



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 15, 2017

Ms. Cynthia Tynan and Ms. Ana Viera Ayala
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2017-03459

Dear Ms. Tynan and 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# 645870 (OGC# 172789, 172792, 173098).

The University of Texas M. D. Anderson Cancer Center (the "university") received three requests for information relating to specified executive recruiting requests for proposals ("RFP").¹ Two requestors seek records related to RFP No. AIS-ADM-00281-RFP. The remaining requestor seeks records related to RFP Nos. AIS-ADM-00158-RFP and AIS-ADM-00281-RFP. You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. You state release of the submitted information may implicate the proprietary interests of Bridge Partners, LLC ("Bridge"), Heidrick & Struggles International, Inc. ("Heidrick"), Korn Ferry International ("KF"), Management Partners, Inc. d/b/a Furst Group ("Furst"), Meyer Consulting, LLC ("Meyer"), Phillips, DiPisa and Associates ("Phillips"), Russell Reynolds Associates (RRA), Selge Holdings and Ventures, LLC ("Selge"), Solomon Page Group, LLC ("Solomon"), Summit Talent Group, LLC ("Summit"), The Edge Group ("Edge"), Tyler and Company, LLC ("Tyler"), and Warren Recruiting, Inc. ("Warren"). Accordingly, you state, and provide

¹We note the university sought and received clarification of some of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

documentation showing, you notified these third parties of the requests for information and of their 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 KF, Furst, Meyer, RRA, and Phillips. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note RRA argues against release of information that was not submitted by the university.² This ruling does not address information that was not submitted by the university and is limited to the information the university has submitted as responsive 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).

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 Bridge, Heidrick, Selge, Solomon, Summit, Edge, Tyler and Warren explaining why their information should not be released. Therefore, we have no basis to conclude these third parties have 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 university may not withhold any of the submitted information on the basis of any proprietary interest Bridge, Heidrick, Selge, Solomon, Summit, Edge, Tyler and Warren may have in it.

Section 552.104(a) of the Government Code exempts 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. KF, Furst, Meyer, RRA, and Phillips state they have competitors. In addition, KF, Furst, Meyer, RRA, and Phillips state release of some of their submitted information would give an advantage to their competitors and seek to withhold the information they have indicated. 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

²RRA seeks to withhold fee information and contracts not submitted by the university

§ 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 831, 839. After review of the information at issue and consideration of the arguments, we find KF, Furst, Meyer, RRA, and Phillips have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information KF, Furst, Meyer, RRA, and Phillips seek to withhold, which we have marked, under section 552.104(a).³

KF, RRA, and Phillips claim some of their remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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

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

Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This 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).

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* ORD 661 at 5.

KF, RRA, and Phillips argue some of their information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find KF has established a *prima facie* case that its customer information constitutes trade secret information. Therefore, the customer information at issue must generally be withheld under section 552.110(a) of the Government Code. However, to the extent any of the customer information KF seeks to withhold has been published on its website, such information is not confidential under section 552.110(a). In addition, RRA and Phillips have established a *prima facie* case that their search methodology is a trade secret. Therefore, the information at issue must be withheld under section 552.110(a) of the Government Code. We also conclude KF has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find KF has not demonstrated the necessary factors to establish a trade secret claim for its remaining 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). Therefore, the university may not withhold any of KF’s remaining information under section 552.110(a).

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).

KF and RRA further argue some of their remaining information consists of commercial information, the release of which would cause them substantial competitive harm under section 552.110(b) of the Government Code. To the extent any of the customer identities RRA seeks to withhold are not available on the company website, we find RRA has demonstrated the information we have marked constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, the university must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find KF and RRA have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause either company substantial competitive harm. *See* ORD 661. Therefore, the university may not withhold any of KF's or RRA's remaining information under section 552.110(b).

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, 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. *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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions 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). Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

You state some of the submitted information consists of evaluation score sheets that “constitute a communication between employees of the [u]niversity reflecting their deliberative and policymaking processes in ranking the responsive bid proposals.” Additionally, you contend the disclosure of this information “would hinder the decision-

making process of the [u]niversity.” 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 you marked under section 552.111 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, the university may withhold the information we marked under section 552.104(a). The university must withhold the information we have marked under section 552.110 of the Government Code. The university may withhold the information you marked under section 552.111 of the Government Code. The university 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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/sb

Ref: ID# 645870

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

13 Third Parties
(w/o enclosures)