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ATTORNEY GENERAL OF TEXAS

October 27, 2015

Ms. Audra Gonzalez Welter
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-22514

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# 584621 (OGC# 163586).

The University of Texas Medical Branch at Galveston (the "university") received a request for all responses to a specified request for proposals and the name of the firm that was selected.¹ Although you state you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified BRG-Berkeley Research Group; Cognizant Technology Solutions; Culbert Healthcare Solutions; Engagement Principal; FTI Consulting ("FTI"); Huron Healthcare ("Huron"); KaufmannHall; McGladrey LLP; McKinnis Consulting Services, Inc. ("McKinnis"); MedAssets; Moss Adams, LLP.; Nordic Consulting Partners ("Nordic"); Navigant Consulting, Inc. ("Navigant"); and Sagacious Consultants of the request for information and of their right to submit arguments to this office as to why the submitted

¹We note university sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

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 Huron, FTI, McKinnis, MedAssets, Navigant, and Nordic. We have considered the submitted arguments and reviewed the submitted information.

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) 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 only received comments from Huron, FTI, McKinnis, MedAssets, Navigant, and Nordic explaining why their submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in the 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 the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we note Nordic argues against the release of information that was not submitted by the university. This ruling does not address information that was not submitted by the university and is limited to the information the university has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Huron argues some of its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses 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. *See id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We 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, we find no portion of Huron's information constitutes highly intimate or embarrassing information of no legitimate public concern. Accordingly, the university may

not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

McKinnis and Nordic argue portions of their information should be withheld under section 552.104 of the Government Code. Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* McKinnis and Nordic state they have competitors. In addition, McKinnis and Nordic state the release of their information at issue would give advantage to their competitors or other bidders. After review of the information at issue and consideration of the arguments, we find McKinnis and Nordic have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we have marked and the information McKinnis has marked under section 552.104(a).²

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 that are privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be the following:

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

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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. 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, substantial competitive injury would likely result from release of the information at issue. *See id.*; *see also* ORD 661 at 5 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

FTI, Huron, MedAssets, Navigant, and Nordic object to the release of their information under section 552.110(b) of the Government Code. Upon review, we find FTI, MedAssets, Navigant, and Nordic have demonstrated portions of their information, including pricing information, which we have marked, consist of commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the university must withhold the information we have marked under section 552.110(b) of the Government Code.⁴ We further find Navigant and Nordic have both demonstrated their client information consists of commercial or financial information, the release of which would cause substantial competitive harm. Thus, the university must withhold Navigant’s and Nordic’s client information under section 552.110(b); however, to the extent the client information is

³The 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).

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

publicly available on the companies' websites, the university may not withhold such information under section 552.110(b). We find none of the third parties have provided a specific factual or evidentiary showing that the release of their remaining information would cause substantial competitive injury. *See* ORD 661 at 5-6 (1999) (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). Therefore, none of the remaining information may be withheld under section 552.110(b).

Huron, McKinnis, MedAssets, and Navigant object to the release of portions of their remaining information under section 552.110(a) of the Government Code. Upon review, we find McKinnis has demonstrated its client information constitutes a trade secret. Thus, to the extent the client information at issue is not publicly available on McKinnis' website, the university must withhold the client information under section 552.110(a) of the Government Code.⁵ However, we find Huron, MedAssets, and Navigant have failed to establish a *prima facie* case their remaining information meets the definition of a trade secret, and have failed to demonstrate the necessary factors to establish a trade secret claim for their remaining information. *See* ORD 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). Consequently, the university may not withhold any of the remaining information under section 552.110(a) of the Government Code.

We note some of the submitted information may 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 may withhold the information we have marked and the information McKinnis has marked under section 552.104(a). The university must withhold the information we have marked under section 552.110(b) of the Government Code and Navigant's and Nordic's client information under section 552.110(b) of the Government Code. The university must also withhold McKinnis' client information under section 552.110(a) of the Government Code. However, to the extent the client information is publicly available on the companies' websites, the university may not withhold such information under section 552.110(b) or section 552.110(a) of the Government Code. The

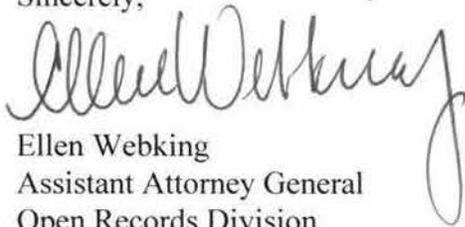
⁵As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

remaining information must be released; 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,



Ellen Webking
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Open Records Division

EW/akg

Ref: ID# 584621

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