



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 26, 2016

Mr. Richard A. McCracken
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, Third Floor
Fort Worth, Texas 76102

OR2016-01947

Dear Mr. McCracken:

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# 595350 (Fort Worth PIR# W046859).

The City of Fort Worth (the "city") received four requests for information pertaining to a specified request for proposal. You state you have released some information. We understand the city takes no position with respect to whether the submitted information is excepted from disclosure; however, you state its release may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, you notified Bank of America Merchant Services ("Bank of America"); Certified Payments; First Data Merchant Services; Community Bankers; Forte; Heartland Payment Systems; Native Merchant Services; nCourt, LLC; Paymentech, LLC ("Paymentech"); Paymentus; TransFirst; Value Payment Systems; and Elavon of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from Forte, Paymentus, Paymentech,

TransFirst and Bank of America. We have reviewed the submitted information and considered the submitted arguments.

You state the city sought clarification for one of the requests for information. *See* Gov't Code § 552.222(b) (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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You further state the city has not received a response to the request for clarification. Thus, for the requested information for which the city has sought but has not received clarification, we find the city is not required to release information in response to the request. However, if the requestor clarifies the request for information, the city must seek a ruling from this office before withholding any responsive information from the requestor. *See* Gov't Code § 552.222(b); *City of Dallas*, 304 S.W.3d at 387. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as the city has submitted information responsive to the request and third parties have made arguments against disclosure of this information, we will address the applicability of the arguments to 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has only received comments from Forte, Paymentus, Paymentech, TransFirst, and Bank of America explaining why their information should not be released to the requestor. Thus, we have no basis to conclude the remaining third parties have protected proprietary interests 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 city may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Next, we note TransFirst seeks to withhold information the city has not submitted to this office for review. This ruling does not address information that was not submitted by the city and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Forte and TransFirst state they have competitors. In addition, Forte and TransFirst state release of the information they seek to withhold would give advantage to a competitor or bidder. After review of the information at issue and consideration of the arguments, we find Forte and Transfirst have established the release of their information at issue, which we have marked, would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information we have marked under section 552.104(a) of the Government Code.¹

552.110 of the Government Code 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

¹As our ruling is dispositive, we need not address Forte’s or TransFirst’s remaining argument against disclosure of their information at issue.

secret factors.² 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 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 (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).

Upon review of the submitted arguments, we find Paymentus, Paymentech, and Bank of America have failed to demonstrate any of their submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision No. 319 at 3 (1982) (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 Paymentus’s, Paymentech’s, or Bank of America’s submitted information may be withheld under section 552.110(a) of the Government Code.

Paymentus, Paymentech, and Bank of America contend some of their information is commercial or financial information, the release of which would cause substantial

²The 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).

competitive harm. Upon review of Paymentus's and Paymentech's arguments and the information at issue, we find they have established some of their submitted information constitutes commercial or financial information, the release of which would cause the companies substantial competitive injury. Therefore, the city must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Paymentus and Paymentech have failed to make the specific factual or evidentiary showing that release of their remaining information would result in substantial damage to its competitive position. Further, we find Bank of America has failed to make the specific factual or evidentiary showing that release of any portion of its information would result in substantial damage to its competitive position. Thus, Paymentus, Paymentech, and Bank of America have not demonstrated that substantial competitive injury would result from the release of the remaining information at issue. *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). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

Next, Paymentus asserts some of its information is protected under section 552.102(a) of the Government Code. We understand Paymentus to further assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. 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. Section 552.101 of the Government Code encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find none of Paymentus's information is protected under section 552.102(a); thus, the city may not withhold the information at issue on that basis.

We note some of the remaining 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 city may withhold the information we have marked under section 552.104(a) of the Government Code. The city must withhold the information we have marked under section 552.110(b) of the Government Code. The city must release the remaining information; however, 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,



Joseph Keeney
Assistant Attorney General
Open Records Division

JDK/dls

Ref: ID# 595350

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Claudio Rivera
Proposal Writer
Bank of America Merchant Services
5565 Glenridge Connector, NE, Suite 2000
Atlanta, Georgia 30342
(w/o enclosures)

Mr. Mark Nehls
Relationship Manager
Citi Merchant Service provided by
First Data Merchant Services
5565 Glenridge Connector, NE
Atlanta, Georgia 30342
(w/o enclosures)

Mr. Matt Sparks
Community Bankers
908 South Old Missouri Road
Springdale, Arizona 72764
(w/o enclosures)

Forte Payment Systems, Inc.
c/o Mr. Jeffrey D. Dunn
Munsch, Hardt, Kopf & Harr, P.C.
500 North Akard Street, Suite 3800
Dallas, Texas 75201-6659
(w/o enclosures)

Mr. Michael Lawler
Heartland Payment Systems
570 Devall Drive, Suite 202
Auburn, Alabama 36832
(w/o enclosures)

Mr. Richard Henry
Native Merchant Services
15455 Dallas Parkway, Sixth Floor
Addison, Texas 75001
(w/o enclosures)

Ms. Kathleen Miller
Ncourt, L.L.C.
955a Cobb Place Boulevard
Kennesaw, Georgia 30144
(w/o enclosures)

K.D. Lavalais
Chase Paymentech
P.O. Box 809001
Dallas, Texas 75380-9001
(w/o enclosures)

Paymentus Corp.
c/o Mr. Larry H. Kunin
Morris, Manning & Martin, L.L.P.
3343 Peachtree Road, NE, Suite 1600
Atlanta, Georgia 30326
(w/o enclosures)

Ms. Lindsay B. Hudson
Corporate Counsel
Transfirst, L.L.C.
1393 Veterans Memorial Highway #307-s
Hauppauge, New York 11788
(w/o enclosures)