



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 24, 2020

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

OR2020-05756

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# 813061 (OGC# 193810).

The University of Texas Health Science Center at Houston (the "university") received a request for the contracts related to request for proposals 744-1918 HER/RCM. 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 interests of Blue Tree Network, Inc.; Impact Advisors, LLC ("Impact"); and Nordic Consulting Partners, Inc. Accordingly, the university states, and provides documentation showing, it notified these parties 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 Impact. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 notified 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 the remaining third parties may have in the information.

Next, we note the submitted information 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

...

(2) information the attorney general determines is exempted 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 private vendors for the purchase of goods or services, and the contracts are not expired or completed. Impact 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). Upon review, we find the contracts at issue are subject to the amendments; therefore, we will consider the submitted arguments under sections 552.104 and 552.110 for 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.” 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. Impact states it has competitors. In addition, Impact 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.

Impact seeks to withhold its entire contract, which is 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, Impact’s information 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 Impact has established the release of the information we indicated would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we indicated under section 552.104(a) of the Government Code.¹ However, we find Impact has failed to establish the release of its remaining information would give advantage to a competitor or bidder. Thus, we conclude Impact’s remaining information may not be withheld under section 552.104(a) of the Government Code.

Impact claims its remaining information is 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

¹ As our ruling on this information is dispositive, we need not address the remaining arguments against disclosure of this information.

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 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 § 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).

Impact asserts the remaining information at issue constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Impact 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 Impact 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

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;
- (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).

references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of Impact's remaining information may be withheld under section 552.110(a).


Impact 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 Impact 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 Impact's remaining information under section 552.110(b) of the Government Code.

In summary, the university may withhold the information we 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,


Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/rm

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Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)