



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 16, 2015

Ms. Lori J. Robinson
Staff Attorney
Austin Independent School District
1111 West Sixth Street
Austin, Texas 78703

OR2015-11894

Dear Ms. Robinson:

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# 567392.

The Austin Independent School District (the "district") received a request for the Workday/IBM proposal response to a specified request for proposals. Although you do not take any position with respect to whether the submitted information is excepted from disclosure under the Act, you state release of the information may implicate the proprietary interests of IBM Public Sector Workday Enterprise Applications ("Workday"). Accordingly, you state, and provide documentation demonstrating, the district notified Workday of the request for information and of the company's right to submit arguments stating why the submitted 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.

Workday argues portions of the submitted information are not subject to disclosure 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. Gov't Code § 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

¹There 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 the submitted 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 district must withhold the customer reference information at issue, which we have marked, under section 552.110(a). However, 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. Further, 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; ORDs 319 at 3, 306 at 3. Accordingly, the district 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, including pricing information, which we have marked, would cause it substantial competitive injury. Accordingly, the district 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 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 costs, 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, qualifications, and pricing are not ordinarily excepted from disclosure under statutory

predecessor to section 552.110). We therefore conclude the district may not withhold any of the remaining information under section 552.110(b).

Workday also raises section 552.139 of the Government Code, which 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). Workday argues portions of the submitted information contain information relating to specified technologies used by the company and specific security measures taken to protect client data. Workday further argues that this computer network and security defense information could be used to defeat Workday's security. However, Workday was not the winner of the contract at issue. Thus, Workday has not demonstrated how any of the information at issue relates to computer network security, or to the design, operation, or defense of the computer network as contemplated in section 552.139(a). Moreover, we find Workday has failed to explain how any of the submitted information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the district may not withhold any of the submitted information under section 552.139 of the Government Code.

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, to the extent the customer reference information at issue is not publicly available on Workday's website, the district must withhold the customer reference information at issue, which we have marked, under section 552.110(a) of the Government Code. The district must withhold the information we have marked under section 552.110(b) of the Government Code. The district 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,



Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 567392

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Paige Bayliss
IBM Public Sector Workday Enterprise Applications
3039 East Cornwallis Road, Building 002
Research Triangle Park, North Carolina 27709
(w/o enclosures)