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November 15, 2012

Mr. R. Brooks Moore
Managing Counsel, Governance
Office of General Counsel
The Texas A&M University System
301 Tarrow Street, Sixth Floor
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OR2012-18433

Dear Mr. Moore:

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# 471128 (TAMU Reference Nos. SO-12-089 and SO-12-101).

The Texas A&M University System (the "system") received two requests for information pertaining to three specified requests for proposals. Although you take no position on whether the requested information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Able Services; ABM Janitorial Services; ARAMARK Management Services; BIO Landscape; Compass Group USA, Inc. d/b/a Chartwells and Southeast Service Corporation d/b/a SSC Service Solutions ("Compass"); ERMCI, LLC; GCA Education Services; ISS Grounds Control ("ISS"); J&J Worldwide Services ("J&J"); J.E. Dunn Construction Co.; Johnson Controls, Inc.; Marsden Services; Native Land Design; OJS System; PFMI; Pritchard Industries; Sodexo Services; The Davey Tree Expert Co. ("Davey"); UGL Services; and Valley Crest Landscape ("Valley Crest"). Accordingly, you have notified these third parties of the requests and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Compass, Davey, ISS, J&J, and Valley Crest. We have reviewed the submitted arguments and the submitted

information. We have also received and considered comments from an interested third party. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state and we agree, some of the requested information was the subject of previous requests for information pertaining to any final contracts between the system and Compass, and proposals for custodial services, landscaping maintenance services, and building maintenance services. As a result of these requests, this office issued Open Records Letter No. 2012-17662 (2012). In that ruling, this office ruled the system must withhold insurance policy numbers under section 552.136 and release the remaining information in accordance with copyright law. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, the system must continue to rely on the prior ruling as a previous determination and withhold or release the information we have previously ruled on in accordance with Open Records Letter No. 2012-17662. *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). However, because the submitted information is not encompassed by the previous determination, we will consider the submitted arguments.

Next, we note that 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 decision, we only have received comments from Compass, Davey, ISS, J&J, and Valley Crest. Thus, we find none of the remaining third parties have demonstrated that they have a protected proprietary interest in any of their 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 system may not withhold any of the remaining third parties' information on the basis of any proprietary interest they may have in their information.

ISS and J&J contend that their proposals may not be disclosed because the information at issue was marked confidential. However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body

under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

ISS raises section 552.104 of the Government Code for 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. However, section 552.104 protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government). As the system does not seek to withhold any information pursuant to section 552.104, no portion of ISS’s information may be withheld on this basis.

Davey, ISS, J&J, and Valley Crest 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.¹ 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 Davey and Valley Crest have demonstrated some of their customer information and J&J, Davey, and ISS 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 Davey and Valley Crest have published the remaining customer identities they seek to withhold on their respective websites. Because Davey and Valley Crest have published this information, they have failed to establish its release would cause substantial competitive harm. Additionally, we find Davey, ISS, J&J and Valley Crest have made only conclusory allegations that the release of the remaining information they seek to withhold would result in substantial damage to their competitive positions. Thus, Davey, ISS, J&J and Valley Crest have not demonstrated that substantial competitive injury would result from the release of any of the remaining information. See Open Records Decision Nos. 661, 509 at 5 (1988) (because 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

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).

under statutory predecessor to section 552.110). Therefore, the system may not withhold any of Davey's, ISS's, J&J's or Valley Crest's remaining information under section 552.110(b).

We further find Davey, ISS, and J&J 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 system may not withhold any of the remaining information under section 552.110(a).

We note some of the remaining information is subject to sections section 552.130 and 552.136 of the Government Code.² Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the system must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states 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." *Id.* § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, the system must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code.

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 system must continue to rely on Open Records Letter No. 2012-17662 as a previous determination and withhold or release the information we previously ruled on in

²The 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).

accordance with that ruling. The system must withhold the information we have marked under sections 552.110, 552.130, and 552.136 of the Government Code. The system must release the remaining information, but any information subject to 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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PL/tch

Ref: ID# 471128

Enc. Submitted documents

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