



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

January 28, 2016

Ms. Jennifer Burnett  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2016-02173

Dear Ms. Burnett:

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# 595880 (OGC# 165828).

The University of Texas Southwestern Medical Center (the "university") received a request for information pertaining to a specified request for proposals. You state you have released some information to the requestor. Although the university takes no position as to whether the submitted information is excepted under the Act, it states release of the submitted information may implicate the proprietary interests of Aloysius Butler & Clark d/b/a Creative Intelligence ("ABC"); Bayard; Buyer Advertising, Inc. ("Buyer"); Findly Talent, L.L.C. ("Findly"); Shaker Recruitment Advertising & Communications ("Shaker"); and TMP Worldwide Advertising & Communications, L.L.C. ("TMP"). Accordingly, the university states, and provides documentation showing, it notified the 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 the Act in certain circumstances). We have received comments from Buyer, Shaker, and TMP. We have considered the submitted arguments and reviewed the submitted information.

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, we have not received comments from ABC, Bayard, or Findly explaining why the submitted information should not be released. Therefore, we have no basis to conclude either ABC, Bayard, or Findly has 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest ABC, Bayard, or Findly may have in the information.

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, 839 (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. Buyer and TMP state they have competitors. In addition, Buyer and TMP state release of their information would give advantage to their competitors or other bidders. After review of the information at issue and consideration of the arguments, we find Buyer and TMP have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold Buyer's and TMP's information under section 552.104(a).<sup>1</sup>

We understand Shaker to raise section 552.110 of the Government Code for some of its information.<sup>2</sup> Section 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, 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

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>2</sup>Although Shaker does not raise section 552.110 of the Government Code in its brief, we understand it to raise this exception based on the substance of its arguments.

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.<sup>3</sup> 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) of the Government Code 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

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<sup>3</sup>The 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).

injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Upon review, we find Shaker has demonstrated its pricing information constitutes commercial or financial information, the release of which would cause it substantial competitive injury. Accordingly, the university must withhold the information we have marked under section 552.110(b) of the Government Code. We also find Shaker has demonstrated its customer information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, to the extent Shaker's customer information is not publicly available on its company website, the university must withhold the customer information at issue under section 552.110(b) of the Government Code. However, we find Shaker has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause it substantial competitive harm. *See* Open Records Decision Nos. 661, 509 at 5 (1988), 319 at 3, 175 at 4 (1977). Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Shaker argues its remaining information, including any customer information publicly available on Shaker's website, constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Shaker has failed to establish a *prima facie* case this information meets the definition of a trade secret and has not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 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), 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). Accordingly, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

In summary, the university may withhold Buyer's and TMP's information under section 552.104(a) of the Government Code. The university must withhold the information we have marked under section 552.110(b) of the Government Code. To the extent Shaker's customer information is not publicly available on its company website, the university must withhold the customer information at issue under section 552.110(b) of the Government Code. The university must release the remaining information.

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,



Cristian Rosas-Grillet  
Assistant Attorney General  
Open Records Division

CRG/akg

Ref: ID# 595880

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Anthony R. Shaker  
Shaker Recruitment Advertising &  
Communications  
1100 Lake Street  
Oak Park, Illinois 60301  
(w/o enclosures)

Mr. Paul Pomeroy  
Aloysius Butler & Clark  
d/b/a Creative Intelligence  
819 North Washington Street  
Wilmington, Delaware 19801  
(w/o enclosures)

Mr. Terry K. Mond  
For Buyer Advertising  
Gordon, Mond & Ott, PC  
1 Batterymarch Park, Suite 312  
Quincy, Massachusetts 02169  
(w/o enclosures)

Ms. Amanda Thompson-O'Neal  
Bayard  
902 Broadway, 10<sup>th</sup> Floor  
New York, New York 10010  
(w/o enclosures)

Mr. Glenn Mitchell  
TMP Worldwide  
125 Broad Street, 10<sup>th</sup> Floor  
New York, New York 10004  
(w/o enclosures)

Ms. Lana Peters  
Findly Talent, LLC  
630 Fifth Avenue, Suite 659  
New York, New York 10022  
(w/o enclosures)