



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 18, 2013

Mr. Eric D. Bentley
Senior Assistant General Counsel
Office of the General Counsel
University of Houston System
311 E. Cullen Building
Houston, Texas 77204-2028

OR2013-01118

Dear Mr. Bentley:

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# 476618.

The University of Houston System (the "university") received three requests for all proposals and tabulation sheets in relation to a specified RFP. 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 160/90; BD&E; Creative Communication Associates ("CCA"); Forge Academia ("Forge"); TexHahn Media, Inc. ("Hahn"); Pennebaker; Phoenix Design Works ("Phoenix"); Plum Agency ("Plum"); Siegel + Gale ("Siegel"); Simpson:Scarborough; Stamats, Inc. ("Stamats"); Tocquigny; and Zone 5. Accordingly, you state the university has notified the third parties of the request for information and of their right to submit arguments to this office as to why their 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 Act in certain circumstances). We have received comments submitted by 160/90, Stamats, and Zone 5. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-15942 (2012). In that ruling, we determined the university must release the

information at issue, which consisted of a score sheet for the RFP at issue. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the university must rely on Open Records Letter No. 2012-15942 as a previous determination and release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will consider the submitted arguments against its disclosure.

Next, we must address the university's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(e), within fifteen business days of receipt of the request the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the university received the requests for information on October 29, 2012, and November 7 and 12, 2012. We find the university's fifteen-business-day deadlines under section 552.301(e) were November 19, 2012, November 28, 2012, and December 3, 2012, respectively. You do not inform this office the university was closed during any business days between October 29, 2012, and December 3, 2012. However, the university submitted three of the requested proposals in an envelope meter marked January 7, 2013. *See id.* § 552.308(a) (deadline under the Act is met if document bears post office mark indicating time within the deadline period). Consequently, we find the university failed to comply with section 552.301 of the Government Code as to these proposals.

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 a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (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. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Because third-party interests are at

stake in this instance, we will consider whether the information at issue must be withheld under the Act.

Next, we note 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 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, we have not received comments from BD&E, CCA, Forge, Hahn, Pennebaker, Phoenix, Plum, Siegel, Simpson:Scarborough, or Tocquigny explaining why their information should not be released. Therefore, we have no basis to conclude BD&E, CCA, Forge, Hahn, Pennebaker, Phoenix, Plum, Siegel, Simpson:Scarborough, or Tocquigny have a protected proprietary interest in their submitted information. *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. Accordingly, the university may not withhold any of the information at issue on the basis of any proprietary interest BD&E, CCA, Forge, Hahn, Pennebaker, Phoenix, Plum, Siegel, Simpson:Scarborough, or Tocquigny may have in it.

160/90 asserts portions of its proposal are excepted from disclosure pursuant to 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(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the university does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to any portion of 160/90's proposal. *See* ORD 592 (governmental body may waive section 552.104).

160/90, Stamats, and Zone 5 argue against disclosure of portions of their information under section 552.110 of the Government Code. Section 552.110 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 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 a 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 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 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). 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; *Huffines*, 314 S.W.2d at 776; Open ORDs 319 at 3, 306 at 3.

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).

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 id.*; *see also* ORD 661 at 5.

160/90, Stamats, and Zone 5 claim portions of their respective submitted information constitute trade secrets. We note, however, that Stamats informs us it has made its customer information publicly available on its website. Because Stamats has published this information, it has failed to demonstrate this information constitutes a trade secret. Upon review, we find 160/90, Stamats, and Zone 5 have failed to demonstrate that any portion of the submitted information meets the definition of a trade secret. *See* Open Records Decision Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We further 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 Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, the university may not withhold any of remaining information pursuant to section 552.110(a) of the Government Code.

160/90, Stamats, and Zone 5 also contend portions of the remaining information consist of commercial or financial information, the release of which would cause substantial competitive harm to these third parties. Upon review, we conclude Zone 5 has established the release of its pricing information, which we have marked, would cause it substantial competitive injury. However, we find 160/90, Stamats, and Zone 5 have made only conclusory allegations that release of the remaining information would cause them substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov’t Code § 552.110(b); *see also* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Further, this office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder, such as 160/90, is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of

Information Act, 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We therefore conclude that the university may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

We note the remaining information contains information that is subject to section 552.136(b) of the Government Code.² Section 552.136 provides in part 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”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Therefore, the university must withhold the information we have marked under section 552.136 of the Government Code.

We note some of the submitted 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, the university must continue to rely on Open Records Letter No. 2012-15942 as a previous determination and release the information we previously ruled on in accordance with that ruling. The university must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The university must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

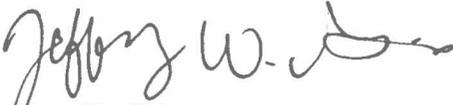
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free,

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).

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.

Sincerely,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 476618

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Daniel Kehn
Creative Communication
Associates
16 Sage Estate
Albany, New York 12204
(w/o enclosures)

Ms. Susan Pennebaker
Pennabaker
Suite 200
1100 West 23rd Street
Houston, Texas 77008
(w/o enclosures)

Mr. Sung W. Lee
Plum Agency
12 Desbrosses Street
New York, New York 10013
(w/o enclosures)

Mr. Raymond J. Witkowski
Vice President
Zone 5
25 Monroe Street, Suite 300
Albany, New York 12210
(w/o enclosures)

Mr. Mike Benes
Forge Academia
8 Winchester Place
Winchester, Massachusetts 02144
(w/o enclosures)

Mr. Shannon Slusher
CEO & Co-Founder
160/90
One South Broad Street, Tenth Floor
Philadelphia, Pennsylvania 19107
(w/o enclosures)

Ms. Amy Skiles
Phoenix Design Works
180 Wyoming Avenue
Maplewood, New Jersey 07040
(w/o enclosures)

Mr. Peter Damon
Siegel+Gale
625 Avenue of the Americas
New York, New York 10011
(w/o enclosures)

Mr. Richard Hanson
Senior Controller
Stamats, Inc.
P.O. Box 1888
Cedar Rapids, Iowa 52406-1888
(w/o enclosures)

Mr. Jeff Hahn
Hahn, Texas
1105 North Lamar Boulevard
Austin, Texas 78703
(w/o enclosures)

Mr. Tom Fornoff
Tocquigny
401 Congress Avenue
Austin, Texas 78701
(w/o enclosures)