



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 24, 2004

Mr. Dan Junell  
Assisant General Counsel  
Teacher Retirement System  
1000 Red River Street  
Austin, Texas 78701-2698

OR2004-7237

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206853.

The Teacher Retirement System of Texas ("TRS") received a request for information including the three categories of information submitted for our review: (1) Exhibit A, the TRS staff analysis (due diligence) that the TRS Board of Trustees requested at its May 21 meeting, (2) Exhibit B, the services contract between Pathway Capital Management, LLC ("Pathway") and TRS, and (3) Exhibit C, a Conflict of Interest Disclosure Statement and the related TRS ethics file. You indicate that some of the requested information has been provided to the requestor and some has been made available to the requestor. You claim that portions of Exhibit C are excepted from disclosure under section 552.101 of the Government Code. You claim that Exhibit A is excepted from release under section 552.104 of the Government Code. You also assert that information contained in Exhibit C may be excepted from disclosure under section 552.110 Government Code but take no position and make no argument regarding this exception. In addition, pursuant to section 552.305 of the Government Code, you notified Pathway Capital Management, LLC ("Pathway"), and Bain Capital, Inc. ("Bain"), whose proprietary interests may be implicated by the request. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). Pathway claims that its pricing information is excepted from release under section 552.110 of the Government Code. We have considered the submitted

arguments and reviewed the submitted information. We have also received and considered the requestor's arguments that the submitted information may not be withheld pursuant to the exceptions argued by TRS. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

We note that an interested third party is allowed ten business days after the receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Bain has not submitted any comments to this office explaining how the release of any information in Exhibit A would implicate its proprietary interests. Therefore, Bain has provided us with no basis to conclude that it has protected proprietary interests in Exhibit A. *See* Gov't Code § 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 (1990). Accordingly, information in Exhibit A which relates to Bain may not be withheld under section 552.110 of the Government Code.

We now turn to TRS's claims regarding the submitted information. We begin with Exhibit C, which TRS claims is subject to section 552.101 of the Government Code. Initially, we must address the TRS's obligations under section 552.301 of the Government Code in seeking a ruling from this office. Within fifteen business days of receiving a written request for information, the governmental body is required to submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). TRS acknowledges that it did not submit written comments regarding section 552.101 or a copy of the information at issue under section 552.101 within fifteen business days as required by section 552.301(e).

Pursuant to section 552.302 of the Government Code, TRS's failure to comply with section 552.301 results in the legal presumption that Exhibit C is public and must be released. In order to overcome the presumption that Exhibit C is public, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). The applicability of section 552.101 is such a compelling reason. Therefore, we will address your claim under section 552.101 of the Government Code.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that another statute makes confidential. TRS raises section 552.101 in conjunction with section 825.507 of the Government Code. Section 825.507 provides in relevant part:

(a) Records of a participant that are in the custody of the retirement system . . . are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section.

(b) The retirement system may release records of a participant . . . to:

(1) the participant or the participant’s attorney or guardian or another person who the executive director determines is acting on behalf of the participant;

(2) the executor or administrator of the deceased participant’s estate, including information relating to the deceased participant’s beneficiary;

(3) a spouse or former spouse of the participant if the executive director determines that the information is relevant to the spouse’s or former spouse’s interest in member accounts, benefits, or other amounts payable by the retirement system;

(4) an administrator, carrier, consultant, attorney, or agent acting on behalf of the retirement system;

(5) a governmental entity, an employer, or the designated agent of an employer, only to the extent the retirement system needs to share the information to perform the purposes of the retirement system, as determined by the executive director;

(6) a person authorized by the participant in writing to receive the information;

(7) a federal or state criminal law enforcement agency that requests a record for a law enforcement purpose;

(8) the attorney general to the extent necessary to enforce child support; or

(9) a party in response to a subpoena issued under applicable law if the executive director determines that the participant will have a reasonable opportunity to contest the subpoena.

