



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 22, 2016

Ms. Ana Vieira Ayala  
Senior Attorney & Public Information Coordinator  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2016-17590A

Dear Ms. Ayala:

This office issued Open Records Letter No. 2016-17590 (2016) on August 4, 2016. We have examined this ruling and determined we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on August 4, 2016. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). This ruling was assigned ID# 630566 (OGC # 169310).

The University of Texas System (the "system") received a request for all responses to specified requests for qualifications and proposals issued by the system, a specified contract, and all change orders and amendments to the contract.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>2</sup>

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<sup>1</sup>We note you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). We note the system received the required deposit on May 16, 2016. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

<sup>2</sup>We note the system did not comply with section 552.301 of the Government Code in raising section 552.101 of the Government Code. *See* Gov't Code § 552.301(b), (e). Nevertheless, because section 552.101

You also state release of the submitted information may implicate the proprietary interests of Atkins North America, Inc. (“Atkins”); Austin Commercial, L.P.; The Ballinger Company; Bartlett Cocke General Contractors, L.L.C.; HC Beck, Ltd. d/b/a The Beck Group (“Beck”); DPR Construction; CO Architects; Fentress Architects (“Fentress”); FKP Architects; Flad & Associates, Inc. d/b/a Flad Architects; Flintco, L.L.C.; M. Arthur Gensler Jr. & Associates d/b/a Gensler; Hensel Phelps Construction Co.; Hill & Wilkinson (“Hill”); HKS, Inc. (“HKS”); Jacobs Ennead Architects; Jennings Hackler and Partners, Inc.; Kahler Slater Marmon Mok; Kirksey Architecture (“Kirksey”); Lawrence Group; Linbeck; Lock Aeck & Sargent; Moore Ruble Yudell Architects & Planners (“Moore”); Overland Partners (“Overland”); PageSoutherlandPage, LLP (“PageSoutherland”); Payette; Perkins+Will; Perkins Eastman Architects, P.C.; Satterfield & Pontikes Construction, Inc.; SHWGROUP (“SHW”); SmithGroupJR; SpawGlass Contractors, Inc.; STUDIOS Architecture; Turner Construction Company; Vaughn Construction; Rafael Vinoly Architects (“RVA”); VOA Associates; White Construction Company; and WHR Architects. Accordingly, you state you notified the third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See id.* § 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 Atkins, Beck, Fentress, Hill, HKS, Kirksey, Moore, Overland, SHW, PageSoutherland, and RVA.<sup>3</sup> We have reviewed the submitted information and considered the submitted arguments.

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 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 the remaining notified third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of these 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

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is a mandatory exception that can provide a compelling reason to overcome the presumption of openness, we will consider the applicability of section 552.101 to the information at issue. *See id.* §§ 552.007, .302, .352.

<sup>3</sup>Although HKS raises section 552.101 of the Government Code, HKS has provided no arguments explaining how this exception is applicable to the submitted information. Further, although Moore raises section 552.101 in conjunction with sections 1985.3 and 1985.6 of the California Code of Civil Procedure, in addition to California case law and constitutional law, Moore has provided no arguments supporting these assertions. Additionally, although Moore, HKS, and SHW assert section 552.104 of the Government Code, these third parties have provided no arguments supporting this assertion. Therefore, we assume these third parties no longer assert these exceptions. *See Gov’t Code* § 552.305.

information is trade secret), 542 at 3. Accordingly, the system may not withhold the submitted information on the basis of any proprietary interest the remaining notified third parties 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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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. Atkins, Beck, Fentress, Hill, Kirksey, Overland, PageSoutherland, and RVA state they have competitors. In addition, Atkins, Beck, Fentress, Hill, Kirksey, Overland, PageSoutherland, and RVA state release of the information at issue would give an advantage to their competitors. We note Beck was the winning bidder and seeks to withhold the terms of the contract with the system. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 839. After review of the information at issue and consideration of the arguments, we find Atkins, Beck, Fentress, Hill, Kirksey, Overland, PageSoutherland, and RVA have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the submitted information related to Hill, Kirksey, PageSoutherland, and RVA in addition to the information we have marked and indicated under section 552.104(a).<sup>4</sup>

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 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing

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<sup>4</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the system must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, upon review, we find you have failed to demonstrate the remaining information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, system may not withhold the remaining information at issue under section 552.101 in conjunction with common-law privacy.

HKS and SHW claim portions of the remaining information are excepted under section 552.110 of the Government Code, which 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 5. 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.<sup>5</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. *See* 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 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (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).

HKS and SHW claim section 552.110(b) of the Government Code for portions of their respective information. Upon review, we find HKS has demonstrated its pricing information

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<sup>5</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).

constitutes commercial or financial information, the release of which would cause substantial competitive injury to HKS. Therefore, the system must withhold HKS's pricing information under section 552.110(b).<sup>6</sup> However, upon review, we find HKS and SHW have not demonstrated release of the remaining information at issue would cause the respective companies substantial competitive harm. *See* Open Records Decision Nos. 661, 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, qualifications, and pricing 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 the remaining information may be withheld under section 552.110(b).

HKS and SHW argue portions of their respective information constitute trade secrets under section 552.110(a) of the Government Code. However, upon review, we find HKS and SHW have failed to establish a *prima facie* case the information at issue meets the definition of a trade secret and have 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). Accordingly, no portion of the remaining information may be withheld under section 552.110(a).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.<sup>7</sup> *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individuals

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<sup>6</sup>As our ruling is dispositive, we need not address HKS's remaining argument under section 552.110(a) of the Government Code for this information.

<sup>7</sup>The 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).

whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. Conversely, if the individuals at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the cellular telephone service, then the system may not withhold the marked information under section 552.117(a)(1).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document 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 all images of license plates within the remaining information under section 552.130.

Section 552.136 of the Government Code provides, “[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); *see id.* § 552.136(a) (defining “access device”). Upon review, the system must withhold all bank account and routing numbers within the remaining information under section 552.136.

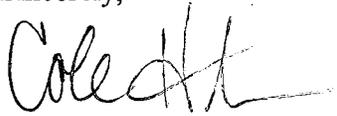
We note portions of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of 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 system may withhold the submitted information related to Hill, Kirksey, PageSoutherland, and RVA in addition to the information we have marked and indicated under section 552.104(a) of the Government Code. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must withhold HKS's pricing information under section 552.110(b) of the Government Code. If the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. The system must withhold all images of license plates within the remaining information under section 552.130 of the Government Code. The system must withhold all bank account and routing numbers within the remaining information under section 552.136 of the Government Code. The remaining information must be released; however, any information 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/bhf

Ref: ID# 630566

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Parties  
(w/o enclosures)