



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 7, 2017

Ms. Leticia D. McGowan
Assistant General Counsel
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2017-02767

Dear Ms. McGowan:

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# 645580 (ORR# 15774).

The Dallas Independent School District (the "district") received a request for seven categories of information pertaining to all proposals submitted in response to request for proposals number CM-204701. You indicate the district will release some of the requested information to the requestor pending the requestor's response to an itemized cost estimate. 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 Careington International Corporation ("Careington"), Davis Vision ("Davis"), Delta Dental ("Delta"), EyeMed Vision Care, Humana, MetLife, QCD of America, Standard Insurance Company, Superior Vision Services, Inc. ("Superior"), and United Healthcare ("United"). Accordingly, you state, and provide documentation supporting, you notified these third parties of the request for information and of their right 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 Careington, Davis, Delta, MetLife, Superior, and United. We have reviewed the submitted information and considered the submitted arguments.

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from EyeMed Vision Care, Humana, QCD of America, or Standard Insurance Company, explaining why their information should not be released. Therefore, we have no basis to conclude any of these companies has a protected proprietary interest in the information at issue. *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 district may not withhold the information at issue on the basis of any proprietary interest these third parties may have in the submitted information.

Careington, Davis, Delta, MetLife and United assert the information they indicated is protected under section 552.104 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, the court concluded 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. Careington, Davis, Delta, MetLife, and United state they have competitors. In addition, Careington, Davis, Delta, MetLife, and United state the information at issue, if released, would give their competitors an unfair advantage. After review of the information at issue and consideration of the arguments, we find Careington, Davis, Delta, MetLife, and United have established the release of the information they indicated would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information of Careington, Davis, Delta, and United we have marked and all of MetLife's information under section 552.104(a) of the Government Code.¹

Superior and United assert some of their information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110(a) protects trade secrets obtained from a person. *See* Gov't Code § 552.110(a). 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:

¹As our ruling is dispositive, we need not address Careington's, Delta's, or MetLife's remaining arguments against disclosure of this information.

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.² RESTATEMENT OF TORTS § 757 cmt. b. 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* 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

²The 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).

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* Open Records Decision No. 661 at 5 (1990).

Superior contends its customer and pricing information are commercial or financial information, the release of which would cause substantial competitive harm to the company. Upon review, we find Superior has demonstrated its customer and pricing information, which we have marked, constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the district must withhold this information under section 552.110(b) of the Government Code.³

United asserts portions of its remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude United has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find United has not demonstrated the necessary factors to establish a trade secret claim for any of its remaining information. *See* ORD 402. Therefore, the district may not withhold any of United’s remaining information under section 552.110(a).

Careington and Delta also assert portions of their remaining information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990). Further, we note an individual’s name, education, prior employment, and personal information are not ordinarily private information subject to common-law privacy. *See* Open Records Decision

³As our ruling is dispositive, we need not address Superior’s remaining argument against disclosure of this information.

Nos. 554 (1990), 448 (1986). Thus, upon review, we find Careington and Delta have failed to demonstrate any of the information at issue is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the district may not withhold any of Careington's or Delta's information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note portions of the information being released in this instance 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, the district may withhold the information we marked and all of MetLife's information under section 552.104(a) of the Government Code. The district must withhold the information we marked under section 552.110 of the Government Code. The district must release the remaining information; however, any information subject to copyright may be released only 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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 645580

Enc. Submitted documents

c: Requestor
(w/o enclosures)

10 Third Parties
(w/o enclosures)