ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2010

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

OR2010-13482

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# 392604 (OGC#s 131079 and 131604).

The University of Texas at Austin (the "university") received two requests for the proposals for RFP IFO # 2011016RL for Brand Research and Positioning Strategy Development. You state the university will redact a bank account number pursuant to Open Records Decision No. 684 (2009) and section 552.136 of the Government Code.[1] The university takes no position on whether the remaining information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received correspondence from representatives of Burson-Marsteller; Eco Advertising, LLC ("Eco");

[1]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a bank account number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Daniel J. Edelman, Inc. ("Edelman"); Gelb Consulting Group ("Gelb"); Stamats, Inc. ("Stamats"), Three Chairs Consulting, Inc. d/b/a PGC Creative ("PGC"); and Tocquigny.[2] We have considered the submitted arguments and have reviewed the submitted information.

Initially, we note, and you acknowledge, the department failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting an open records decision from this office. *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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because third party interests are at stake, we will address whether the submitted information must be withheld to protect the interests of the third parties.

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) of the Government Code 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 only received comments from Burson-Marsteller, Eco, Edelman, Gelb, Stamats, PGC, and Tocquigny. We, thus, have no basis for concluding that any portion of the submitted information constitutes the proprietary information of the remaining third parties from whom we have not received comments. *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 any of the submitted information based on the proprietary interests of the remaining third parties.

Gelb contends that its proposal may only be disclosed with its express written permission. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex.*

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[2]The remaining third parties are as follows: The Ampersand Agency; Brandthink, L.L.C.; The Brand Consultancy; Carnegie Communications, L.L.C.; Gravelle Branding & Marketing; The Harrell Group; Michaels Opinion Research, Inc.; GSD&M Idea City, L.L.C.; Harris Interactive Brand and Communications Consulting; Harte-Hanks Direct, Inc.; Idiscover Consulting Group; RDW Group, Inc.; Simpson Scarborough; Steel Advertising & Interactive, Inc.; Truth Beauty Now, L.L.C.; Vollmer Public Relations, Inc.; Wilson Research Strategies; and Mind Over Markets, L.L.C.

Indus. Accident Bd., 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Gelb, PGC, and Stamats claim portions of their proposals are confidential under section 552.101 of the Government Code, but none of these companies have directed our attention to any law, nor are we aware of any, under which the information they seek to withhold is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). We, therefore, conclude that the university may not withhold any of the information at issue under section 552.101 of the Government Code.

PGC also raises section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note, however, that section 552.104 only protects the interests of a governmental body and is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). In this instance, the university has not argued that the release of any portion of PGC's information would harm the university's interests in a particular competitive situation under section 552.104. Because the university has not submitted any arguments under section 552.104, we conclude that the university may not withhold any of the information at issue under section 552.104 of the Government Code.

Burson-Marstellar, Eco, Gelb, Edelman, PGC, Stamats, and Tocquigny all claim some of the submitted 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(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 trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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.[3] RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 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 proposal or 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *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,

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[3]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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (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).

Burson-Marsteller, Eco, Edelman, Gelb, PGC, and Stamats all claim portions of their information are excepted under section 552.110(a). After reviewing the submitted information and arguments, we conclude the university must withhold some of Burson-Marsteller's and Edelman's customer information, which we have marked, under section 552.110(a). We note, however, that Edelman makes the identities of some of its current and past customers publicly available on its website. In light of the company's own publication of such information, we cannot conclude that the identities of these customers qualify as trade secrets. Furthermore, we determine that Burson-Marsteller, Eco, Edelman, Gelb, PGC, and Stamats failed to demonstrate that any of the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for their remaining information. Accordingly, the university must only withhold the information we have marked pursuant to section 552.110(a).

Burson-Marsteller, Edelman, Gelb, PGC, Stamats, and Tocquigny claim portions of their information are excepted under section 552.110(b). Upon review of the third parties' arguments and their information at issue, we find that Burson-Marsteller, Edelman, Gelb, PGC, and Tocquigny have established that the pricing information we have marked in their submitted information constitutes commercial or financial information, the release of which would cause each company substantial competitive harm. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code.[4] However, we find Burson-Marsteller, Edelman, Gelb, PGC, Stamats, and Tocquigny have made only conclusory allegations that the release of the remaining submitted information each company seeks to withhold would result in substantial damage to their respective competitive positions. Thus, these third parties have not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

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[4]As our ruling is dispositive for this information, we need not address Gelb's remaining argument against the disclosure of its pricing information.

We note that some of the remaining information appears to 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. Attorney General Opinion JM- 672 (1987). A governmental body must allow inspection of copyrighted materials 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 section 552.110 of the Government Code. The remaining information must be released in accordance with 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, 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,

Laura Ream Lemus
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Open Records Division

LRL/jb

Ref: ID# 392604

Enc. Submitted documents

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