



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 9, 2016

Mr. R. Brooks Moore
Managing Counsel, Governance
The Texas A&M University System
301 Tarrow Street, Sixth Floor
College Station, Texas 77840-7896

OR2016-20411

Dear Mr. Moore:

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# 627374 (Ref. No. W001146-070516).

Texas A&M University (the "university") received a request for the scoring sheets for, and proposals submitted in response to, a specified request for proposals. Although 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 fourteen third parties.¹ Accordingly, you state, and provide documentation showing, you notified the 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 HireRight, Inquiries, GIS, JD Palatine, and Summit. We have considered the submitted arguments and reviewed the submitted information.

¹The third parties are AccuSource, Inc.; A-Check America, Inc. d/b/a A-Check Global; First Advantage; General Information Services, Inc. ("GIS"); HireRight, LLC ("HireRight"); Inquiries, Inc. ("Inquiries"); JD Palatine; Kelmar Global; Quicksius, LLC d/b/a Quick Search; ScreeningONE, Inc.; Sterling Infosystems Inc.; Summit Security Services, Inc. ("Summit"); TrionAid Associates Inc.; and Truescreen, Inc.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from HireRight, Inquiries, GIS, JD Palatine, and Summit explaining why the information should not be released. Therefore, we have no basis to conclude any of 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 any of the information at issue on the basis of any proprietary interest the remaining third parties may have in it.

Next, we note HireRight 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).

JD Palatine asserts some of its information is confidential under section 382.041 of the Health & Safety Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information protected by section 382.041 of the Health & Safety Code. Section 382.041 provides, in relevant part, that "a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). The "commission" referenced in the statute is the Texas Commission on Environmental Quality. By its own terms, section 382.041 pertains only to information submitted to the Texas Commission on Environmental Quality. *See id.*; *see also* Open Records Decision No. 652 at 5 (1997). The information at issue was submitted to the university. Consequently, none of the information at issue is made confidential by section 382.041 of the Health and Safety Code, and the university may not withhold it under section 552.101 on that basis.

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. HireRight, Inquiries, GIS, JD Palatine, and Summit all state they

have competitors. In addition, each of the companies states release of the information at issue would give advantage to a competitor or bidder. After review of the information at issue and consideration of the arguments, we find the companies 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 HireRight has marked, the information GIS has marked, GIS's sample services agreement, the information Summit has marked, and the information we have marked under section 552.104(a) of the Government Code.²

JD Palatine also asserts portions of its remaining information are excepted from disclosure under section 552.110(a) of the Government Code, which 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:

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 RESTATEMENT OF TORTS § 757 cmt. b. This

²As our ruling is dispositive, we do not address the other arguments to withhold this information.

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.

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. ORD 402.

Upon review of JD Palatine's arguments, we find JD Palatine has established its customer information and the information we have marked constitute trade secret information for purposes of section 552.110(a). Accordingly, the university must withhold the information we have marked under section 552.110(a) of the Government Code. In addition, to the extent JD Palatine's customer information is not publicly available on the company's website, the university must withhold JD Palatine's customer information under section 552.110(a) of the Government Code. However, we find JD Palatine has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret, and has failed to demonstrate the necessary factors to establish a trade secret claim for any of its remaining information. *See* ORDs 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), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Consequently, the university may not withhold any of JD Palatine's remaining information under section 552.110(a) of the Government Code.

We note some of the remaining information is subject to section 552.136 of the Government Code.⁴ Section 552.136 of the Government Code states "Notwithstanding 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Upon review, we find the university must withhold the information we have marked under section 552.136 of the Government Code.

In summary, the university may withhold the information HireRight has marked, the information GIS has marked, GIS's sample services agreement, the information Summit has marked, and the information we have marked under section 552.104(a) of the Government

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

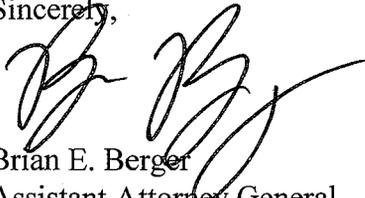
⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code. The university must withhold the information we have marked under section 552.110(a) of the Government Code. In addition, to the extent JD Palatine's customer information is not publicly available on the company's website, the university must withhold JD Palatine's customer information under section 552.110(a) of the Government Code. The university must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 627374

Enc. Submitted documents

c: Requestor
(w/o enclosures)

14 Third Parties
(w/o enclosures)