



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 6, 2017

Ms. Jennifer Burnett
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
210 West Seventh Street
Austin, Texas 78701-2902

OR2017-27718

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# 684887 (OGC#s 177236, 177403, 177421).

The University of Texas Health Science Center at San Antonio (the "university") received three requests from three different requestors for proposals related to a specified request for proposals issued by the university.¹ Although you take no position on the submitted information, you state release of this information may implicate the proprietary interests of The Atkins Group; blr further; Daniel Brian Advertising; DeVito/Verdi; Enrollment Marketing Solutions, Inc.; F. Guerra Deberry, LLC; Frederick Swanston; Interlex Communications, Inc.; The Johnson Group, LLC ("Johnson"); Lewis Communications ("Lewis"); NDP; Northlich; PAVLOV; Richards/Carlberg; Rucker & Co.; Screamer Co.; Sensis, Inc.; Ten Adams; and Triptych Consulting. Accordingly, you state you notified the third parties of the requests 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*

¹We note we asked the university to provide additional information pursuant to section 552.303 of the Government Code. *See Gov't Code* § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the university pursuant to that request.

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 Johnson, Lewis, and NDP.² We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the third requestor only seeks the winning bidder's proposal. Thus, any additional information the university has submitted is not responsive to the third request. Thus, the university need not release non-responsive information to the third requestor.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining notified third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of 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 interests 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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, 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. Johnson, Lewis, and NDP each state they have competitors. In addition, Johnson, Lewis, and NDP state release of the information at issue would give an advantage to their respective competitors. We note Lewis was the winning bidder and seeks to withhold some of its pricing information. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public

²Although Lewis also raises section 552.101 of the Government Code for the submitted information, Lewis provided no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume Lewis no longer asserts this exception. *See* Gov't Code §§ 552.301, .302.

funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find Johnson, Lewis, and NDP have 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 have marked under section 552.104(a) of the Government Code.³

Section 552.110 of the Government Code protects (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. 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, 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 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 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as

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

well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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).

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.*; ORD 661 at 5-6.

Lewis claims its client information is confidential under section 552.110(a). Upon review, we find Lewis has established a *prima facie* case that its client information constitutes trade secrets. Accordingly, to the extent Lewis’s client information at issue is not publicly available on the company’s website, the university must withhold Lewis’s client information under section 552.110(a) of the Government Code. To the extent this client information is publicly available on the company’s website, the university may not withhold such information under section 552.110(a).

NDP asserts some of its information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find NDP has established the release of the information at issue, including its client information, constitutes commercial or financial information, the release of which would cause substantial competitive injury to NDP. Therefore, the university must withhold the information we have marked, as well as NDP’s

⁴The 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).

client information to the extent the client information is not publicly available on NDP's website, under section 552.110(b) of the Government Code.

Section 552.136 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." Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Lewis and NDP seek to withhold their respective Dun & Bradstreet Data Universal Numbering System number under section 552.136. Upon review, we find Lewis and NDP have failed to demonstrate the applicability of section 552.136 to the information at issue and the university may not withhold it on this ground.

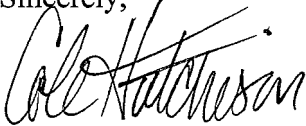
We note some of the remaining information appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection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

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 684887

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

18 Third Parties
(w/o enclosures)