



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 13, 2017

Mr. R. Brooks Moore
Deputy General Counsel
Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2017-07919

Dear Mr. Moore:

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# 653410 (R000234-020217; R000263-020617).

West Texas A&M University (the "university") received two requests for information pertaining to a specified bidding situation. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of FEV Tutor, Inc.; Link-Systems International, Inc.; Pearson; Tutor.com; Upswing International, Inc.; and Brainfuse, Inc. ("Brainfuse").¹ Accordingly, you state, and provide documentation demonstrating, you notified the 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

¹We note the university did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). Nevertheless, because third-party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider whether the submitted information must be withheld under the Act based on third-party interests. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977).

comments from Tutor.com and Brainfuse. We have reviewed the submitted information and considered the submitted arguments.

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) of the Government Code 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 FEV Tutor, Inc., Link-Systems International, Inc., Pearson, or Upswing International, Inc. explaining why the submitted 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 the submitted information on the basis of any proprietary interest these third parties may have in the information.

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). 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. Tutor.com states it has competitors. In addition, Tutor.com states release of the information at issue would give advantage to a competitor or bidder. After review of the information at issue and consideration of the arguments, we find Tutor.com has 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 we marked under section 552.104(a).²

Brainfuse claims portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects two types of information: (1) trade secrets and (2) commercial 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. *See* Gov't Code § 552.110(a)-(b).

Section 552.110(a) of the Government Code protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the

²As our ruling for this information is dispositive, we need not address the remaining argument against its disclosure.

Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.); *see also* ORD 552 at 2. 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5-6. 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 Records Decision Nos. 255 (1980), 232 (1979), 217(1978).

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others 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).

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.

Brainfuse claims portions of its information are excepted under section 552.110(b) of the Government Code. Upon review, we find Brainfuse has established the release of its customer information would cause it substantial competitive injury. Nevertheless, to the extent Brainfuse has published any of the customer information at issue on its website, this information is not confidential under section 552.110. Accordingly, the university must withhold Brainfuse’s customer information in the submitted documents under section 552.110(b), provided Brainfuse has not published the information on its website. However, we find Brainfuse has failed to demonstrate that release of any of the remaining information at issue, including any customer information published on Brainfuse’s website, would result in substantial damage to its competitive position. Thus, the third party has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* ORD 661. Accordingly, the university may not withhold any of Brainfuse’s remaining information, including any customer information published on Brainfuse’s website, under section 552.110(b) of the Government Code.

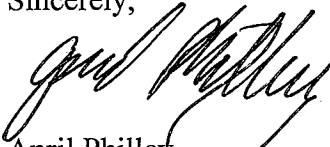
Brainfuse claims portions of its remaining information are excepted under section 552.110(a) of the Government Code. Upon review, we find Brainfuse has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret, nor has the company demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORDs 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), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). As previously noted, 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; ORDs 319 at 3, 306 at 3. Accordingly, the university may not withhold any of Brainfuse’s remaining information under section 552.110(a) of the Government Code.

In summary, the university may withhold the information we marked under section 552.104 of the Government Code. The university must withhold Brainfuse’s customer information, provided Brainfuse has not published the information on its website, under section 552.110(b) of the Government Code. 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,



April Philley
Assistant Attorney General
Open Records Division

AP/sb

Ref: ID# 653410

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

5 Third Parties
(w/o enclosures)