



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 1, 2017

Ms. Jennifer Burnett  
Attorney & Public Information Coordinator  
University of Texas System  
201 West 7th Street, Suite 600  
Austin, Texas 78701-2901

OR2017-12001

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# 660192 (OGG# 174456).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for the winning proposals pertaining to a specified request for qualifications. Although the university takes no position as to whether the submitted information is excepted under the Act, the university informs us release of this information may implicate the proprietary interests of HKS, Inc. ("HKS"); Courtney Harper + Partners, L.C. ("Courtney Harper"), Perkins + Will; and WHR Architects, Inc. ("WHR"). Accordingly, the university states, and provides documentation showing, it notified the third parties of the request for information and of their rights 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 arguments from Courtney Harper, Perkins + Will, and WHR. We have considered the submitted arguments and reviewed the submitted information.

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 HKS, explaining why the submitted information should not be released. Therefore, we have no

basis to conclude HKS has 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, 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 HKS may have in the information.

Courtney Harper and Perkins + Will each claim section 552.104 of the Government Code for portions of their information. 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). 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. Courtney Harper asserts it has competitors. Further, Courtney Harper explains release of its information at issue would give its competitors an advantage. After review of Courtney Harper’s information at issue and consideration of Courtney Harper’s arguments, we conclude the university may withhold the information we marked and indicated under section 552.104(a). However, we find Perkins + Will failed to demonstrate release of its information at issue would give advantage to a competitor or bidder. Accordingly, the university may not withhold any of Perkins + Will’s information under section 552.104 of the Government Code.

Courtney Harper, Perkins + Will, and WHR argue portions of their remaining information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code 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.<sup>1</sup> 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* 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) 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.

Perkins + Will and WHR contend some of their information is commercial or financial information, the release of which would cause substantial competitive harm to the companies. Upon review of WHR’s arguments under section 552.110(b), we conclude WHR has established the release of the information we marked would cause the company substantial competitive injury. Accordingly, the university must withhold the information we marked under section 552.110(b).<sup>2</sup> However, we find Perkins + Will has not established any of its information at issue constitutes commercial or financial information the disclosure of which would cause the companies substantial competitive harm. *See* Gov’t Code

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<sup>1</sup>The 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).

<sup>2</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

§ 552.110(b); Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative); Open Records Decision No. 319 at 3 (1982) (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). Therefore, the university may not withhold any of the remaining information at issue under section 552.110(b).

Courtney Harper and Perkins + Will seek to withhold some of their remaining information under section 552.110(a). Upon review, we conclude Courtney Harper and Perkins + Will have failed to establish a *prima facie* case any portion of their information at issue meets the definition of a trade secret. We further find Courtney Harper and Perkins + Will have not demonstrated the necessary factors to establish a trade secret claim for their 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 the remaining information at issue under section 552.110(a).

In summary, the university may withhold the information we marked under section 552.104(a) of the Government Code. The university must withhold the information we marked 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](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,



Patrick P. Mehaffy  
Assistant Attorney General  
Open Records Division

PPM/eb

Ref: ID# 660192

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

4 Third Parties  
(w/o enclosures)