



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2010

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

OR2010-18546

Dear Ms. Angadicheril:

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# 402668 (OGC# 133477).

The University of Texas Health Science Center at Houston (the "university") received a request for the proposals submitted by five named companies selected for the short list related to request for proposals number 744-1008. Although you take no position as to the public availability of the submitted information, you state release of this information may implicate the proprietary interests of Sterling Infosystems, Inc. ("Sterling"); HireRight, Inc. ("HireRight"); K Griff Investigations & Civil Processing, Inc. ("KGI"); Screening ONE, Inc. ("ONE"); Kelmar & Associates ("Kelmar"); and General Information Services, Inc. ("GIS"). Thus, pursuant to section 552.305 of the Government Code, you notified the third parties of the request and of the companies' right to submit arguments to this office as to why their information should not be released. Gov't Code § 552.305(d); *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 to disclosure under the Act in certain circumstances). We have considered the comments received from Sterling, HireRight, and GIS and reviewed the submitted information.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from KGI, ONE, or Kelmar explaining why any portion of those companies' submitted information should not be released. Therefore, we have no basis to conclude KGI, ONE, or Kelmar have any protected proprietary interest in their submitted proposals. *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 (1990). Consequently, the university may not withhold any portion of the proposals pertaining to KGI, ONE, or Kelmar on the basis of any proprietary interest those companies may have in that information.

Next, both Sterling and GIS claim their proposals are excepted under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the university does not seek to withhold any information pursuant to this exception, we do not consider the claims by Sterling and GIS under section 552.104. *See* ORD 592 (governmental body may waive section 552.104). Thus, the university may not withhold any submitted information under section 552.104.

Sterling asserts portions of its proposal are excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Sterling does not cite to any specific law, and we are not aware of any, that makes any portion of its proposal confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, the university may not withhold any portion of Sterling's information under section 552.101 of the Government Code.

Sterling, Hireright, and GIS each raise section 552.110 for portions of their submitted proposals. Section 552.110 protects the proprietary interests of 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) "commercial 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." *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 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* 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.¹ Open Records Decision No. 402 (1983).

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 information at issue. *See* ORD 661 at 5-6 (for information to be withheld under

¹The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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).

Sterling, GIS, and Hireright each claim portions of their proposals that contain references are confidential pursuant to section 552.110(a) of the Government Code. Upon review, we have marked the identities of these companies' references, which the university must withhold under section 552.110(a) of the Government Code. Sterling, GIS, and Hireright also claim their proposals contain proprietary processes and methodologies that are trade secrets. Upon review of the submitted arguments and information, we have marked the portions of the proposals pertaining to GIS and Hireright that contain specific details about the companies' methods. We find GIS and Hireright have shown how this marked information is protected as trade secrets, and the university must withhold this information under section 552.110(a). However, Sterling has not demonstrated the factors necessary to establish a trade secret claim with respect to the information it seeks to withhold. Additionally, the remaining portions of the proposals pertaining to GIS and Hireright contain general information about services, staffing, and qualifications of the companies that do not reveal details about how the companies conduct their business. Section 552.110 is generally not applicable to this type of information, and neither GIS nor Hireright has otherwise explained how this remaining information meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Similarly, although Sterling, GIS, and Hireright each seek to withhold their pricing information, they have not demonstrated how this information constitutes a trade secret. *See id.* Therefore, no remaining information at issue may be withheld under section 552.110(a).

Turning to section 552.110(b), we find GIS and Hireright have established release of their proposed pricing information would cause the companies substantial competitive injury. Therefore, the university must withhold the information we have marked under section 552.110(b) in the proposals for GIS and Hireright. However, neither of these companies has provided specific factual or evidentiary showing release of its remaining information at issue would cause the company substantial competitive injury. *See* Open Records Decision Nos. 661 at 5-6, 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), 319 at 3. Therefore, the university may not withhold the remaining information GIS and Hireright seek to withhold under section 552.110(b). Although Sterling also seeks to withhold the pricing information from its submitted proposal, pricing information of a winning bidder is generally not excepted under section 552.110(b) because 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, because Sterling won the contract resulting from request for proposals number 744-1008, the university may not withhold any pricing information from its proposal under section 552.110(b).

Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”² Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). This office has determined insurance policy numbers are “access device” numbers for purposes of section 552.136. Thus, we conclude the insurance policy numbers we have marked in the proposals pertaining to KGI and Kelmar must be withheld under section 552.136 of the Government Code.³

The remaining information contains documents 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, the university must withhold the information we marked under sections 552.110(a) and 552.110(b) of the Government Code as well as the information we

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

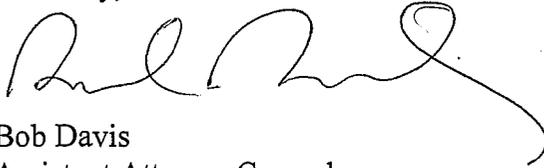
³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

marked under section 552.136 of the Government Code. The remaining information must be released in accordance with copyright law.⁴

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 402668

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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⁴The information being released contains social security numbers. 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 under the Act. See Gov't Code § 552.147(b).

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