



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 6, 2019

Ms. Jennifer Burnett
Senior Attorney and Public Information Coordinator
The University of Texas System
210 West 7th Street
Austin, Texas 78701

OR2019-34461

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# 800459 (OGC# 192977).

The University of Texas Health Science Center at Tyler (the "university") received a request for certain information pertaining to a specified request for proposals. Although the university takes no position as to whether the submitted information is excepted under the Act, the university states release of the submitted information may implicate the proprietary interest of cue:creative ("Cue") and Romph & Pou Agency, Inc. ("R&P"). Accordingly, the university states, and provides documentation showing, it 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 explain applicability of exception in the Act in certain circumstances). We have received comments from Cue and R&P. We have considered the submitted arguments and reviewed the submitted information.

Cue and R&P raise section 552.104 of the Government Code for some of the information at issue. Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *See* 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. Cue and R&P state they have competitors and release of the information at issue would cause their companies harm. After review of the information at issue and consideration of the arguments, we find Cue and R&P 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 indicated under 552.104(a) of the Government Code.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 chemical compound, a process for 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 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

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

² 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; and
- (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).

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* Open Records Decision No. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). 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).

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* Open Records Decision No. 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).

R&P assert some of its remaining information is confidential under section 552.110(b) of the Government Code. Upon review, we find R&P has established some of its remaining information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the university must withhold the information we indicated under section 552.110(b) of the Government Code. However, upon review, we find R&P has failed to demonstrate by specific factual evidence the release of the remaining information at issue would result in substantial competitive injury. *See* ORD 661; *see also* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the university may not withhold any portion of the remaining information under section 552.110(b) of the Government Code.

R&P asserts some of the remaining information is confidential under section 552.110(a) of the Government Code. Upon review, we find R&P has failed to demonstrate a *prima facie* case the information at issue meets the definition of a trade secret and has not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 402. Therefore, the university may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. Gov’t Code § 552.147. Accordingly, the university may

withhold the social security numbers in the remaining information under section 552.147 of the Government Code.³

R&P raises section 552.101 of the Government Code in conjunction with common-law privacy for some of the remaining information. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *See id.* § 552.101. This section 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. *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, the 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). We note some of the remaining information contains business ownership percentages. Upon review, we find a portion of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the university must withhold the information we indicated under section 552.101 of the Government Code in conjunction with common-law privacy.⁴

In summary, the university may withhold the information we have indicated under 552.104(a) of the Government Code. The university must withhold the information we indicated under section 552.110(b) of the Government Code. The university may withhold the social security numbers in the remaining information under section 552.147 of the Government Code. The university must withhold the information we indicated under section 552.101 of the Government Code in conjunction with common-law privacy. 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

³ As our ruling is dispositive, we need not address R&P’s remaining arguments against disclosure of the information at issue.

⁴ As our ruling is dispositive, we need not address R&P’s remaining argument against disclosure of this information.

responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Kimbell Kesling
Attorney
Open Records Division

KK/gw

Ref: ID# 800459

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)