



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 17, 2017

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

OR2017-01090

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# 641818 (OGC Nos. 172559 and 172347).

The University of Texas System (the "system") received two requests for information pertaining to five specified solicitations. You state you do not have information responsive to a portion of the requests.¹ You claim a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Further, you state release of the submitted information may implicate the proprietary interests of multiple third parties. 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.² See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²The system notified: Academic Search; Attain, LLC; Baker Tilly; BDO USA, LLP; BTH Solutions; Crowe Horwath ("Crowe"); Ernst & Young, LLP ("EY"); Grant Thornton, LLP ("Grant"); Kaye Sassman International Corporation; KPMG, LLP ("KPMG"); Merritt Hawkins; Pedigo Staffing; Plante & Moran, PLLC; Postlethwaite & Netterville; Pricewaterhouse Coopers, LLC; Protiviti, Inc.; R.L. Townsend & Associates, LLC; Virtus Placement; Volume Licensing Group; Warbird Consulting Partners ("Warbird"); and Weaver and Tidwell, LLP ("Weaver").

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 Crowe, EY, Grant, KPMG, Warbird, and Weaver. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-27025 (2016). In that ruling, we determined the system: (1) must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) may withhold the information you marked under section 552.111 of the Government Code; (3) must withhold the information you marked under section 552.139 of the Government Code; and (4) must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the system must continue to rely on Open Records Letter No. 2016-27025 as a previous determination and withhold or release the information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address the arguments against release of the remaining submitted information.

Next, 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 not received comments from any of the remaining third parties explaining why the information at issue should not be released. Therefore, we have no basis to conclude any of the other third parties has 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 system may not withhold any of the information at issue on the basis of any proprietary interest the other third parties may have in it.

Next, we note Crowe, Grant, Warbird, and Weaver argue against the release of information that was not submitted by the system. This ruling does not address information that was not submitted by the system and is limited to the information the system 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).

We note the submitted information includes contracts for the purchase of services from a private vendor that are subject to the posting requirements in section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

- (a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

Id. § 2261.253(a)(1). The submitted contracts, valued at more than \$15,000 are between the system, which is a state agency, and private vendors for the purchase of services, and the contracts are not expired or completed. *See id.* §§ 2261.002(2) (“state agency” has meaning assigned by Gov’t Code § 2151.002), 2151.002(3) (“state agency” includes university system or institution of higher education as defined by Educ. Code § 61.003). Accordingly, the submitted contracts are required to be posted on the system’s internet website. Although EY seeks to withhold portions of the contract at issue under sections 552.104 and 552.110 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989)*. Therefore, the system may not withhold any portion of the submitted contracts under section 552.104 or section 552.110 of the Government Code. Accordingly, the system must release the contracts in their entirety.

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 (1993)*, 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 that 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. *See ORD 615 at 5*. 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. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). 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)*. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *ORD 615 at 4-5*. 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 seek to withhold the information you have marked in the submitted score sheets under section 552.111 of the Government Code. You state the information at issue consists of advice, opinion, and recommendations related to policymaking matters of the system. You further state the information at issue relates to communications between system employees reflecting the deliberative and policymaking processes in ranking responsive bid proposals. Based on your representations and our review, we find the system has demonstrated the information you have marked consists of advice, opinions, or recommendations on policymaking matters of the system. Thus, the system may withhold the marked information under section 552.111 of the Government Code.

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). 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, 839 (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. EY, KPMG, Grant, Warbird, and Weaver state they have competitors. In addition, EY, KPMG, Grant, Warbird, and Weaver state release of the information at issue would give advantage to their competitors. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 839. After review of the information at issue and consideration of the arguments, we find EY, KPMG, Grant, Warbird, and Weaver have established the release of the information we have marked would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information we have marked under section 552.104(a).³ Crowe also raises section 552.104 of the Government Code. However, Crowe does not make any arguments

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

explaining how section 552.104 applies to its submitted information. Upon review, we find Crowe has failed to demonstrate the release of its information would give advantage to a competitor or bidder. Accordingly, the system may not withhold any of Crowe's information under section 552.104 of the Government Code.

Crowe also generally raises section 552.110 of the Government Code, which 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. 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 RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that

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

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. *See* 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 Record Decision Nos. 255, 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.*; *see also* ORD 661 at 5-6 (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).

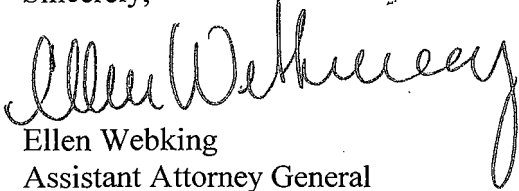
Upon review, we conclude Crowe has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find Crowe has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Additionally, we find Crowe has not established any of the information at issue constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov’t Code § 552.110(b). Therefore, none of the information at issue may be withheld under section 552.110(a) or section 552.110(b) of the Government Code.

In summary, the system must continue to rely on Open Records Letter No. 2016-27025 as a previous determination and withhold or release the information in accordance with that ruling. The system may withhold the information you have marked under section 552.111 of the Government Code. The system may withhold the information we have marked under section 552.104 of the Government Code. The system must release the remaining information.

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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 641818

Enc. Submitted documents

c: Requestor
(w/o enclosures)

20 Third Parties
(w/o enclosures)