

Office of the Attorney General
State of Texas
Informal Letter Ruling No. OR2017-08873
April 26, 2017

Ms. Jennifer Burnett
Attorney & Public Information Coordinator
The University of Texas System
201 West Seventh Street, Suite 600
Austin, Texas 78701-2902

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# 653821 (OGC# 173737).

The University of Texas at Austin (the "university") received a request for information pertaining to the winning bid of a specified request for proposals. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Attain, LLC ("Attain"); Deutser; and FSG, Inc. ("FSG"). Accordingly, you state, and provide documentation showing, you notified Attain, Deutser, and FSG 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 FSG. 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 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 ruling, we have not received comments from Attain or Deutser. Thus, we have no basis to conclude Attain or Deutser has a protected proprietary interest in the 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 university may not withhold any of the submitted information on the basis of any proprietary interest Attain or Deutser 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 (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. FSG states it has competitors. In addition, FSG states the release of its information at issue would "harm FSG's competitive advantage by allowing competitors to determine FSG's bid amount and propose bids below FSG's bid, serving to undercut FSG's attractiveness to proposed clients." After review of the information at issue and consideration of the arguments, we find FSG has established the release of the information at issue, which we have marked, would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we have marked under [section 552.104\(a\) of the Government Code](#).

FSG claims portions of its 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 Open Records Decision No. 552 (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 [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 Record Decision Nos. 255 (1980), 232 (1979), 217 (1978).

FSG asserts portions of its information constitute trade secrets under [section 552.110\(a\) of the Government Code](#). Upon review, we conclude FSG has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find FSG has not demonstrated the necessary factors to establish a trade secret claim for its information. See ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under [section 552.110](#)). Therefore, none of FSG's information may be withheld under [section 552.110\(a\)](#).

In summary, the university may withhold the information we marked under [section 552.104\(a\) 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,

Kaelan A. Henze
Assistant Attorney General
Open Records Division

Footnotes

- ¹ 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).