ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 31, 2012

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

OR2012-08347

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# 455211 (OGC# 142540).

The University of Texas Health Science Center at Houston (the "university") received a request for proposals submitted in response to a specified request for proposals. Although the university takes no position regarding whether the submitted information is excepted from disclosure, you state release of the requested information may implicate the proprietary interests of third parties. Accordingly, you provide documentation showing you have notified the third parties of the request and their right to submit arguments to this office.[1] *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 comments from Alpha, CBIC, and an attorney for Hallmark. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note a portion of the information you have submitted is not responsive to the instant request because it was created after the date of the request and is not part of a

[1]The notified third parties are Alpha Building Corporation ("Alpha"); Cactus Builders; CBIC Construction & Development, LLC ("CBIC"); Centennial Contractors Enterprises, Inc.; Dura Pier Facilities Services, Ltd.; Hallmark Capital Group, LLC ("Hallmark"); Horizon International Group, LLC; Jamail & Smith Construction; J.T. Vaughn Construction, LLC; P2MG, LLC; South Coast Construction Services, Inc.; and The Trevino Group, Inc.

proposal submitted to the university. This ruling does not address the public availability of the non-responsive information, which we have marked, and the university is not required to release it in response to this request.

We next note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have received comments only from Alpha, CBIC, and Hallmark. Thus, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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 information at issue on the basis of any proprietary interest any of the remaining third parties may have in the information. As no exceptions to disclosure have been raised for the remaining third parties' proposals, they must be released to the requestor.

Alpha, CBIC, and Hallmark raise section 552.110 of the Government Code for portions of their proposals. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure (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 a "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 defines 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) (citation omitted); *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.[2] This office will accept a claim that information subject to the Act is excepted as a trade secret under section 552.110(a) if a *prima facie* case for the exception is made, 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. 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. *See* ORD 661 at 5-6 (business must show by specific factual evidence that release of particular information at issue would cause substantial competitive injury).

Upon review, we find Alpha has demonstrated some of its customer information and CBIC and Hallmark have demonstrated their pricing information, which we have marked, constitute commercial or financial information, the release of which would cause substantial competitive injury. However, we note Alpha has published the remaining customer identities it seeks to withhold, and Hallmark has published all of the customer and project identities it seeks to withhold, on their respective websites. Because Alpha and Hallmark have published this information, they have failed to establish its release would cause substantial competitive harm. Further, we note Alpha was one of the winning bidders. The pricing information of entities contracting with a government body 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* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, we find Alpha, CBIC and Hallmark have failed to establish by a factual or evidentiary showing that release of the remaining information they seek to withhold would cause the companies substantial competitive injury.

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

See ORD 661. Therefore, the university may not withhold any of Alpha's, CBIC's, or Hallmark's remaining information under section 552.110(b).

We further find Alpha, CBIC, and Hallmark have not demonstrated how any of their remaining information constitutes a trade secret. *See* Restatement of Torts § 757 cmt. b (1939) (trade secret "is not simply information as to single or ephemeral events in the conduct of the business"); ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the university may not withhold any of the remaining information under section 552.110(a).

Hallmark also raises section 552.101 of the Government Code for portions of its information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. Hallmark first asserts some of its information is protected by the Privacy Act of 1974, section 552a of title 5 of the United States Code ("Federal Privacy Act"). We note that the Federal Privacy Act applies only to a federal agency. *See* 5 U.S.C. 552(f), 552a (a). State and local government agencies are not covered by the Federal Privacy Act. *See Davidson v. Georgia*, 622 F. 2d 895, 896 (5th Cir. 1980); *see also* Attorney General Opinion MW-95 (1979). Because the university is not a federal agency, it is not bound by the Federal Privacy Act's confidentiality provisions as would be a federal agency. *See* 5 U.S.C. §§ 552a(a)(1), 552(f) (defining "agency" for purposes of Privacy Act). Therefore, the information at issue cannot be considered confidential by law pursuant to section 552.101 of the Government Code in conjunction with the Federal Privacy Act.

Hallmark next raises section 552.101 of the Government Code in conjunction with the Federal Financial Modernization Act, also known as the Gramm-Leach-Bliley Act (the "GLB Act"). *See* 15 U.S.C. §§ 6801-6827. The purpose of the GLB Act is to promote competition in the financial services industry. *See* H.R. Conf. Rep. No. 106-434, at 245 (1999), reprinted in 1999 U.S.C.C.A.N. 245, 245. Reflecting Congressional concern regarding the dissemination of consumers' personal financial information, the Act provides certain privacy protections "to protect the security and confidentiality of [consumers'] nonpublic personal information." 15 U.S.C. § 6801. The statute defines nonpublic personal information ("NPI") as "personally identifiable financial information ["PIFI"] - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution." *Id.* § 6809(4)(A). Federal regulations define "PIFI" as:

> any information:
>
> > (i) [a] consumer provides to [a regulated financial institution] to obtain a financial product or service . . .;

> (ii) [a]bout a consumer resulting from any transaction involving a financial product or service between [a regulated financial institution] and a consumer; or
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> (iii) [a regulated financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer.

16 C.F.R. § 313.3(o)(1). Additional protection is provided to consumers by limitations placed on the reuse of PIFI obtained from a financial institution by a nonaffiliated third party. Section 6802(c) provides as follows:

> ... a nonaffiliated third party that receives from a financial institution [NPI] under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6802(c). Hallmark asserts portions of its information should be confidential under the GLB Act. However, Hallmark does not inform this office, nor does the information on its face reflect, that the information at issue is NPI or PIFI as defined by the federal regulations. *See Individual Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) ("It is the context in which information is disclosed-rather than the intrinsic nature of the information itself-that determines whether information falls within the GLB Act."). Thus, we are unable to conclude that the GLB Act is applicable to this information, and it may not be withheld on this basis.

Hallmark raises section 552.136 of the Government Code for its bonding information. Section 552.136 provides 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." Gov't Code § 552.136(b). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Hallmark has not explained how any of the information at issue constitutes an access device number for purposes of section 552.136, and none of it may be withheld on that basis.

We note portions of the submitted information are protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, 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 copyright law and the risk of a copyright infringement suit. As no exceptions to disclosure have been raised, the submitted information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.

In summary, the university must withhold the information we have marked in Alpha's, CBIC's, and Hallmark's proposals under section 525.110(b) of the Government Code. The remaining responsive information must be released to the requestor, 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, 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,

Misty Haberer Barham
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Open Records Division

MHB/som

Ref: ID# 455211

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