



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2018

Ms. Cynthia Tynan
Senior Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2901

OR2018-04141

Dear Ms. Tynan:

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# 696637 (OGC Nos. 178544 and 179048).

The University of Texas M. D. Anderson Cancer Center (the "university") received two requests for information from different requestors submitted in response to a specified request for proposals.¹ You state you have released some information to the second requestor. 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 Accenture, LLC; Analytics Advisory Group; Cocolevio, LLC ("Cocolevio"); Datasource Consulting, LLC; Digital Management, LLC; EMC Corporation; ERASCO Group, LLC; Ernst & Young, LLC ("E&Y"); IBM d/b/a Truven Health Analytics, LLC ("Truven"); IDI Consulting, LLC; Optimity Advisors, LLC; OptumInsight, Inc.; Pricewaterhouse Coopers, LLP; Procured, Inc. ("Procured"); Robo Holdings, LLC; Robots and Pencils, LLC; SapientRazorfish; V3 Main Technologies, Inc. ("V3"); and Viscosity North America. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right 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* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and

¹We note the university sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

explain applicability of exception in the Act in certain circumstances). We have received comments from Cocolevio, E&Y, Truven, Procured, and V3. We have also received comments from the first requestor.² See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). 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 *id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party has 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 interest any remaining third party may have in the information.

E&Y, Procured, and Truven argue section 552.104 of the Government Code for some of their information. V3 generally asserts section 552.104 for some of its 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. E&Y, Procured, and Truven state they have competitors. E&Y states "release of this information would, without question, result in the loss of specific, defined competitive edge developed over many decades." Procured argues release of the information at issue "give[s] an unfair advantage to Procured's competitors in both future competitive bids and in seeking business outside of a bid process." Truven asserts "[i]n the instance this information were to be released, a competitor may mimic or copy our proposal and give competitors an advantage[.]" After review of the information at issue and consideration of the arguments, we find E&Y, Procured, and Truven have established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we have indicated under section 552.104(a) of the Government Code.³ However, we find V3 has failed to

²Although the first requestor asserts that Procured failed to comply with section 552.305(e), we note that a violation of section 552.305 does not result in the legal presumption that the requested information is public under section 552.302 of the Government Code.

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

demonstrate the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may not withhold any of V3's information under section 552.104 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(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 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.⁴ 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

⁴The 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).

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).

Cocolevio and V3 assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Cocolevio has established a *prima facie* case that its customer information constitutes trade secret information. Accordingly, to the extent Cocolevio’s customer information is not publicly available on the company’s website, the university must withhold Cocolevio’s customer information under section 552.110(a) of the Government Code.⁵ However, we find V3 and Cocolevio have failed to establish a *prima facie* case that any portion of the remaining information at issue meets the definition of a trade secret. We further find neither V3 nor Cocolevio has demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, the university may not withhold any of V3’s information at issue or any of Cocolevio’s remaining information at issue under section 552.110(a) of the Government Code.

Cocolevio and V3 assert portions of their remaining information consist of commercial or financial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Cocolevio has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the university must withhold this information, which we have indicated, under section 552.110(b) of the Government Code. Further, to the extent any of the customer identities Cocolevio seeks to withhold have been published on its website, we find Cocolevio has failed to establish release of such information would cause the company substantial competitive harm. Additionally, we find neither Cocolevio nor V3 has demonstrated that

⁵As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

substantial competitive injury would likely result from the release of any of its remaining information. *See* 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Therefore, the university may not withhold any of V3's information or any of Cocolevio's remaining information 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."⁶ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the university must withhold the insurance policy numbers 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.

In summary, the university may withhold the information we have indicated under section 552.104(a) of the Government Code. To the extent Cocolevio's customer information is not publicly available on the company's website, the university must withhold Cocolevio's customer information under section 552.110(a) of the Government Code. The university must withhold the information we have indicated under section 552.110(b) of the Government Code. The university must withhold the insurance policy numbers under section 552.136 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.⁷

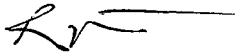
⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁷We note the remaining information includes social security numbers. Section 552.147(b) of the Government Code authorizes a government body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/som

Ref: ID# 696637

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

19 Third Parties
(w/o enclosures)