



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2010

Mr. R. Brooks Moore
Assistant General Counsel
The Texas A&M University System
Office of the General Counsel
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2010-11930

Dear Mr. Moore:

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# 389507.

The Texas A&M University System (the "university") received two requests for information. The first request was for the following information pertaining to RFP01 VCR-10-006: (1) a list of vendors submitting proposals; (2) the decision criteria used by the evaluation committee to score all submitted proposals; (3) the scoring record of the submitted proposals against the decision criteria; (4) copies of the technical and cost proposals for the two finalist organizations; and (5) the final cost amount of the winning proposal. The second request was for the technical and pricing proposals for each of the responses to RFP01 VCR-10-006 and the final cost for the winning proposal. You state the university has provided some of the requested information to the first requestor. While you take no position with respect to the public availability of the submitted information, you state that the requests may implicate the proprietary interests of Attain, L.L.C. ("Attain"); Huron Consulting Group ("Huron"); Schaefer & Company, L.L.C. ("Schaefer"); and PricewaterhouseCoopers, L.L.P. ("PwC"). Accordingly, you notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (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 to

disclosure in certain circumstances). We have received arguments from Schaefer. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge that the university failed to comply with the requirements of section 552.301 of the Government Code with regards to the second request. *See* Gov't Code § 552.301(b). A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. *Id.* §552.302. In order to overcome the presumption that the requested information is public information, a governmental body must provide a compelling reason why the information should not be disclosed. *See Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records Decision No. 150 (1977). We note some of the submitted information may be excepted from disclosure under section 552.136 of the Government Code.¹ Because section 552.136 and third party interests can provide compelling reasons to withhold information, we will consider the submitted arguments.

Next, we note that 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Attain, Huron, or PwC. We, thus, have no basis for concluding that any portion of the submitted information pertaining to these third parties constitutes their proprietary information, and the university may not withhold any portion of their information on that basis. *See id.* § 552.110; 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.

Schaefer asserts that portions of its proposal are excepted from disclosure under section 552.110 of the Government Code, which protects: (1) trade secrets and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom it was obtained. 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

¹The 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).

adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 2. 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 secret factors.² RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 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).

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. *See* ORD 661 (business enterprise must

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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

show by specific factual evidence that release of information would cause it substantial competitive harm).

Schaefer contends portions of its proposal qualify as trade secret information under section 552.110(a). Upon review, we find that Schaefer's customer information, which we have marked, must be withheld under section 552.110(a). Although Schaefer argues its pricing information should be withheld as a trade secret, we note pricing information pertaining to a particular proposal or 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." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Furthermore, we find Schaefer has failed to demonstrate any portion of the remaining information in its proposal meets the definition of a trade secret. Therefore, the university may not withhold any of Schaefer's remaining information under section 552.110(a).

Schaefer also claims portions of its proposal are excepted from disclosure under section 552.110(b). Upon review of Schaefer's arguments and the information at issue, we find Schaefer has failed to provide specific factual evidence demonstrating that release of any of its remaining information would result in substantial competitive harm to the company. See Open Records Decision Nos. 661 (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 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder, such as Schaefer, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. See Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). See generally Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the university may not withhold any portion of Schaefer's proposal pursuant to section 552.110(b).

We note the remaining information contains bank account and routing numbers that are subject to section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of [the Act], 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 *id.* § 552.136(a) (defining "access device"). We note the second requestor has a right of access to his own company's bank

account and routing numbers.³ *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987). Thus, the university must withhold the bank account and routing numbers we marked under section 552.136 of the Government Code.⁴

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 (1978). 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, the university must withhold the customer information we have marked under section 552.110(a) of the Government Code. The university must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.⁵

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

³Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁵We note the information being released contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 389507

Enc. Submitted documents

cc: Requestors
(w/o enclosures)

Ms. Alicia K. Harkness
PricewaterhouseCoopers, L.L.P.
1800 Tysons Boulevard
McLean, VA 22101
(w/o enclosures)

Ms. Sheri R. Hunter
Attorney for Schaefer & Company, L.L.C.
Sedwick, Detert, Moran & Arnold, L.L.P.
919 Congress Avenue, Suite 1250
Austin, Texas 78701
(w/o enclosures)