



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2012

Ms. Connie Crawford
Assistant County Attorney
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OR2012-11011

Dear Ms. Crawford:

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# 458975 (File No. HO-12-135).

The El Paso County Hospital District d/b/a University Medical Center of El Paso (the "district") received a request for "copies of the proposals that were submitted in response to RFP #852-12/11-001." Although you take no position as to whether the submitted information is excepted under the Act, you inform us that release of this information may implicate the proprietary interests of six interested third parties: Health Stream, Inc.; The Jackson Group, Inc.; Market Dimensions; J.L. Morgan & Associates, Inc.; NRC Picker ("NRC"); and Press Ganey Associates, Inc. ("PGA"). Accordingly, you state, and provide documentation demonstrating, the district notified these 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. *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 Act in certain circumstances). We have received comments submitted by NRC and PGA. We have considered the submitted arguments and reviewed the submitted information.

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 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, only NRC and PGA have submitted comments to this office explaining why their submitted information should not be released. Therefore, we have no basis to conclude that the remaining third parties have a protected proprietary interest in the submitted information. *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 district may not withhold any portion of the information pertaining to the third parties that have not submitted comments to this office on the basis of any proprietary interest those companies may have in the information.

PGA is concerned with the requestor's identity and intended use of the requested information. We note, however, the identity of the requestor is generally not a factor to be considered when a governmental body receives a request for information. *See* Gov't Code § 552.223 (requiring uniform treatment of all requests for information). This office has determined the Act does not permit the consideration by a governmental body or this office of a requestor's intended use of information when responding to open records requests. *See id.* § 552.222(a) (stating governmental body may not inquire into purpose for which information will be used); *see also* Open Records Decision Nos. 508 at 2 (1988) (motives of a person seeking information under the Act are irrelevant), 51 (1974). Therefore, the district may only withhold the submitted information if it is excepted from disclosure under the Act.

NRC raises section 552.101 of the Government Code for some of its information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, NRC has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of NRC's information confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). In addition, we note this office has concluded section 552.101 does not encompass other exceptions found in the Act, such as section 552.110 of the Government Code. Therefore, the district may not withhold any of NRC's information under section 552.101 of the Government Code.

NRC also raises 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 bidding situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions generally). As the district does not argue section 552.104 is applicable in this instance, we conclude none of NRC's information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

NRC and PGA each raise 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. *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.¹ 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

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 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).

necessary factors have been demonstrated to establish a trade secret claim. *See* 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.*; *see also* ORD 661 at 5-6.

Upon review, we find NRC has established a *prima facie* case that its customer information, which we have marked, constitutes trade secrets. Therefore, the district must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, we find that NRC has failed to establish a *prima facie* case that any of the remaining information it seeks to withhold constitutes a trade secret. *See* Gov’t Code § 552.110(a); ORD 402. Additionally, we find PGA failed to demonstrate that any of the information it seeks to withhold meets the definition of a trade secret, nor has PGA demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD No. 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

We also find NRC has established that release of its pricing information would cause the company substantial competitive injury. Therefore, the district must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find NRC and PGA have made only conclusory allegations that the release of the remaining information each seeks to withhold would result in substantial damage to their competitive position. Thus, NRC and PGA have not demonstrated that substantial competitive injury would result from the release of any of their remaining information. *See generally* Open Records Decision Nos. 661, 509 at 5 (1988), 319 at 3. Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

NRC claims its remaining information is confidential under section 552.128 of the Government Code. Section 552.128 is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). However, NRC does not indicate it submitted the proposal in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on

a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, NRC submitted its proposal to the district in connection with a specific proposed contractual relationship with the district. We therefore conclude the district may not withhold any portion of NRC's information under section 552.128 of the Government Code.

Finally, we note some of the submitted information may 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 district must withhold the information we have marked under section 552.110 of the Government Code. The district must release the remaining information to the requestor, but any information 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,



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Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 458975

Enc. Submitted documents

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