



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2012

Ms. Melissa V. Garcia
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2012-19181

Dear Ms. Garcia:

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# 472420 (U.T. OGC# 146478).

The University of Texas Health Science Center at Houston (the "university") received a request for documents handled by the scorers of a specified request for proposal, which includes the proposals submitted to the scorers.¹ We note you have redacted social security numbers pursuant to section 552.147 of the Government Code.² You have also redacted insurance policy numbers pursuant to section 552.136(c) of the Government Code.³ Although you take no position on whether the remaining requested information is excepted

¹You state the university sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a 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 that 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 the request is clarified or narrowed).

²Section 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. Gov't Code § 552.147(b).

³Section 552.136 authorizes a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. See Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). See *id.* § 552.136(d), (e).

from disclosure, you state release of this information may implicate the proprietary interests of CBIC Construction & Development, LLC ("CBIC"), Hallmark Capital Group, LLC ("Hallmark"), Horizon International Group, LLC ("Horizon"), Jamail & Smith Corporation ("Jamail"), J.T. Vaughn Construction, LLC ("Vaughn"), South Coast Construction Services, Inc. ("South Coast"), The Trevino Group, Inc. ("Trevino"), Weatherproofing Technologies, Inc. ("Weatherproofing"), and Gilbane Building Company ("Gilbane"). Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Gilbane. We have reviewed the submitted information.

We note that 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 decision, we have not received correspondence from CBIC, Hallmark, Horizon, Jamail, Vaughn, South Coast, Trevino, or Weatherproofing. Thus, CBIC, Hallmark, Horizon, Jamail, Vaughn, South Coast, Trevino, and Weatherproofing have not demonstrated that they have protected proprietary interests in any of their 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 CBIC's, Hallmark's, Horizon's, Jamail's, Vaughn's, South Coast's, Trevino's, or Weatherproofing's submitted information on the basis of any proprietary interests CBIC, Hallmark, Horizon, Jamail, Vaughn, South Coast, Trevino, or Weatherproofing may have in their 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). 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 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.⁴ 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 that 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, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Gilbane claims its requested information is trade secret information. Upon review, we find Gilbane has established a *prima facie* case that some of its customer information constitutes trade secrets. Accordingly, the university must withhold the information we have marked under section 552.110(a). We note, however, that Gilbane published the identity of some of

⁴The 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 (1939); *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

its customers on its website, thereby making this information publically available. Because Gilbane has published this information, it has failed to demonstrate this information is a trade secret, and none of it may be withheld under section 552.110(a). We also note pricing information pertaining to a particular proposal or 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 (citation omitted); *see also Huffines*, 314 S.W.2d at 776. Thus, we find Gilbane has failed to demonstrate any of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the university may not withhold any of the remaining information under section 552.110(a).

Gilbane contends some of its submitted information is commercial or financial information, release of which would cause the company competitive harm. Upon review of Gilbane's arguments under section 552.110(b), we conclude Gilbane has not made the specific factual or evidentiary showings required by section 552.110(b) that release of any of the remaining information would cause the company substantial competitive harm. *See Open Records Decision Nos. 661, 509 at 5 (1988)* (because 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), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Furthermore, as previously noted, Gilbane published the identities of some of its customers on its website, making this information publically available. Gilbane does not explain how release of any of the information it has made public on its website would cause the company substantial competitive harm. We therefore conclude the university may not withhold any of the remaining information under section 552.110(b).

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 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 must withhold the customer information we have marked under section 552.110 of the Government Code. The university must release the remaining information; 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Jasmine D. Wightman
Assistant Attorney General
Open Records Division

JDW/dls

Ref: ID# 472420

Enc. Submitted documents

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