



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 13, 2017

Ms. Jennifer Burnett
Attorney
The University of Texas System
Office of General Counsel
201 West Seventh Street, Suite 600
Austin, Texas 78701-2902

OR2017-07931

Dear Ms. Burnett:

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# 653276 (OGC# 173646).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for all submitted proposals, presentation materials of proposers, and contracts between the university and firms that were awarded contracts in relation to the RFP for Sponsorship, Event, and Talent Management.¹ Although the university takes no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of CAA Sports, LLC ("CAA"), Charity Dynamics, LLC ("Charity"), Intersport, Inc. ("Intersport"), Lagardère Unlimited Consulting, LLC ("Lagardère"), LeadDog Marketing Group, Inc. ("LeadDog"), MMI Agency ("MMI"), Octagon, Inc. ("Octagon"), Team Epic, LLC ("Team Epic"), The Richards Group, Inc. ("Richards"), United Entertainment Group ("United"), and Young & Rubicam ("Young"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights 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*

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 the interests of third parties can provide compelling reasons to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352.

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 CAA, Lagardère, Octagon, United, and Young. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Lagardère objects to disclosure of information the university has not submitted to this office for review. This ruling does not address information that was not submitted by the university and is limited to the information the university 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).

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Charity, Intersport, LeadDog, MMI, Team Epic, and Richards explaining why the submitted information should not be released. Therefore, we have no basis to conclude Charity, Intersport, LeadDog, MMI, Team Epic, and Richards have protected proprietary interests 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest Charity, Intersport, LeadDog, MMI, Team Epic, and Richards may have in the information.

CAA, Lagardère, Octagon, United, and Young assert the information they indicated is protected under section 552.104 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). 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. CAA, Lagardère, Octagon, United, and Young each states it has competitors. In addition, CAA, Lagardère, Octagon, United, and Young each state release of its information at issue would give advantage to a competitor or bidder. After review of the submitted information and consideration of the arguments, we find CAA, Lagardère, Octagon, United, and Young have established release of the information each has indicated would give advantage to a

competitor or bidder. Thus, we conclude the university may withhold the information CAA, Lagardère, Octagon, United, and Young have indicated under section 552.104(a).²

Lagardère claims portions of its remaining information are excepted under 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

³The 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).

Section 552.110(b) of the Government Code 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Lagardère claims portions of its information are excepted from disclosure under section 552.110(a) of the Government Code. Upon review, we find Lagardère has established a *prima facie* case its customer information we marked constitutes trade secret information for purposes of section 552.110(a). Nevertheless, to the extent Lagardère has published any of the customer information at issue on its website, this information is not confidential under section 552.110(a). Accordingly, the university must withhold Lagardère’s customer information we marked under section 552.110(a), provided Lagardère has not published the information on its website. However, upon review, we find Lagardère has failed to demonstrate any of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 3. Therefore, none of Lagardère’s remaining information may be withheld under section 552.110(a) of the Government Code.

Lagardère also claims portions of its information are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find Lagardère has demonstrated release of the information we marked would cause it substantial competitive harm. Accordingly, the university must withhold the information we marked under section 552.110(b) of the Government Code. However, we find Lagardère has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of Lagardère’s remaining information would cause the company substantial competitive harm. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the university may not withhold Lagardère’s remaining information under section 552.110(b) of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101.

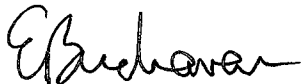
Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the university must withhold the information we marked under section 552.101 of the Government Code.

In summary, the university may withhold the information CAA, Lagardère, Octagon, United, and Young have indicated under section 552.104(a). The university must withhold Lagardère's customer information in the submitted information under section 552.110(a), provided Lagardère has not published the information on its website. The university must withhold the information we marked under section 552.110(b) of the Government Code. The university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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,



Emily Buchanan
Assistant Attorney General
Open Records Division

EB/eb

Ref: ID# 653276

Enc. Submitted documents

c: Requestor
(w/o enclosures)

11 Third Parties
(w/o enclosures)