



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 23, 2009

Mr. Robert N. Jones  
Assistant General Counsel  
Texas Workforce Commission  
101 East 15th Street  
Austin, Texas 78711-2548

OR2009-10252

Dear Mr. Jones:

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# 349899 (TWC Tracking No. 090326-009).

The Texas Workforce Commission (the "commission") received a request for all information, including the winning proposals, pertaining to a specified request for proposals. Although you take no position with respect to the public availability of the requested information, you state that release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the commission has notified the interested third parties of the request and of their right to submit arguments to this office explaining why the submitted information should not be released.<sup>1</sup> See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that 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). Pursuant to section 552.305(d), Southern Methodist University ("SMU") has submitted comments to this office objecting to the release of its information. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>The notified third parties are: The University of Texas at Austin; University of North Texas; University of Houston; The University of Texas at Dallas; The University of Texas at Arlington; Texas Tech University; Southern Methodist University; San Jacinto Community College District; Sam Houston State University; Richland College; and Prairie View A&M University.

Initially, we must address the commission's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See Gov't Code § 552.301(e)(1)(D)*. The commission received the request for information on March 26, 2009, but did not request a ruling from this office or submit the information at issue until May 19, 2009. Thus, the commission failed to comply with the requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id. § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third party interests can provide a compelling reason to withhold information, we will address whether the submitted information is excepted from disclosure under the Act.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, only SMU has submitted to this office reasons explaining why its information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in the submitted proposals. *See 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 (1990). Therefore, the commission may not withhold any portion of the submitted information on the basis of any proprietary interest that the remaining third parties may have in this information.

We will now address the submitted arguments. We understand SMU to assert that its submitted resumes are confidential under section 552.101 in conjunction with common-law privacy. 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. This section encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is 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 demonstrated. *Id.* at 681-82. Upon review, we determine the submitted resumes do not contain information considered either highly intimate or embarrassing. In addition we note that education, prior employment, and personal information are not ordinarily private information subject to section 552.101. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Therefore, we find the submitted resumes may not be withheld under section 552.101 in conjunction with common-law privacy.

SMU also asserts that portions of its proposal are excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. We note that section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 (1991). As the commission does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov’t Code § 552.104 may be waived by governmental body). Therefore, the commission may not withhold any of SMU’s information under section 552.104.

Next, SMU asserts that release of its resumes could encourage competitors to recruit SMU personnel for employment. Thus, we understand SMU to assert that its submitted resumes are confidential under section 552.110(b) of the Government Code. 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.” 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). We note that information pertaining to employee rosters and qualifications is not typically excepted from disclosure under section 552.110(b). *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not ordinarily excepted under section 552.110). Further, we find that SMU has only made conclusory allegations that release of the resumes at issue would cause SMU substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Accordingly, we find that none of the information at issue may be withheld pursuant to section 552.110(b) of the Government Code. As SMU raises no further exceptions to