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ATTORNEY GENERAL OF TEXAS

November 30, 2017

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2017-27304

Dear Ms. Harden:

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# 686074 (PIR Nos. 17-47536, 17-47551, and 17-47643).

The Office of the Attorney General (the "OAG") received three requests from different requestors for information pertaining to a specified OAG procurement. The OAG states it will release some information. Although the OAG takes no position as to whether the submitted information is excepted under the Act, it states release of this information may implicate the proprietary interests of Adjacent Technologies; Column Technologies, Inc.; Cycom Data Systems, Inc.; Eccentex Corporation; Eclectic Innovative Solutions LLC; FutureNet Group, Inc.; Journal Technologies, Inc.; Karpel Solutions; Legal Files Software, Inc.; Leidos Digital Solutions, Inc. ("Leidos"); Matrix Pointe Software, LLC ("Matrix"); and Visionary Integration Professionals, LLC ("VIP"). Accordingly, the OAG states, and provides documentation showing, it notified these third parties of the requests 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 comments from Leidos, Matrix, and VIP. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the request received from the third requestor is narrower than the request received from the first and second requestors. Thus, the OAG need not release information to the third requestor that is not responsive to her request for 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 the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third 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 OAG may not withhold the submitted information on the basis of any proprietary interest the remaining 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. Matrix asserts it has competitors and release of its information at issue would give an advantage to its competitors. After review of the information at issue and consideration of the arguments, we conclude the OAG may withhold the information we marked under section 552.104(a) because Matrix established the release of the information at issue would give advantage to a competitor or bidder.¹

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(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

¹As our ruling is dispositive, we need not address Matrix's remaining arguments against disclosure of this information.

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 Restatement's list of six trade secret factors.² 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 (1980), 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,

²The 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).

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.

Upon review, we find Leidos and VIP have demonstrated their customer information constitutes commercial or financial information, the release of which would cause the companies substantial competitive injury. Thus, to the extent Leidos' and VIP's customer information is not publicly available on the companies' websites, the OAG must withhold Leidos' and VIP's customer information under section 552.110(b). However, to the extent Leidos' and VIP's customer information is publicly available on the companies' websites, it may not be withheld under section 552.110(b). In that event, we will address Leidos' and VIP's arguments under section 552.110(a) for their customer information that is publicly available on the companies' websites. We find Leidos and VIP have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information at issue would cause the companies substantial competitive harm; thus, the OAG may not withhold Leidos' or VIP's remaining information under section 552.110(b). *See* Open Records Decision Nos. 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act).

Leidos and VIP also argue some of their information constitutes trade secrets under section 552.110(a) of the Government Code. To the extent Leidos' and VIP's customer information is publicly available on their websites, it may not be withheld under section 552.110(a). Additionally, upon review, we find Leidos and VIP have failed to establish a *prima facie* case their remaining information at issue meets the definition of a trade secret and have not demonstrated the necessary factors to establish a trade secret claim for this information. *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 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We further find Leidos and VIP have not demonstrated the necessary factors to establish a trade secret claim for their remaining information at issue. *See* ORD 402. Therefore, the OAG may not withhold any of Leidos' or VIP's remaining information at issue under section 552.110(a).

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."³ 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.

³This office will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the OAG must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁴

VIP argues, to the extent some of its customer information is publicly available on its website, it is subject to section 552.117 of the Government Code.⁵ Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). In this instance, the information at issue does not include the home address and telephone number, emergency contact information, social security number, or family member information of a current or former employee or official of the OAG. Thus, section 552.117 is not applicable to the information at issue. Therefore, the OAG may not withhold any of the information at issue on this basis.

VIP argues to the extent some of its customer information is publicly available on its website, it is subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address in information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract. *See id.* § 552.137(c). We note

⁴As our ruling is dispositive, we need not address VIP's arguments against disclosure of this information.

⁵Although VIP also raises section 552.024 of the Government Code, we note this section is not an exception to disclosure. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024.

the e-mail addresses VIP seeks to withhold fall under section 552.137(c); therefore, the OAG may not withhold these e-mail addresses under section 552.137 of the Government Code.

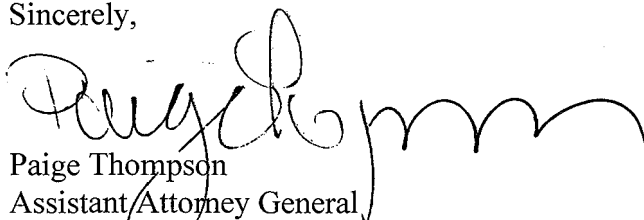
We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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 OAG may withhold the information we marked under section 552.104(a) of the Government Code. To the extent Leidos' and VIP's customer information is not publicly available on the companies' websites, the OAG must withhold Leidos' and VIP's customer information under section 552.110(b) of the Government Code. The OAG 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; however, any information protected by copyright may only be released in accordance with copyright law. Further, the OAG need not release information to the third requestor that is not responsive to her request.

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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/som

Ref: ID# 686074

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

12 Third Parties
(w/o enclosures)