



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 14, 2016

Ms. Eman Patricia Arabi-Katbi
Assistant General Counsel
The University of Houston System
311 E Cullen Building
Houston, Texas 77204

OR2016-01159

Dear Ms. Arabi-Katbi:

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# 594298.

The University of Houston (the "university") received a request for bid tabulations and submitted bids for a specified request for proposals.¹ Although you take no position as to whether the submitted information is excepted from disclosure under the Act, you state release of the submitted information may implicate the proprietary interests of Driven Local, Educational Marketing Group, Inc., Eduvantis, L.L.C. ("Eduvantis"), Forthea Interactive, L.L.C. ("Forthea"), Kirk Communications, Softway Solutions, and Strategar, L.L.C. 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

¹You state the university sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (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).

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 Eduvantis and Forthea.² We have reviewed the arguments and 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 letter, we have received comments from only Eduvantis and Forthea. Thus, none of the remaining third parties have demonstrated they have a protected proprietary interest in any of 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 the information on the basis of any proprietary interests the remaining third parties may have in the information.

Eduvantis claims some of its information is protected under section 552.104 of the Government Code. Section 552.104(a) 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. Eduvantis states it has competitors. In addition, Eduvantis states release of its information would “allow a competitor to obtain both strategy and pricing advantages which may be used in future bid opportunities.” After review of the information at issue and consideration of the arguments, we find Eduvantis has established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we have marked under section 552.104(a).

We understand Forthea to assert its information is protected proprietary information under section 552.110(a). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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:

²Although Forthea raises section 552.021 of the Government Code, we note this provision is not an exception to disclosure under the Act. *See* Gov't Code § 552.021 (providing public information is available during normal business hours).

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 secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.³ 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. Open Records Decision No. 402 (1983).

Upon review, we find Forthea has failed to establish a *prima facie* case its information meets the definition of a trade secret. Moreover, we find Forthea has not demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See id.* Therefore, none of the Forthea's information may be withheld under section 552.110(a) of the Government Code.

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

We note some of the remaining 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 under section 552.104(a) of the Government Code. The remaining information must be released; however, any information subject to copyright must 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,



Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 594298

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. David Mulligan
Eduvantis
120 South LaSalle Street, Suite
1515
Chicago, Illinois 60603
(w/o enclosures)

Mr. Nick Lindauer
Forthea LLC
3355 West Alabama Street, Suite
1230
Houston, Texas 77098
(w/o enclosures)

Driven Local
c/o Eman Patricia Arabi-Katbi
Assistant General Counsel
The University of Houston System
311 E Cullen Building
Houston, Texas 77204
(w/o enclosures)

Educational Marketing Group, Inc.
c/o Eman Patricia Arabi-Katbi
Assistant General Counsel
The University of Houston System
311 E Cullen Building
Houston, Texas 77204
(w/o enclosures)

Kirk Communications
c/o Eman Patricia Arabi-Katbi
Assistant General Counsel
The University of Houston System
311 E Cullen Building
Houston, Texas 77204
(w/o enclosures)

Strategar, L.L.C.
C/o Eman Patricia Arabi-Katbi
Assistant General Counsel
The University of Houston System
311 E Cullen Building
Houston, Texas 77204
(w/o enclosures)