



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 4, 2010

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

OR2010-11787

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# 389228.

The University of Texas Health Science Center at Tyler (the "university") received a request for the bidders' proposals and contracts relating to seven specified purchase order numbers. You state the university does not maintain a contract relating to one of the specified purchase order numbers and does not maintain any proposals relating to any of the specified purchase order numbers.¹ Although you take no position with respect to the public availability of the requested information, you state release of this information may implicate the proprietary interests of third parties.² You inform us, and provide documentation showing, pursuant to section 552.305 of the Government Code, the university has notified the interested third parties of the request and of their right to submit arguments to this office explaining why their submitted information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²The interested third parties are GE Healthcare ("GE"); Kronos, Inc. ("Kronos"); Merry X-Ray Corp./Source One ("Merry"); Novation L.L.C. ("Novation"); and Spacelabs Healthcare, Inc. ("Spacelabs").

not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from Spacelabs. We have considered the submitted arguments and reviewed the submitted information.³

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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, GE, Kronos, Merry, and Novation have not submitted any comments to this office explaining how release of the submitted information would affect their proprietary interests. Accordingly, none of the information at issue may be withheld on the basis of the proprietary interests of these companies. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). As the university makes no arguments regarding this information, it must be released to the requestor.

Spacelabs raises section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. 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

³Although you inform us your letter of June 17, 2010, includes responsive information that the university failed to submit in a timely manner, we note this correspondence included duplicates of documents you submitted to this office with your letter of June 9, 2010.

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.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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 is generally not a trade secret under section 552.110(a) 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." *See RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Huffines*, 314 S.W.2d at 776.

Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See ORD 661* at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Spacelabs contends portions of its information constitutes a trade secret under section 552.110(a) of the Government Code. After reviewing the company's arguments and the information at issue, we conclude Spacelabs has failed to establish a *prima facie* case that any of its responsive information is a trade secret protected by section 552.110(a). Thus, the university may not withhold any portion of the submitted information under section 552.110(a) of the Government Code. *See ORD 402*.

⁴The following are the six factors that the Restatement gives 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).

Spacelabs seeks to withhold portions of its information under section 552.110(b) of the Government Code. Upon review, we find Spacelabs has established the release of a portion of its information would cause the company substantial competitive injury. Therefore, the university must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Spacelabs has made only conclusory allegations that the release of its remaining information would cause the company substantial competitive injury, and it has provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Furthermore, we note the remaining information consists of purchase orders by the university. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information in a government contract is generally not excepted under section 552.110(b). *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). Accordingly, none of the remaining information may be withheld under section 552.110(b). As Spacelabs raises no additional arguments against disclosure, the remaining information must be released.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 389228

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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