



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 26, 2015

Ms. Audra Gonzalez Welter
Attorney & Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2015-17793

Dear Ms. Welter:

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# 577107 (OGC #162496).

The University of Texas at Austin (the "university") received a request for the winning proposals submitted for five specified RFPs. 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 Powerhouse Animation Studios, LLC ("Powerhouse"); Alpheus Media, Inc.; Audion, LLC; Barnhill Productions, Inc., dba Castleview Productions; BrightLeaf Group, Inc.; Butter Brand dba Pushstart Creative; Creative Suitcase, LLC; Digital Results, LLC, dba Springbox; Double Line, Inc.; Ensipre Studios; FleishmannHillard Austin; Jenkev Productions, Inc.; Leaning Forward Technologies, LLC; Mr. Video Productions; Region C, LLC; Stonebridge Communications, Inc.; Texas Crew Productions, LLC; TradeMark Media; and UPG Video Marketing. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the 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 the Act in certain circumstances). We have received comments from Powerhouse. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have only received comments from Powerhouse. Thus, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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 submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Section 552.110 of the Government Code 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). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). 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.¹ 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 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 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. See Open Records Decision No. 402 (1983). We 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 also *Huffines*, 314 S.W.2d at 776; Open Record Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.*; see also Open Records Decision No. 661 at 5 (1990).

Powerhouse claims portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Powerhouse has established a *prima facie* case that its customer information constitutes trade secret information. Therefore, the customer information at issue must generally be withheld under section 552.110(a) of the Government Code.² However, to the extent any of the customer information Powerhouse seeks to withhold has been published on the company’s website, such information is not confidential under section 552.110(a). We also conclude

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

²To the extent the customer information is not published on the company’s website, we need not address Powerhouse’s remaining arguments for this information.

Powerhouse has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Powerhouse has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. See ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of Powerhouse's remaining information may be withheld under section 552.110(a).

Powerhouse argues some of the remaining information consists of commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. We note Powerhouse was a winning bidder in this instance. 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 is generally not excepted under section 552.110(b). See Open Records Decision No. 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 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. See Gov't Code § 552.022(a)(3); Open Records Decision No. 541 at 8 (1990). Further, to the extent any of the customer identities Powerhouse seeks to withhold have been published on its website, we find Powerhouse has failed to establish release of such information would cause the company substantial competitive harm. Upon review, we find Powerhouse has not established any of the remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. Accordingly, none of Powerhouse's remaining information may be withheld under section 552.110(b) of the Government Code.

We understand Powerhouse to assert some of its information is excepted under section 552.101 of the Government Code 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *Rosen v.*

Matthews Constr. Co., 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). We also note an individual's name, education, prior employment, and personal information are not ordinarily private information subject to common-law privacy. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Upon review, however, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the university may not withhold any portion of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov't Code § 552.102(a). We understand Powerhouse to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d 336. The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Having carefully reviewed the information at issue, we find no portion of the submitted information is subject to section 552.102(a) of the Government Code, and the university may not withhold any of the submitted information on that basis.

Section 552.136(b) of the Government Code provides, “[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.”³ 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. Accordingly, the university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

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 (1977). A

³The 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).

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 Powerhouse's customer information is not publicly available on the company's website, the university must withhold Powerhouse's submitted customer information under section 552.110(a) of the Government Code. The university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The university must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.⁴

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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

⁴While Powerhouse objects to the release of the social security numbers in the remaining information, we note 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. See Gov't Code § 552.147(b).

Ref: ID# 577107

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Brad Graeber
CEO
Powerhouse Animation Studios
Westpark 2, Suite 225
8140 North Mopac
Austin, Texas 78759
(w/o enclosures)

Ms. Beth Hames
Co-Owner
Alpheus Media, Inc.
1414 West 6th Street
Austin, Texas 78703
(w/o enclosures)

Ms. Mary Maltbie
VP for Higher Education
Enspire Studios
1708 Guadalupe Street
Austin, Texas 78701-1215
(w/o enclosures)

Mr. Kevin Hart
President
Mr. Video Productions
2612 Bryan Avenue
Bellevue, Nebraska 680005
(w/o enclosures)

Ms. Jane E. Scott
CEO
BrightLeaf Group, Inc.
7000 North Mopac, Suite 200
Austin, Texas 78731
(w/o enclosures)

Ms. Susan McCain
SVP, Senior Partner and General Manager
FleishmannHillard Austin
828 West 6th Street, Suite 102
Austin, Texas 78703
(w/o enclosures)

Mr. Kevin Haberer
CEO
Jenkev Productions
7010 McKarmy Boulevard
Dallas, Texas 75248
(w/o enclosures)

Mr. Ted C. Barnhill
President
Barnhill Productions, Inc.
d/b/a Castleview Productions
1100 West 41st Street
Austin, Texas 78756
(w/o enclosures)

Mr. Anthony L. Cannon
President
Leaning Forward Technologies, LLC
9504 IH 35 North, Suite 319
San Antonio, Texas 78233
(w/o enclosures)

Mr. Benjamin Jansen
Managing Member
Audion, LLC
1715 East 6th Street, Suite 210
Austin, Texas 78702
(w/o enclosures)

Ms. Janet Kahoe
President
Stonebridge Communications, Inc.
3027 Abell Avenue
Baltimore, Maryland 21218
(w/o enclosures)

Mr. Adrian Taylor
Principal
Butter Brand
d/b/a Pushstart Creative
4600 Mueller Boulevard, Suite 1007
Austin, Texas 78723
(w/o enclosures)

Mr. Roka Music
Owner/Executive Producer
Region C, LLC
1702 Evergreen Avenue
Austin, Texas 78704
(w/o enclosures)

Ms. Maria Saavedra
COO
Digital Results, LLC
d/b/a Springbox
708 Congress Avenue
Austin, Texas 78701
(w/o enclosures)

Mr. Chip Rives
Senior Producer/Director
Texas Crew Productions, LLC
109 Denson Drive #109
Austin, Texas 78752
(w/o enclosures)

Ms. Megan Walling
Business Development Manager
TradeMark Media
1601 East 7th Street, Suite 200
Austin, Texas 78702
(w/o enclosures)

Mr. Ben Cecil
Partner, Strategy Director
UPG Video Marketing
7801 North Lamar Boulevard, Suite D103
Austin, Texas 78752
(w/o enclosures)

Mr. Zeynep Young
Chief Executive Officer
Double Line, Inc.
5918 West Courtyard Drive, Suite 405A
Austin, Texas 78730
(w/o enclosures)

Ms. Rachel Clemens
President
Creative Suitcase, LLC
1012 East 38th Street
Austin, Texas 78751
(w/o enclosures)