ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 11, 2014

Ms. Ana Vieira
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2014-04144

Dear Ms. Vieira:

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# 516714 (UT OGC No. 153649).

The University of Texas at Austin (the "university") received a request for five categories of information pertaining to RFP 721-1322 for ERP Software. You state the university is releasing some of the requested information. You claim some of the submitted information is excepted from disclosure under section 552.139 of the Government Code. Additionally, although you state the university takes no position with respect to some of the submitted information, its release may implicate the interests of Workday, Inc. ("Workday"). Accordingly, you state, and provide documentation demonstrating, the university notified Workday of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining 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). We have received comments from Workday. We have reviewed the submitted information and the submitted arguments.

Initially, Workday raises section 552.104 of the Government Code. This section excepts from required public 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 which 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, no portion of Workday's information may be withheld on this basis.

Section 552.139 of the Government Code provides, in part:

> (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.
>
> (b) The following information is confidential:
>
> > (1) a computer network vulnerability report; [and]
> >
> > (2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). You state the information in Tab 7 "details what services Workday will provide and implement with regard to enterprise applications and software, the release of which could make the computer network security vulnerable." You also contend releasing the information in Tab 7 would render the university's network security vulnerable to unauthorized access, harm, and criminal activity. Additionally, Workday asserts some of its information relates to Workday's security testing and monitoring frequency of its network and systems. Workday explains this security information is directly related to the security of the university's data on Workday's systems. Further, Workday explains some of its information consists of audit reports of Workday's security controls of its software applications. Based on these representations and our review of the information, we find the university and Workday have demonstrated these portions of the submitted information relate to computer network security; the design, operation, or defense of a computer network; or an assessment of the extent to which software of a contractor of a governmental body is vulnerable to unauthorized access or harm. Accordingly, the university must withhold the information we have marked under section 552.139.

Workday submits arguments against disclosure of its 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. *Id.* § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information

that is trade secrets obtained from a person and information that is 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

> [A]ny 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) (citation omitted); *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.[1] *See* 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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

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[1]There are six factors the Restatement gives as indicia of 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 the 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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. *Id.*; 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).

Workday claims portions of its information, including its customer reference information, constitute trade secrets. Upon review, we find Workday has established a *prima facie* case that its customer reference information constitutes trade secrets. Accordingly, to the extent the customer reference information at issue is not publicly available on Workday's website, the university must withhold the customer reference information at issue, which we have indicated, under section 552.110(a). We find Workday has failed to demonstrate the remaining information for which it asserts section 552.110(a) meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the university may not withhold the remaining information at issue on the basis of section 552.110(a).

Workday also contends portions of the remaining information are commercial or financial information, release of which would cause substantial competitive harm to Workday. Upon review of Workday's arguments under section 552.110(b), we conclude Workday has established the release of some of its remaining information, which we have marked, would cause it substantial competitive injury. Accordingly, the university must withhold the information we have marked under section 552.110(b). However, we find Workday has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (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). We therefore conclude the university may not withhold any of the remaining information under section 552.110(b).

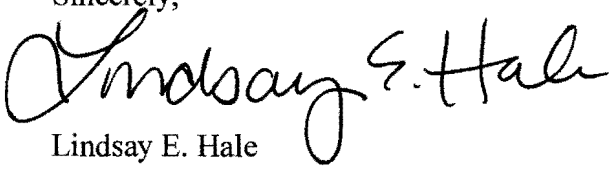
We note some of the remaining information appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection 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 withhold the information we have marked under section 552.139 of the Government Code. To the extent the customer reference information at issue is not publicly available on Workday's website, the university must withhold the customer reference information at issue, which we have indicated, under section 552.110(a) of the Government Code. The university must withhold the information we have marked under section 552.110(b) 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.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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 516714

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)