



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 4, 2009

Ms. Neera Chatterjee  
Public Information Coordinator  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2009-07676

Dear Ms. Chatterjee:

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# 344979.

The University of Texas at San Antonio (the "university") received two requests for copies of proposals submitted for RFP No. 30801577 and related information, as well as information relating to RFI No. 30801364.<sup>1</sup> You state you have released some of the requested information, including the information relating to RFI No. 30801364. You state you will withhold a social security number pursuant to section 552.147 of the Government Code.<sup>2</sup> You claim that a portion of the submitted information is excepted from disclosure under section 552.137 of the Government Code. You do not take a position as to whether the remainder of the proposals are excepted under the Act; however, you state their release may implicate the proprietary rights of the third parties who submitted the proposals. You state, and provide documentation showing, that you have notified Sungard Higher Education, Inc., iStrategy Solutions ("iStrategy"), OnTime BI, Inc. ("OnTime BI"), ZogoTech, Business Objects, WCI Consulting, Inc., Information Builders, and SAS Institute of their right to submit arguments to this office as to why the submitted proposals 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

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<sup>1</sup>The university sought and received clarification from the first requestor. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

<sup>2</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office.

received correspondence from OnTime BI, iStrategy, and ZogoTech. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, that the university failed to comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential by law. *See* Open Records Decision No. 150 (1977). Because the proprietary interests of third parties are at stake and because ~~section 552.137 of the Government Code presents a compelling reason against disclosure~~, we will consider the submitted arguments against disclosure.

Next, we note that 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received correspondence from Sungard Higher Education, Inc., Business Objects, WCI Consulting, Inc., Information Builders, or SAS Institute explaining why their information should not be released. Thus, we have no basis for concluding that any portion of the submitted information pertaining to these third parties constitutes proprietary information, and the university may not withhold any portion of their information on that basis. *See* 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 (1990).

We now address the arguments of iStrategy, OnTime BI, and ZogoTech for their submitted proposals.<sup>3</sup> 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

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<sup>3</sup>Although OnTime BI raises section 552.101 of the Government Code for their pricing and delivery schedule, we understand them to raise section 552.110 of the Government Code as this is the proper exception for the substance of their comments.

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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.

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RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this 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 (1939); *see also* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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 that 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 (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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. *See id.* § 552.110(b); *see also* ORD 661 at 5-6.

OnTime BI, iStrategy, and ZogoTech all contend that their submitted software proposals contain trade secrets. Having considered the submitted arguments, we conclude that iStrategy has established a *prima facie* case that its client information constitutes a trade secret. We also find that ZogoTech has established that a portion of its client information is a trade secret. However, we note that ZogoTech has made the identities of some of its clients, which it seeks to withhold, publicly available on its website. Thus, ZogoTech has failed to demonstrate that the information published on its website is a trade secret. Accordingly, the university must withhold the client information, which we have marked, pursuant to section 552.110(a). We find that ZogoTech and iStrategy have not demonstrated that any of their remaining information, and OnTime BI has not demonstrated that any of its information, constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* ORD 552 at 5-6. Thus, the university may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Next, we determine that OnTime BI has established that the release of its pricing information would cause the company substantial competitive injury. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code. However, OnTime BI, ZogoTech, and iStrategy have made only conclusory allegations that release of their remaining information would cause substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov’t Code § 552.110; ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, market studies, experience, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We further note that the pricing information of a winning bidder, such as ZogoTech in this instance, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying

analogous Freedom of Information Act reason that disclosure of prices charged government is a cost of doing business with government). Thus, we conclude that none of the remaining information may be withheld under section 552.110(b) of the Government Code.

You raise section 552.137 of the Government Code for a portion of the remaining information, which you have marked. Section 552.137 provides in relevant part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . . [.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses you have marked are contained in OnTime BI's response to a request for bids or proposals. Thus, none of the marked e-mail addresses are excepted under section 552.137.

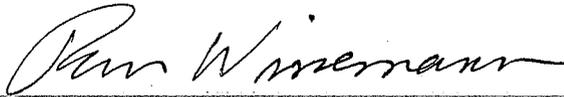
We note that portions of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the university must withhold the information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The remaining information must be released; however, in releasing the information that is copyrighted, the university must comply with applicable copyright law.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Pamela Wissemann  
Assistant Attorney General  
Open Records Division

PFW/jb

Ref: ID# 344979

Enc. Submitted documents

c: 2 Requesters  
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