



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 1, 2019

Ms. Cynthia Tynan
Senior Attorney & Public Information Coordinator
The University of Texas System
210 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2019-21265

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# 778597 (OGC# 190642).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for six categories of information pertaining to a specified request for proposals and the awarded contract. You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state you notified Allscripts Healthcare Solutions; CostFlex, LLC ("CostFlex"); Kaufman Hall; Oracle; Organizational Intelligence, LLC ("OI"); Perficient; Premier; and Strata Decision Technology ("Strata") of the request for information and of the 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 explain applicability of exception in the Act in certain circumstances). We have received comments from CostFlex, OI, and Strata. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note CostFlex and OI object to disclosure of information the university has not submitted to this office for review. This ruling does not address information that was not submitted by the university and is limited to the information the university has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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) 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 the remaining 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 interest any of the remaining third parties may have in the information.

We note the submitted contract is subject to section 2261.253 of the Government Code. Section 2261.253 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[.]

...

(b) A state agency monthly may post contracts described by Subsection (a) that are valued less than \$15,000.

...

(e) A state agency that posts a contract on its Internet website as required under this section shall redact from the posted contract

(1) information that is confidential under law; [and]

(2) information the attorney general determines is excepted from public disclosure under [the Act.]

...

(f) The redaction of information under Subsection (e) does not exempt the information from the requirements of Section 552.021 or 552.221.

Gov't Code § 2261.253(a)(1), (b), (e)(1)-(2), (f). The contract at issue is between the university, a state agency, and Strata, a private vendor, for the purchase of goods or services. We note the contract is valued at more than \$15,000 and has not expired nor been completed. Strata raises sections 552.104 and 552.110 of the Government Code for the contract at issue; however, 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). The 85th Legislature amended section 2261.253; pursuant to the amendments, state agencies shall redact from contracts subject to section 2261.253 information that is confidential under law or information the attorney general determines is excepted from public disclosure under the Act. Gov't Code § 2261.253(e)(1)-(2); *see also id.* § 2261.253(f). We note the amendments “apply only in relation to a contract for which a state agency first advertises or otherwise solicits bids, proposals, offers, or qualifications on or after [September 1, 2017].” Act of May 29, 2017, 85th Leg., R.S., ch. 556, § 17(c), 2017 Tex. Sess. Law Serv. 1535, 1540. Upon review, we find the contract at issue is subject to the amendments; therefore, we will consider Strata’s arguments under sections 552.104 and 552.110 for the contract at issue.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking

functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state Exhibits 5 and 6 consist of internal communications and deliberations pertaining to the evaluation and scoring of the responsive bid proposals. You explain this information is reflective of the deliberative process by which the university ranks the responsive bid proposals. Thus, you state the information at issue consists of advice, opinions, and recommendations pertaining to the policymaking functions of the university. Based on these representations and our review of the information at issue, we find the university has demonstrated the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the university. Thus, the university may withhold Exhibits 5 and 6 under section 552.111 of the Government Code.¹

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. CostFlex, OI, and Strata state they have competitors. Further, CostFlex, OI, and Strata state the release of the information at issue would provide their competitors with an advantage. We note Strata seeks to withhold the terms of a contract. 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 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

¹As our ruling is dispositive, we need not address Strata's argument against disclosure of this information.

sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 842.

Strata seeks to withhold the contract at issue in its entirety under section 552.104 of the Government Code. However, subsection 2261.253(e) states, in relevant part, “[a] state agency that posts a contract on its Internet website as required under [section 2261.253] shall redact [information the attorney general determines is excepted from public disclosure] from the posted contract[.]” See Gov’t Code § 2261.253(e) (emphasis added). Interpreting subsection 2261.253(e) to allow a state agency to withhold the entirety of a contract that the legislature, in the same section, expressly requires the state agency to post on its internet website is absurd and not consistent with the unambiguous language used by the legislature. Pursuant to the plain language of this subsection, a state agency may not withhold the entirety of a contract subject to section 2261.253. See *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009) (unambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results); Attorney General Opinion GA-0876 (2011); see also Sen. Comm. on Finance, Bill Analysis, Tex. S.B. 20, 84th Leg., R.S. (2015) (“The purpose of this bill is to reform state agency contracting by clarifying accountability, increasing transparency, and ensuring a fair competitive process.”). Accordingly, the information at issue may not be withheld in its entirety under section 552.104.

After review of the information at issue and consideration of the arguments, we find CostFlex and OI have established the release of their information at issue would give advantage to a competitor or bidder. Further, we find Strata has established the release of the information we have marked would give advantage to a competitor or bidder. Thus, we conclude the university may withhold CostFlex and OI’s information in its entirety, as well as Strata’s information we have marked, under section 552.104(a) of the Government Code.² However, we find Strata has failed to establish the release of the remaining information would give advantage to a competitor or bidder. Thus, we conclude the remaining information at issue may not be withheld under section 552.104(a) of the Government Code.

Strata asserts its remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person 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:

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of the submitted information.

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.³ 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) of the Government Code protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause

³The 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).

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.

Strata asserts the remaining information at issue constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Strata 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 Strata has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, the university may not withhold any of Strata’s remaining information under section 552.110(a) of the Government Code.

Strata further argues the remaining information at issue consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. We note this office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* ORD 514 (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3); ORD 541 at 8. Upon review, we find Strata has failed to demonstrate the release of any of its remaining information would result in substantial harm to its competitive position. Accordingly, the university may not withhold any of Strata’s remaining information under section 552.110(b) of the Government Code.

In summary, the university may withhold Exhibits 5 and 6 under section 552.111 of the Government Code. The university may withhold CostFlex and OI’s information in its entirety and Strata’s information we have marked under section 552.104(a) of the Government Code. The university must release the remaining 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,

A handwritten signature in black ink that reads "Erin Groff". The signature is written in a cursive, flowing style.

Erin Groff
Assistant Attorney General
Open Records Division

EMG/be

Ref: ID# 778597

Enc. Submitted documents

c: Requestor
(w/o enclosures)

8 Third Parties
(w/o enclosures)