



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 21, 2011

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

OR2011-18814

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# 441063 (OGC No. 140268).

The University of Texas at Dallas (the "university") received a request for eight categories of information related to a specified request for proposals.<sup>1</sup> You claim the submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code. In addition, you state release of this information may implicate the proprietary interests of certain third parties. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.<sup>2</sup> 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 received arguments from Pilot's Building Maintenance, Inc. ("Pilot") and Pritchard Industries Southwest, Inc. ("Pritchard"). We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>As you did not submit a copy of the request, we take our description from your brief.

<sup>2</sup>The third parties notified pursuant to section 552.305 are: Able Services; AHI Facility Services, Inc.; American Facility Services, Inc.; Aztec Facility Management, LP; CTJ Maintenance, Inc.; Eagle Maintenance Co., Inc.; Entrust One Facility Services, Inc.; GCA Services Group; HBS National Corporation; Marcis & Associates; OJS Systems, Inc.; Oriental Building Services, Inc.; Pilot's Building Maintenance, Inc.; Pritchard Industries Southwest, Inc.; R.A.S. Services, Inc.; UBM Enterprise, Inc.; Unicare Building Maintenance, Inc.; and WFF Facility Services.

Initially, we must address the university's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). In this instance, you state the university received the request for information on October 10, 2011. However, as of the date of this letter, you have not submitted a copy of the written request for information. Consequently, we find the university failed to comply with the requirements of section 552.301 in requesting this decision from our office.

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 the requested information is public and must be released unless a compelling reason exists 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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise section 552.104 of the Government Code as an exception to disclosure of the responsive information, this is a discretionary exception that protects only a governmental body's interests and may be waived. *See* Open Records Decision Nos. 592 (1991) (governmental body may waive statutory predecessor to section 552.104), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.104 does not constitute a compelling reason to withhold information for purposes of section 552.302. Accordingly, the university may not withhold any of the responsive information under section 552.104 of the Government Code. However, because third party interests can provide a compelling reason to withhold information, we will consider whether any of the responsive information may be excepted under the Act.

We next 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) 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 arguments from Pilot and Pritchard. Thus, we have no basis for concluding any portion of the submitted information constitutes the proprietary information of any of the

remaining third parties. *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 any of the remaining third parties.

Pilot and Pritchard claim section 552.110 of the Government Code for portions of their submitted information. Section 552.110 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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" has been defined as the following:

A trade secret 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (citation omitted); *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 the 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. ORD 552 at 2. 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. Open Records Decision No. 402 (1983).

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. *Id.*; ORD 661.

Pritchard argues some of its information constitutes trade secrets. Upon review, we find Pritchard has failed to demonstrate any of the information for which the company asserts section 552.110(a) meets the definition of a trade secret, nor has Pritchard demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the university may not withhold any of the information at issue on the basis of section 552.110(a) of the Government Code.

Pilot and Pritchard contend some of their information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we conclude Pritchard has established the release of its pricing information, which we have marked, would cause the company substantial competitive injury; therefore the university must withhold the information we have marked under section 552.110(b). However, we find Pilot and Pritchard have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the companies substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982)

(statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience). We, therefore, conclude the university may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Pilot also seeks to withhold a social security number in its submitted information.<sup>3</sup> Section 552.147 provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov't Code § 552.147. Therefore, the university may withhold the social security numbers in the submitted information under section 552.147.<sup>4</sup>

We note portions of the remaining information are subject to sections 552.101 and 552.136 of the Government Code.<sup>5</sup> Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note the remaining information contains business ownership percentages. This personal financial information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of [the Act], 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.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has

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<sup>3</sup>Although Pilot raises sections 552.101 and 552.102 of the Government Code as an exception to disclosure for the social security number at issue, we note section 552.147 is the proper exception to raise.

<sup>4</sup>We note 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. Gov't Code § 552.147(b).

<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

determined an insurance policy number is an access device number for purposes of section 552.136. We conclude the university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note 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. 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 have marked under section 552.110 of the Government Code. The university may withhold the submitted social security numbers under section 552.147 of the Government Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the insurance policy numbers we have marked under section 552.136 of the Government Code. The university must release the remaining information, but any information that is protected by copyright may only 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](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 Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 441063

Enc. Submitted documents

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