request for information and of their right 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 Asher, GDC, Rocket, and Ward. We have considered the submitted 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 ruling, we have not received comments from Creative, Steel, or TKO. Thus, we have no basis to conclude any of these third parties has a protected proprietary interest in 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 GLO may not withhold any of the submitted information on the basis of any proprietary interest Creative, Steel, or TKO may have in the information.

Asher, GDC, Rocket, and Ward claim some of their information is excepted under section 552.110 of the Government Code.¹ 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). 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. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides that 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

¹Although GDC also raises section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision No. 676 at 1-2 (2002).

secret factors.² 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. *See* 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 Record Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.

Asher, GDC, Rocket, and Ward contend some of their information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we conclude Asher, GDC, and Ward have established the release of their customer information would cause the companies substantial competitive injury. Accordingly, to the extent Asher’s, GDC’s, and Ward’s customer information within the submitted information is not publicly available on Asher’s, GDC’s, and Ward’s website, the GLO must withhold the customer information at issue under section 552.110(b). To the extent Asher, GDC, and Ward’s customer information is publicly available on the companies’ websites, the GLO may not withhold such information under section 552.110(b). Asher, GDC, Rocket, and Ward also raise section 552.110(b) for some of their remaining information. Upon review, we find Asher and GDC have demonstrated some of their

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

information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the GLO must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Asher, GDC, Rocket, and Ward have not established any of the remaining information constitutes commercial or financial information the disclosure of which would cause the companies substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the GLO may not withhold any of the remaining information at issue on this basis.

We next address Asher, GDC, and Rocket's arguments under section 552.110(a) for the remaining information at issue. To the extent Asher's and GDC's customer information is publicly available on the companies' websites, the GLO may not withhold such information under section 552.110(a). Upon review, we find Asher, GDC, and Rocket have failed to demonstrate their remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the GLO may not withhold Asher's, GDC's, and Rocket's remaining information at issue on the basis of section 552.110(a).

We note some of the remaining information appears to 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.

In summary, to the extent Asher's, GDC's, and Ward's customer information is not publicly available on the companies' websites, the GLO must withhold the customer information at issue under section 552.110(b) of the Government Code. The GLO must withhold the additional information we have marked under section 552.110(b) of the Government Code. The GLO must release the remaining information; however, any information subject to 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, 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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 572863

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Ms. Gisela Girard
President/COO
Creative Civilization
106 Auditorium Circle, Second Floor
San Antonio, Texas 78205
(w/o enclosures)

GDC Marketing & Ideation
c/o Mr. Andrew Borrego
Moreno & Borrego Law, PLLC
15614 Huebner Road, Suite 109
San Antonio, Texas 78248
(w/o enclosures)

Ms. Gayden Day
President
Rocket Red, Ltd.
1700 Pacific Avenue, Suite 250
Dallas, Texas 75201
(w/o enclosures)

Ms. Samantha McCanless
Director of Operations
Steel Branding
6414 Bee Cave Road, Suite B
Austin, Texas 78746
(w/o enclosures)

Mr. Raul Garza
President
TKO Advertising, Inc.
700 Lamar Boulevard, Suite 200B
Austin, Texas 78703
(w/o enclosures)

Ms. Shirley Ward
CEO
The Ward Group
5750 Genesis Court, Suite 220
Frisco, Texas 75034
(w/o enclosures)