



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 28, 2016

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

OR2016-21897

Dear Ms. Tynan:

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# 628161 (OGC# 170660).

The University of Texas Medical Branch at Galveston (the "university") received a request for the proposals and scoring information pertaining to a specified request for proposals. The university claims portions of the submitted information are excepted from disclosure under section 552.111 of the Government Code. Additionally, the university states release of some of the submitted information may implicate the proprietary interests of LabCorp Occupational Testing Services ("LabCorp") and AIT Laboratories ("AIT"). Accordingly, the university states, and provides documentation showing, it notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue 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 LabCorp and AIT. We have considered the submitted arguments and reviewed the submitted information.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation

with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, a governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You assert some of the submitted information is excepted from disclosure pursuant to section 552.111 of the Government Code. You state some of the information at issue consists of bid scores created by university employees and pertaining to the submitted proposals. You state this information consists of advice, opinions, and recommendations regarding policymaking functions of the university. Based on your representations and our review of the information at issue, we find you have demonstrated the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the university. Thus, the university may withhold the information we noted under section 552.111.

AIT seeks to withhold the entirety of its submitted information and LabCorp seeks to withhold a portion of its submitted information under section 552.104(a) 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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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. LabCorp and AIT state they have competitors. LabCorp and AIT also state release of the information at issue would give advantage to their competitors. After review of the information at issue and consideration of the arguments, we find AIT and LabCorp have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold AIT’s submitted information in its entirety, as well as Attachment III, pages 27 through 42, of LabCorp’s proposal under section 552.104(a) of the Government Code.

LabCorp claims portions of its remaining information are excepted under section 552.110 of the Government Code. 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. 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 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).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 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).

LabCorp contends some of its information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find LabCorp has established a *prima facie* case its customer information we marked constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information we marked is not publicly available on the LabCorp's website, the university must withhold the information we have marked under section 552.110(a). However, LabCorp has failed to establish a *prima facie* case that its pricing information meets the definition of a trade secret. 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

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

Decision Nos. 255, 232 (1979), 217 (1978). Therefore, LabCorp's pricing information may not be withheld under section 552.110(a).

LabCorp also argues its pricing information, pages 22 through 24, submitted as Attachment I to LabCorp's proposal consists of commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find LabCorp has demonstrated its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury to LabCorp. Therefore, the university must withhold LabCorp's pricing information under section 552.110(b).

In summary, the university may withhold the information we noted under section 552.111 of the Government Code. The university may withhold AIT's submitted information in its entirety and Attachment III, pages 27 through 42, of LabCorp's proposal under section 552.104(a) of the Government Code. To the extent LabCorp's customer information we have marked is not publicly available on the company's website, the university must withhold this information under section 552.110(a) of the Government Code. The university must withhold LabCorp's pricing information, pages 22 through 24, submitted as Attachment I to LabCorp's proposal under section 552.110(b). 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,

A handwritten signature in black ink, appearing to read "Erin Groff". The signature is fluid and cursive, with the first name "Erin" and last name "Groff" clearly distinguishable.

Erin Groff
Assistant Attorney General
Open Records Division

EMG/som

Ref: ID# 628161

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)