



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 29, 2020

Ms. Claudene Marshall
Assistant General Counsel
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2020-02658

Dear Ms. Marshall:

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# 808983 (PIR# C002408-110119).

Texas A&M University (the "university") received a request for contracts, amendments, and licensing agreements between the university and a specified third party during a certain date range. 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 Springer Nature ("Springer"). Accordingly, you state, and provide documentation showing, the university notified Springer 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 Springer. We have reviewed the submitted arguments and the submitted information.

Initially, we note some of the submitted information may have been the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2019-22619 (2019). In Open Records Letter No. 2019-22619, we concluded the university must release the submitted information. Springer now seeks to withhold some of its information under section 552.104 of the Government Code that may have been previously ordered released. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its

public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, to the extent any of the information at issue was previously released pursuant to the prior ruling, the university may not now withhold Springer's previously released information under section 552.104. We also note Springer now seeks to withhold some of their information which may have been previously ordered released by the prior ruling under section 552.110 of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address Springer's claims under section 552.110 for any previously released information. Furthermore, except with regard to Springer's claims under section 552.110, there is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, except with regard to Springer's claims under section 552.110, for the submitted information that is identical to the information previously requested and ruled upon by this office, we conclude the university must continue to rely on Open Records Letter No. 2019-22619 as a previous determination and release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address Springer's arguments under section 552.104 for any information not subject to the prior ruling and Springer's arguments under section 552.110 for the submitted information.

Next, we note contracts 2016-31564, 2018-34751, and 2019-35668 are 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

...

(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)(2), (f). The contracts at issue are valued at more than \$15,000, are between the university, which is a state agency, and a private vendor for the purchase of goods or services, and the contracts are not expired or completed. Springer raises sections 552.104 and 552.110 of the Government Code for this information; 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 the attorney general determines is excepted from public disclosure under the Act. Gov't Code § 2261.253(e)(2); *see also id.* § 2261.253(f). 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). We note the amendments do not apply to contract 2016-31564 because the university first advertised or otherwise solicited bids for this contract prior to September 1, 2017. Therefore, the university may not withhold any portion of this contract under section 552.104 or section 552.110 of the Government Code. However, upon review, we find contracts 2018-34751 and 2019-35668 are subject to the amendments; therefore, we will consider Springer’s arguments under sections 552.104 and 552.110 for the contracts at issue, as well as the information not subject to section 2261.253.

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. Springer states it has competitors. In addition, Springer states release of the information at issue would give an advantage to its competitors. 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 sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839.

Springer seeks to withhold some of the submitted information subject to 2261.253(e) of the Government Code 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 Springer has established the release of the information we marked and indicated would give advantage to a competitor or bidder. Thus, to the extent the information at issue was not previously released pursuant to previous rulings, we conclude the university may withhold the information we marked and indicated under section 552.104(a) of the Government Code. However, we find Springer has failed to establish the release of the remaining information would give advantage to a competitor or bidder. Thus, we conclude the remaining information may not be withheld under section 552.104(a) of the Government Code.

Springer claims portions of the remaining information are excepted under section 552.110 of the Government Code, which 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. 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. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also Open Records Decision No. 552 (1990). Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. 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.¹ 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. *See* 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 Record 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

¹ 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;
- (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).

§ 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).

As mentioned above, some of Springer's information may have been subject to previous rulings. Since the issuance of the previous rulings, Springer has not disputed this office's conclusion regarding the release of the information at issue. In this regard, we find Springer has not taken any measures to protect its information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Springer substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, to the extent the information at issue was previously released pursuant to the previous ruling, we conclude the university may not withhold the information at issue under section 552.110 of the Government Code.

To the extent its information at issue was not previously released pursuant to previous rulings, we also conclude Springer 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 Springer has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of Springer's remaining information may be withheld under section 552.110(a).

In addition, upon review, we find Springer has not established any of its remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the university may not withhold any of Springer's remaining information at issue on this basis.

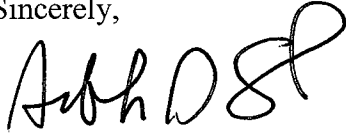
In summary, for the submitted information that is identical to the information previously requested and ruled upon by this office, we conclude the university must continue to rely on Open Records Letter No. 2019-22619 as a previous determination and release the identical information in accordance with that ruling. To the extent the information at issue was not previously released pursuant to previous rulings, we conclude the university may withhold the information we marked and indicated 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 <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,

A handwritten signature in black ink, appearing to read "Deborah Southerland". The signature is fluid and cursive, with the first name being the most prominent.

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/jxd

Ref: ID# 808983

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)