



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 23, 2016

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Ana Vieira Ayala
Senior Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2016-19004

Dear Ms. Ayala:

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# 623643 (OGC# 170069).

The University of Texas Medical Branch at Galveston (the "university") received a request for all e-mail communications involving any of six specified e-mail addresses over a specified time period. 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 Premier, Inc. ("Premier"). Accordingly, you state, and provide documentation showing, you notified Premier of the request for information and of its 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 Premier. We have reviewed the submitted information and the submitted arguments.

Initially, we note Premier seeks to withhold information the university did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive

by the university. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and (2) “[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. 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.¹ RESTATEMENT OF TORTS § 757 cmt. b. This

¹The 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).*

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* 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 result from release of the information at issue. *Id.*; Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Premier asserts portions of the submitted information constitute trade secrets under section 552.110(a) of the Government Code. Premier contends release of the information at issue would result in substantial competitive harm to the company. Having considered Premier’s arguments and reviewed the information at issue, we find Premier has failed to establish a *prima facie* case its information meets the definition of a trade secret, nor has Premier demonstrated the necessary factors to establish a trade secret claim for its 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). Accordingly, none of Premier’s information may be withheld under section 552.110(a) of the Government Code. We further find Premier has not made the specific factual or evidentiary showing required by section 552.110(b) that the release of the information at issue would cause Premier substantial competitive harm. *See* ORD 319. Therefore, the university may not withhold any of the submitted information under section 552.110 of the Government Code.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a

governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c).

We are unable to determine if some of the e-mail addresses we have marked are e-mail addresses that are maintained by a governmental entity for one of its officials or employees. We are further unable to determine if some of the e-mail addresses we have marked are e-mail addresses that fall within the scope of section 552.137(c). Accordingly, we must rule conditionally. To the extent the e-mail addresses we have marked are not maintained by a governmental body for one of its officials or employees or excluded by subsection 552.137(c) of the Government Code, the university must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent the e-mail addresses at issue are maintained by a governmental body for one of its officials or employees or are excluded by subsection 552.137(c), the e-mail addresses may not be withheld under section 552.137 of the Government Code. In any event, we find none of the remaining information falls within the scope of section 552.137; consequently, the university may not withhold any of the remaining information at issue under section 552.137 of the Government Code.

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, to the extent the e-mail addresses we have marked are not maintained by a governmental body for one of its officials or employees or excluded by subsection 552.137(c) of the Government Code, the university must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The university must release the remaining information 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,

A handwritten signature in black ink, appearing to read 'JTB LV' with a horizontal line extending to the right.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 623643

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)

OCT 12 2016

MR

At 1:36 p.m.
Velva L. Price, District Clerk

Cause No. D-1-GN-16-004251

PREMIER, INC,
Plaintiff,

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

v.

353rd JUDICIAL DISTRICT

KEN PAXTON, ATTORNEY GENERAL
FOR THE STATE OF TEXAS, AND THE
UNIVERSITY OF TEXAS MEDICAL
BRANCH,

Defendants.

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, this agreed final judgment came before the Court. Plaintiff Premier, Inc. ("Premier"), and Defendants Ken Paxton, Attorney General of Texas and the University of Texas Medical Branch ("UTMB"), appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff Premier to challenge Letter Ruling OR2016-19004 (the "Ruling"). UTMB received a request from Mr. Arthur Baer (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code Ch. 552, for emails sent and received from certain email addresses. These emails contain information designated by Premier as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA. UTMB requested a ruling from the Open Records Division of the Office of the Attorney General ("ORD"). ORD subsequently issued the Ruling, ordering the release of the Premier Information. UTMB holds the information that has been ordered to be disclosed.

The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn his request, (2) in light of this withdrawal the lawsuit is

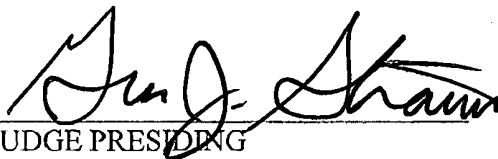


now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

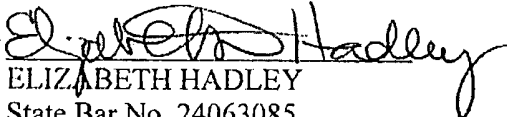
IT IS THEREFORE ORDERED that:

1. Because the request has been withdrawn, no Premier Information should be released in reliance on Letter Ruling OR2016-19004.
2. Pursuant to Tex. Gov't Code § 552.301(g), UTMB shall not rely upon Letter Ruling OR2016-19004 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any Premier information in reliance on said Ruling, and if UTMB receives any future requests for the same or similar Premier information, it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2016-19004.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on October 12, 2016.


JUDGE PRESIDING

AGREED:


ELIZABETH HADLEY

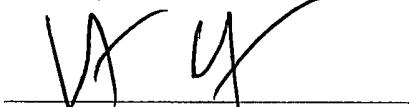
State Bar No. 24063085
Greenberg Traurig, LLP
300 West 6th Street, Suite 2050
Austin, Texas 78701
Telephone: (512) 320-7200
Facsimile: (512) 320-7210
hadleye@gtlaw.com

Attorney for Plaintiff, Premier, Inc.


KIMBERLY L. FUCHS

State Bar No. 24044140
Assistant Attorney General
Administrative Law Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4195
Facsimile: (512) 320-0167
kimberly.fuchs@oag.texas.gov

Attorney for Defendant, University of Texas Medical Branch


MATTHEW R. ENTSMINGER

State Bar No. 24059723
Assistant Attorney General
Chief, Open Records Litigation
Administrative Law Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4151
Facsimile: (512) 457-4686
matthew.entsminger@oag.texas.gov

Attorney for Defendant, Ken Paxton, Attorney General of Texas