ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2009

Mr. John Lawhon
General Counsel
Texas Woman's University
P.O. Box 425497
Denton, Texas 76204

OR2009-12675

Dear Mr. Lawhon:

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# 354723.

The Texas Woman's University (the "university") received a request for the proposal submitted by Cactus Systems, Inc. ("Cactus") and the bid tabulations and evaluations pertaining to Project Number DE-06-15-BT-003. You state the university has released all but the requested proposal. Although you take no position with respect to the public availability of the submitted proposal, you indicate its release may implicate the proprietary interests of Cactus.[1] Accordingly, you state, and have provided documentation showing, you notified Cactus of the request and of its right to submit arguments to this office as to why the submitted proposal should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from Cactus. We have considered the submitted arguments and reviewed the submitted information.

Cactus claims portions of its submitted proposal are excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of

[1]Although you raise sections 552.104 and 552.110 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information.

private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "[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(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 a "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 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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). 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.[2] Open Records Decision No. 402 (1983).

---

[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 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

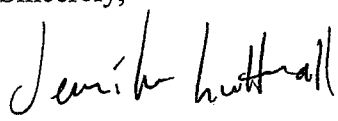
Cactus claims some of its information constitutes trade secrets under section 552.110(a). Upon review, we find Cactus has established that some of its customer information, which we have marked, constitutes a trade secret, and must be withheld under section 552.110(a). We note that Cactus has published the identities of some of its customers on its website. Thus, Cactus has failed to demonstrate that the information it has published on its website is a trade secret. Further, we find Cactus has not demonstrated how the remaining information it seeks to withhold meets the definition of a trade secret, nor has Cactus demonstrated the necessary factors to establish a trade secret claim for this information. Consequently, the university may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Cactus also claims the remaining information it seeks to withhold, including personnel, financial, and general company information, constitutes commercial information that, if released, would cause substantial competitive harm to the company. Upon review of Cactus' arguments and the information at issue, we find that Cactus has failed to provide specific factual evidence demonstrating that release of any of its remaining information would result in substantial competitive harm to the company. As noted above, Cactus published the identities of some of its customers on its website. Additionally, Cactus has made only conclusory allegations that the release of the remaining information at issue would result in substantial damage to its competitive position. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note that the pricing information of a winning bidder 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 reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, the university may not withhold any of the remaining information under section 552.110(b). As no further exceptions to disclosure have been raised, 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.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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 354723

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Nelda J. Hall
President
Cactus Systems, Inc.
2315 North Main Street, Suite 140
Fort Worth, Texas 76164
(w/o enclosures)