



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2012

Ms. Connie Crawford
Assistant County Attorney
El Paso County Hospital District
4815 Alameda Avenue
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OR2012-16750

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# 468386 (ORR# HO-12-238).

The El Paso County Hospital District d/b/a University Medical Center of El Paso (the "district") received a request for information pertaining to request for proposals number 852-12/11-001.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Avatar International, L.L.C. ("Avatar"), HealthStream, Inc. ("HealthStream"), The Jackson Group, Inc. ("Jackson"), Market Dimensions ("Market"), J.L. Morgan & Associates, Inc. ("Morgan"), and Press Ganey Associates, Inc. ("Press Ganey"). Accordingly, you state, and provide documentation showing, you notified Avatar, HealthStream, Jackson, Market, Morgan, and Press Ganey of the request for information and of their rights 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*

¹You state the district sought and received clarification of the information requested. *See Gov't Code § 552.222* (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

(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 Avatar, HealthStream, and Press Ganey.² We have reviewed the submitted information and the submitted arguments.

Initially, we note the submitted proposals pertaining to HealthStream, Jackson, Market, Morgan, and Press Ganey were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-11011 (2012). In that ruling, we determined, in part, the district must release the information pertaining to Jackson, Market, and Morgan, but may release any information protected by copyright only in accordance with copyright law.³ With respect to the information pertaining to Jackson, Market, and Morgan that was previously submitted to and ruled on by this office, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the district must rely on Open Records Letter No. 2012-11011 as a previous determination and release the information pertaining to Jackson, Market, and Morgan in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note although HealthStream was notified of the request for its information pursuant to section 552.305 of the Government Code in Open Records Letter No. 2012-11011, HealthStream did not submit comments in response to the request at issue in the previous ruling. Further, although Press Ganey submitted arguments in the prior ruling, we found Press Ganey had failed to demonstrate the applicability of section 552.110 of the Government Code to any of its information. Accordingly, we determined in our previous ruling the district must release, among other things, HealthStream's and Press Ganey's proposals. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold the previously released information,

²We note although Avatar raises section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Accordingly, we do not address Avatar's argument under section 552.101.

³We note National's information is not at issue in the current ruling. We further note Avatar's information was not at issue in the prior ruling.

unless its release is expressly prohibited by law or the information is confidential by law. In this instance, HealthStream has submitted arguments to our office. Moreover, Press Ganey has submitted further arguments against release of information that was not withheld in the previous ruling. HealthStream and Press Ganey both claim portions of their proposals are excepted under section 552.110 of the Government Code, which makes information confidential under the Act. Therefore, because circumstances have changed with respect to HealthStream and Press Ganey's information, the district may not rely upon the prior ruling as a previous determination for HealthStream and Press Ganey's information, and we will address HealthStream and Press Ganey's arguments against release of their information. We will also address the public availability of the information pertaining to Avatar, which was not at issue in the previous ruling.

Next, we note Avatar argues against the release of information that was not submitted by the district. This ruling does not address information that was not submitted by the district and is limited to the information the department has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Avatar raises section 552.104 of the Government Code for portions of its information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the district does not argue section 552.104 is applicable, we will not consider Avatar's claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, Avatar, HealthStream, and Press Ganey each claim portions of their information are excepted from disclosure under section 552.110 of the Government Code. 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, 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. 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 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). We note pricing information pertaining to a particular 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." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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* Open Records Decision No. 661 at 5 (1999).

⁴The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

As mentioned above, HealthStream and Press Ganey's proposals were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-11011. In that prior ruling, the district notified HealthStream and Press Ganey pursuant to section 552.305, and HealthStream failed to submit any arguments that its information was excepted from disclosure under the Act. Further, we held Press Ganey failed to demonstrate any of its information meets the definition of a trade secret and did not demonstrate the necessary factors to establish a trade secret claim for its information. We also concluded Press Ganey did not demonstrate substantial competitive injury would result from the release of any of its information. Since the issuance of the previous ruling on July 17, 2012, neither HealthStream nor Press Ganey has disputed this office's conclusion regarding the release of their submitted proposals, and we presume the district has released the proposals in accordance with that ruling. In this regard, we find neither HealthStream nor Press Ganey has taken any measures to protect the requested proposal in order for this office to conclude any portion of those documents now either qualifies as a trade secret or contains commercial or financial information, the release of which would cause HealthStream or Press Ganey substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the district may not withhold any information in HealthStream's or Press Ganey's proposals under section 552.110 of the Government Code.

Avatar asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Avatar has established a *prima facie* case that some of its information constitutes trade secret information. Therefore, the information we have marked must be withheld under section 552.110(a) of the Government Code. However, we conclude Avatar has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Avatar has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, none of Avatar's remaining information may be withheld under section 552.110(a).

Avatar further argues some of its information consists of commercial or financial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Avatar has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the district must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Avatar has made only conclusory allegations that the release of any of its remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under 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), 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 (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), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, none of Avatar's remaining information may be withheld under section 552.110(b).

Avatar claims some of its 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, Avatar 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, Avatar 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 Avatar's information under section 552.128 of the Government Code.

We note some of the materials at issue 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 rely on Open Records Letter No. 2012-11011 as a previous determination and release the information pertaining to Jackson, Market, and Morgan in accordance with that ruling. The district must withhold the information we marked under section 552.110 of the Government Code. The remaining information must be released; however, any information that is subject to copyright may be released only 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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Open Records Division

CVMS/som

Ref: ID# 468386

Enc. Submitted documents

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