



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2013

Ms. Zeena Angadicheril
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-22166

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# 509363 (OGC# 152440).

The University of Texas Southwestern Medical Center (the "university") received a request for the contract with Passport Health Communications, Inc. ("Passport") related to a specified request for proposals, the proposal submitted by Passport, and proposals submitted by any non-winning bidders. You indicate the university has released some information to the requestor. You inform us the requestor has withdrawn the request for the proposal submitted by Siemens Medical Solutions USA, Inc. ("Siemens"). Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified MediFax-EDI, L.L.C. ("MediFAX"); Passport; Siemens; SOURCECORP -Managed Care Professionals, Inc. ("SOURCECORP"); and TransUnion Healthcare, L.L.C. ("TransUnion") 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 the Act in certain circumstances). We have received correspondence from representatives of each of the third parties. We have considered the submitted arguments and reviewed the submitted information.

TransUnion raises section 552.104 of the Government Code as an exception to disclosure for its proposal. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that 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 Nos. 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), 522 (1989) (discretionary exceptions in general). As the university does not seek to withhold any information pursuant to section 552.104, no portion of TransUnion's information may be withheld on this basis.

MediFAX, Passport, SOURCECORP, and TransUnion each claim their information is excepted 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. 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also Open Records Decision No. 552 at 2 (1990). 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. 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 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.*; see also Open Records Decision No. 661 at 5-6 (1990) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

MediFAX, Passport, SOURCECORP, and TransUnion claim their information constitutes commercial or financial information, the disclosure of which would cause each company substantial competitive harm. Upon review, we find MediFAX, SOURCECORP, and TransUnion have established their pricing and customer information, which we have marked, constitutes commercial or financial information, the release of which would cause each company substantial competitive injury. Additionally, we find Passport has established its customer information, which we have marked, constitutes commercial or financial information, the release of which would cause Passport substantial competitive injury. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find each company has made only conclusory allegations that the release of any of their remaining information would result in substantial harm to each company’s competitive position. See Open Records

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

Decision Nos. 661 at 5-6, 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). Furthermore, we note the pricing information of a winning bidder, such as Passport, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

Passport, SOURCECORP, and TransUnion claim portions of their information constitute trade secrets. Upon review, we find that Passport and SOURCECORP have established their software screen shots constitute trade secrets. Therefore, the university must withhold this information, which we have marked, under section 552.110(a) of the Government Code. However, we find Passport, SOURCECORP, and TransUnion have failed to demonstrate that any of their remaining information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, none of the remaining information at issue may be withheld under section 552.110(a) 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 university must withhold the information we have marked under section 552.110 of the Government Code. The university 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 509363

Enc. Submitted documents

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