Gov't Code § 825.507(a)-(b). Section 825.507(g) provides that "[i]n this section, 'participant' means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system." *Id.* § 825.507(g).

Exhibit C consists of records relating to the Conflict of Interest Disclosure Statement and the related TRS ethics file # 03-10. TRS explains that Exhibit C concerns a participant in the retirement system. Based on this representation and our review of this information, we find that section 825.507(a) is applicable to Exhibit C. TRS also informs us that the requestor has neither asserted that any of the provisions of section 825.507(b) is applicable in this instance nor provided any information that would allow TRS to determine that any of these provisions applies. We therefore conclude that TRS must withhold the participant's identifying information under section 825.507. Accordingly, the portions of Exhibit C which we have marked are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 825.507 of the Government Code.<sup>1</sup>

We next address the remaining information in Exhibit C which you have marked as protected by common law privacy. Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing 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. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and

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<sup>1</sup>The information for which TRS has claimed section 552.101 in conjunction with section 159.002 of the Occupations Code has been disposed of under section 552.101 in conjunction with section 825.507 of the Government Code. Accordingly, we will not address your claim under section 159.002 of the Occupations Code.

identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). In the instant case, we have already determined that the information in Exhibit C which identifies the retirement system participant is confidential under section 825.507 of the Government Code. We find that no additional information in Exhibit C must be withheld in order to protect the participant's common law right to privacy.

We next address your claim that Exhibit A, the TRS staff analysis (due diligence), is excepted from release under section 552.104 of the Government Code. This office is currently in litigation with the Texas Growth Fund and the Texas Growth Fund II in *Texas Growth Fund and Texas Growth Fund II v. Texas Attorney General Greg Abbott*, Cause No. GN 402527, 353<sup>rd</sup> District Court, Travis County, Texas. Your arguments under section 552.104 and the information in Exhibit A that you seek to withhold are similar to the issues and information involved in the pending litigation. Accordingly, we decline to rule on your section 552.104 arguments at this time and will allow the trial court to determine whether the type of information that you seek to withhold must be released to the public.

Finally, we consider Pathway's arguments regarding Exhibit B, the services contract. Pathway claims that section 3.1 of the contract and section 3 of the second amendment to the contract are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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.

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.), *cert. denied*, 358 U.S. 898 (1958); *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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>2</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Further, section 552.110(b), which protects certain financial or commercial information, 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. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Pathway has not demonstrated that the pricing information in Exhibit B is "a process or device for continuous use in the operation" of Pathway's business. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). Accordingly, we find that Pathway has failed to establish a *prima facie* case that the information it seeks to withhold is a trade secret. *See* Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We also find that Pathway has failed to explain how the release of its pricing information would result in substantial competitive harm to the company. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors); 509 at 5 (1988) (stating that 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 was entirely too speculative); 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under predecessor to Gov't Code § 552.110); *see also* Gov't Code § 552.022(a)(3) (information in account, voucher, or contract relating to receipt or expenditure of public funds by governmental body is public

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others 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).

information). Therefore, Exhibit B may not be withheld from disclosure under section 552.110 of the Government Code.

In summary, TRS must withhold the portions of Exhibit C, which we have marked, under section 552.101 in conjunction with section 825.507 of the Government Code. We decline to rule on TRS's claim under section 552.104 and will allow the court to decide whether information such as Exhibit A must be released to the public. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

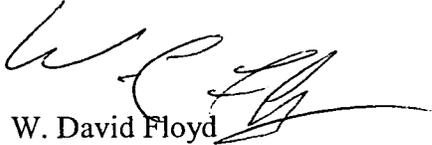
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. David Floyd  
Assistant Attorney General  
Open Records Division

WDF/sdk

Ref: ID# 206853

Enc. Submitted documents

c: Mr. Yamil Berard  
Fort Worth Star-Telegram  
400 West Seventh Street  
Fort Worth, Texas 76101  
(w/o enclosures)