



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2009

Mr. Scott A. Kelly
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2009-00320

Dear Mr. Kelly:

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# 332309.

The Texas A&M University System (the "university") received a request for information pertaining to a specified RFP, including (1) tabulations of participating companies, (2) submitted bid proposals, and (3) "last and best" offers.¹ You state that you will release information responsive to item one of the request. You further state that no responsive information exists regarding item three of the request.² While you take no position as to the public availability of the requested bid proposals, you contend that they may contain proprietary information subject to exception under the Act. Accordingly, you provide documentation showing that the university notified Alliance Work Partners ("Alliance"), Ceridian, ComPsych Corporation ("ComPsych"), Deer Oaks EAP Services ("Deer Oaks"), Magellan Health Services ("Magellan"), and MHNet Behavioral Health ("MHNet"), 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 Magellan, and have reviewed the submitted arguments and information.

Initially, we will address the university's claim that the request for information should be considered received by the university on October 20, 2008. You state, and provide

¹You note that the requestor amended his request by email dated October 29, 2008.

²We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

documentation showing, that the university received the initial request for information on September 30, 2008. On October 14, 2008, you sent the requestor an itemized cost estimate and requested a deposit from the requestor prior to processing the request. Because the university's estimated cost to process the request was over \$100, the university explains that it required the requestor to make a deposit for payment of the anticipated costs in accordance with section 552.263 of the Government Code. Section 552.263(a) provides in relevant part that a governmental body "may require a deposit or bond for payment of anticipated costs . . . if [the governmental body] has provided the requestor with the required *written itemized statement* detailing the estimated charge for providing the copy and if the charge" is estimated to exceed \$100, if the governmental body has more than 15 full-time employees or \$50, if the governmental body has fewer than 16 full-time employees. Gov't Code § 552.263(a) (emphasis added). Further, section 552.263(e) of the Government Code provides that a request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs. *See* Gov't Code § 552.263(e). The university informs us, and provides documentation showing, that on October 15, 2008, the requestor accepted the revised cost estimate and sent in the requested deposit, which the university received on October 20, 2008. Thus, pursuant to section 552.263(e), October 20, 2008 is the date the university received the request for the purposes of section 552.301. Accordingly, the university's ten-business-day deadline was November 3, 2008 and the university's fifteen-business-day deadline was November 10, 2008. The university's request for a ruling was postmarked November 3, 2008 and the university's arguments stating why the stated exceptions apply and the specific information responsive to the request was postmarked November 10, 2008. Therefore, we find that the university's request for a ruling was timely. *See* Gov't Code §§ 552.301(b), (e); .263.

You state that a portion of the requested information, pertaining to Ceridian, ComPsych, and MHNet, is subject to a previous ruling issued by this office on October 16, 2008. *See* Open Records Letter No. 2008-14194 (2008). You state that none of the pertinent facts and circumstances have changed since the issuance of that prior ruling. Thus, we agree that the university must continue to rely on our ruling in Open Records Letter No. 2008-14194 as a previous determination and withhold or release the information that was subject to our prior ruling in accordance with that decision. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling).

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld

from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither Alliance nor Deer Oaks have submitted comments to this office explaining why any portion of their information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of these companies, and none of it may be withheld on this basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

Magellan asserts that portions of the submitted information pertaining to its company are excepted from disclosure under section 552.110 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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;

- (2) the extent to which it is known by employees and others 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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). 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). Information is generally not a trade secret if 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 (1939).

Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Magellan argues that its customer information, staff contact information, pricing information, website access passwords, and information pertaining to processes and product features are excepted from disclosure under section 552.110. Magellan asserts that release of this information would give its competitors a significant competitive advantage and inflict substantial competitive harm on the company. Upon review, we find that Magellan has demonstrated that release of its customer information, pricing information, and website access passwords would cause substantial competitive harm to its interests. Therefore, the university must withhold the information we have marked pursuant to section 552.110(b) of the Government Code. However, we find that Magellan has made only conclusory allegations that release of its remaining information would cause it substantial competitive

injury and has provided no specific factual or evidentiary showing to support such allegations. *See* ORD 661 (for information to be withheld under section 552.110(b), business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), ORD 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel). Thus, we find Magellan has failed to establish that any of the remaining information is excepted under section 552.110(b) of the Government Code.

Further, Magellan has failed to demonstrate that any portion of the information pertaining to processes and product features or to staff contact information constitutes a trade secret for purposes of section 552.110(a). Accordingly, no portion of the remaining information may be withheld pursuant to section 552.110(a) of the Government Code.

We note that portions of the remaining information are subject to section 552.136 of the Government Code, which states that “[n]otwithstanding 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. Therefore, the university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We also note that portions of the remaining information are 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 protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, 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. *See* Open Records Decision No. 550 (1990).

In summary, the university must continue to rely on our ruling in Open Records Letter No. 2008-14194 as a previous determination and withhold or release the information that was subject to our prior ruling in accordance with that decision. The university must withhold the marked customer information, pricing information, and website access passwords pursuant to section 552.110(b) of the Government Code. The university must also withhold the marked insurance policy numbers under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 332309

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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