



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 22, 2015

Ms. Claudene Marshall
Assistant General Counsel
Office of General Counsel
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2015-26987

Dear Ms. Marshall:

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# 591552 (ORR# 15-819 & 15-879).

Texas A&M University (the "university") received two requests from different requestors for information related to request for proposals number 15-0016. 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 American Student Assistance ("American"); Edfinancial Services, L.L.C. ("Edfinancial"); Educational Credit Management Corporation ("ECMC"); Enterprise Recovery Systems, Inc. ("Enterprise"); Nebraska Student Loan Program, Inc. d/b/a Inceptia ("Inceptia"); New Hampshire Higher Education Assistance Foundation ("NHHEAF"); NorthStar Education Services, L.L.C. ("NorthStar"); and USA Funds ("USA"). Accordingly, you state, and provide documentation showing, you notified American, Edfinancial, ECMC, Enterprise, Inceptia, NHHEAF, NorthStar, and USA 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 American, Edfinancial, ECMC, and Inceptia. We have reviewed the submitted information and the submitted arguments.

Initially, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments

from Enterprise, NHHEAF, NorthStar, or USA explaining why the submitted information should not be released. Therefore, we have no basis to conclude Enterprise, NHHEAF, NorthStar, or USA has 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 Enterprise, NHHEAF, NorthStar, or USA may have in the information.

We now turn to the submitted arguments against release of the requested information. Section 552.104(a) of the Government Code excepts 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.* at 841. ECMC and Inceptia state they have competitors. In addition, ECMC states release of the information at issue to its competitors would allow the competitors to undercut its prices or attempt to duplicate, reverse engineer, or otherwise outdo ECMC’s proprietary information in the next bid, thus giving advantage to ECMC’s competitors. Further, Inceptia states the information at issue, if released to Inceptia’s competitors, could be implemented into the competitors’ current and future bid work to compete against the products and services offered by Inceptia. After review of the information at issue and consideration of the arguments, we find ECMC and Inceptia 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 at issue, which we have marked, under section 552.104(a) of the Government Code.¹

Next, American and Edfinancial state portions of their information are excepted from 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. *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 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

¹As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

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.² 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* Open Records Decision No. 552 at 5 (1990). 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). 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 Records 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

²The 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).

result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (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).

American and Edfinancial assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Edfinancial has established a *prima facie* case that portions of its information, including its customer information, constitute trade secret information. Accordingly, the university must withhold Edfinancial's customer information under section 552.110(a); however, Edfinancial's customer information may not be withheld to the extent it is publicly available on Edfinancial's website. We conclude American and Edfinancial have failed to establish a *prima facie* case that any portion of the remaining information meets the definition of a trade secret. We further find American and Edfinancial have not demonstrated the necessary factors to establish a trade secret claim for the remaining information. *See* ORD 402. Therefore, the university may not withhold any of the remaining information under section 552.110(a).

American and Edfinancial further argue portions of their information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Edfinancial has demonstrated portions of its remaining information constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the university must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find American and Edfinancial have failed to demonstrate the release of any of the remaining information would result in substantial harm to their competitive positions. *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). Furthermore, we note the contract at issue was awarded to American. 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 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, the university may not withhold any of the remaining information under section 552.110(b).

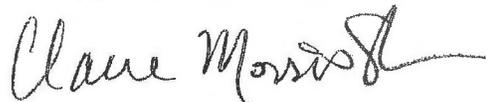
We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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 marked under section 552.104(a) of the Government Code. The university must withhold the information we marked under section 552.110 of the Government Code; however, Edfinancial's customer information may not be withheld to the extent it is publicly available on Edfinancial's website. The university must release the remaining information; however, any information that is subject to copyright may be released only 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,



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Open Records Division

CVMS/som

Ref: ID# 591552

Enc. Submitted documents

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