



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 26, 2017

Mr. Ronny H. Wall  
Associate General Counsel  
Texas Tech University System  
P.O. Box 45031  
Lubbock, Texas 79409

OR2017-22073

Dear Mr. Wall:

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# 675139

The Texas Tech University (the "university") received four requests for information pertaining to a specified request for proposal. 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 multiple third parties.<sup>1</sup> Accordingly, you state, and provide documentation showing, you notified the interested 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 Deutser, FreshForm, and Landtroop. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>The university notified: Alchemy at AMS; Awesome Films; Barkley REI; Belmont Icehouse; Concept Development & Planning, L.L.C.; CultureSpan Marketing; DAHU Agency; Deutser, L.L.C.; FreshForm Interactive ("FreshForm"); Gilbreath Communications; Keystone Resources; Landtroop Strategies ("Landtroop"); Lara & Company Creative, Inc.; Magnitude Digital; Persona Communications; Presley Design Studio, L.C.; Red Letter Communications; Standard Beagle Studio, L.L.C.; and TWG Solutions, L.L.C.

Initially, we note Landtroop argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the university has submitted to us for our review. *See* Gov't Code, § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the university submitted as responsive to the request for information.<sup>2</sup>

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude those parties 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, 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 portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

We also note some of the submitted information consists of information that is subject to section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

Gov't Code § 2261.253(a)(1). The contract at issue is valued at more than \$15,000, is between the university, which is a state agency, and a private vendor for the purchases of services, and the contract is not expired or completed. *See id.* §§ 2261.002(2) ("state agency" has meaning assigned by Gov't Code § 2151.002), 2151.002(3) ("state agency" includes university system or institution of higher education as defined by Educ. Code § 61.003). Landtroop seeks to withhold a portion of its proposal which was incorporated into

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<sup>2</sup>As we are able to make this determination, we need not address the arguments against disclosure of this information.

the contract at issue under sections 552.104, 552.110, and 552.136 of the Government Code. However, we note the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the university may not withhold the information at issue under sections 552.104, 552.110, or 552.136 of the Government Code. Consequently, the university must release the information we have marked pursuant to section 2261.253 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 840. Deutser and FreshForm state they have competitors. Deutser and Freshform also state the information at issue, if released, would give a competitor an advantage in submitting future competitive bids. After review of the information at issue and consideration of the arguments, we find Deutser and FreshForm have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold Deuster’s information, which we have marked, and FreshForm’s information in its entirety under section 552.104(a) of the Government Code.<sup>3</sup>

Landtroop asserts section 552.110 of the Government Code applies to some of its information. 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

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

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.<sup>4</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. 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, 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 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 (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).

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<sup>4</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).

Landtroop states some of its information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Landtroop has established a *prima facie* case that Landtroop's customer information constitutes trade secret information for purposes of section 552.110(a). Therefore, to the extent Landtroop's customer information is not publicly available on its company website, the university must withhold the information we have marked under section 552.110(a) of the Government Code. However, we find Landtroop 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 Landtroop has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Therefore, the university may not withhold any of Landtroop's remaining information at issue under section 552.110(a) of the Government Code.

Upon review, we find Landtroop has failed to demonstrate the release of the information at issue would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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). Consequently, the university may not withhold any of Landtroop's remaining information at issue under section 552.110(b) of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."<sup>5</sup> Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Upon review, the university must withhold all insurance policy numbers in the remaining information under section 552.136 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.

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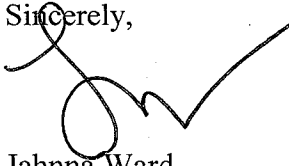
<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the university may withhold Deuster's information, which we have marked, and FreshForm's information in its entirety under section 552.104(a) of the Government Code. To the extent Landtroop's customer information is not publicly available on its company website, the university must withhold the information we have marked under section 552.110(a) of the Government Code. The university must withhold all insurance policy numbers in the remaining information under section 552.136 of the Government Code. The university must release the remaining information; however, any information subject to copyright may only be released 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](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,



Jahanna Ward  
Attorney  
Open Records Division

JW/tdw

Ref: ID# 675139

Enc. Submitted documents

c: 4 Requestors  
(w/o enclosures)

15 Third Parties  
(w/o enclosures)