



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2007

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

OR2007-04977

Dear Mr. Junell:

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# 277060.

The Teacher Retirement System of Texas (the "system") received two requests for responses to the system's Request for Qualifications for Outside Counsel, Period September 1, 2006 - August 31, 2008, #RFQ 0508061D-ML.¹ You state that you have released some of the requested information to the requestors. You also state that you have no information responsive to item 2 of the first request.² You claim that the requested information may contain the proprietary information of third parties. Although you take no position on the proprietary nature of the information, you state, and provide documentation showing, that you have notified the interested third parties of the requests and of their opportunity to

¹See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

submit comments to this office as to why the requested information should not be released to the requestors.³ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the submitted information may not be responsive to the present request. Vinson & Elkins LLP ("Vinson") informs us that one of the requestors clarified her request to exclude Vinson's malpractice insurance information, fee proposal information, and client names. To the extent the requestor excluded this information from the request, it is not responsive to the request, and the system is not required to release such information in response to the request for information.

Next, we note that 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 decision, we have only received responses from the following companies: Berger & Montague, P.C. ("Berger"), Entwistle & Cappucci LLP ("Entwistle"), Kirkpatrick & Lockhart Preston Gates Ellis LLP ("Kirkpatrick") (formerly Preston Gates & Ellis LLP), Labaton Sucharow & Rudoff LLP ("Labaton"), and Pomerantz Haudek Block Grossman & Gross LLP ("Pomerantz").

The remaining third parties have not submitted to this office any reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in any of the responsive information. See, e.g., *id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, we conclude that the system may not withhold any portion

³The interested third parties are as follows: Andrews Kurth LLP; Baron & Budd; Barrack, Rodos, & Bacine; Berger & Montague, P.C.; Berman DeValerio Pease Tabacco Burt & Pucillo; Bernstein Liebhard & Lifshitz, LLP; Bernstein Lithowitz Berger & Grossman LLP; Chimicles & Tikellis LLP; Chitwood Harley Harnes LLP; Cohen, Milstein, Hausfeld & Toll, P.L.L.C.; Entwistle & Cappucci LLP; Grant & Eisenhofer, P.A.; Hahn Loeser & Parks LLP; Heins Mills & Olson, P.L.C.; Kaplan Fox & Kilsheimer LLP; Kirby McInerney & Squire, LLP; Labaton Sucharow & Rudoff LLP and Deats, Durst, Owen & Levy, P.L.L.C.; Lerach Coughlin Stoia Geller Rudman & Robbins LLP; Loeffler, Cabraser, Heimann & Bernstein, LLP; Locke Liddell & Sapp LLP and Lowey Dannenberg Bemporad & Selinger, P.C.; Loeffler Tuggey Pauerstein Rosenthal LLP; Patton, Roberts, McWilliams & Capshaw, LLP; Pomerantz Haudek Block Grossman & Gross LLP; Porter & Hedges, L.L.P.; Preston Gates & Ellis LLP; Reinhart Boerner Van Deuren s.c.; Schiffrin & Barroway, LLP; Spector Roseman & Kodroff, P.C.; Vinson & Elkins LLP; Wolf Haldenstein Adler Freeman & Herz LLP; Wolf Popper LLP and Leonard Frost Levin Van Court & March, PC; York, Keller & Field LLP; and Zimmerman, Axelrad, Meyer, Stern & Wise, P.C.

of the responsive information on the basis of any proprietary interest the remaining third parties may have in the information.

Pomerantz raises section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, Pomerantz has not directed our attention to any law, nor are we aware of any law, under which any portion of the submitted information is considered confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, the system may not withhold any of the submitted information under section 552.101 of the Government Code.

Labaton and Pomerantz assert that their information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the system does not seek to withhold any information pursuant to this exception, the system may not withhold any of the information at issue pursuant to section 552.104 of the Government Code. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).

Berger, Entwistle, Kirkpatrick, Labaton, and Pomerantz contend that portions of their responsive information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for

the production of an article. It may, however, 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). 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. 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. *See id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

After reviewing the information at issue and the submitted arguments, we conclude that Berger, Entwistle, Kirkpatrick, Labaton, and Pomerantz have established that some of the submitted information is commercial or financial information the release of which would cause the companies substantial competitive harm under section 552.110(b). Therefore, the system must withhold the information we have marked under section 552.110(b).⁴ However, Berger, Entwistle, Kirkpatrick, Labaton, and Pomerantz have not established by specific factual evidence that any of the remaining information is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the companies substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”); ORD 661 at 5-6 (section 552.110(b) requires specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of information). As such, none of the remaining information may be withheld under section 552.110 of the Government Code.

We note that some of the materials at issue 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the system must withhold the information we have marked under section 552.110 of the Government Code. The system must release the remaining information to the requestors, but any copyrighted information may only be released in accordance with copyright law. As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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.

⁴As we are able to reach this conclusion, we do not address Pomerantz's argument under section 552.131 of the Government Code.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/jb

Ref: ID# 277060

Enc. Submitted documents

c: Mr. Spencer Barasch
Andrews Kurth, L.L.P.
1717 Main Street, Suite 3700
Dallas, Texas 75201
(w/o enclosures)

Mr. Gary Cruciani
Baron & Budd
3102 Oak Lawn Avenue, Suite 1100
Dallas, Texas 75219
(w/o enclosures)

Mr. Leonard Barrack
Barrack, Rodos & Bacine
2001 Market Street, Suite 3300
Philadelphia, Philadelphia 19103
(w/o enclosures)

Ms. Mary Keller
York, Keller & Field, L.L.P.
816 Congress Avenue, Suite 1670
Austin, Texas 78701
(w/o enclosures)

Mr. Leban Abbott
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
(w/o enclosures)

Mr. Glen DeValerio
Berman DeValerio Pease Tabacco
One Liberty Square, 8th Floor
Boston, Massachusetts 02109
(w/o enclosures)

Mr. Stanley Bernstein
Bernstein Liebhard & Lifshitz, L.L.P.
10 East 40th Street, 28th Floor
New York, New York 10016
(w/o enclosures)

Mr. Max Berger
Bernstein, Litowitz, Berger & Grossmann,
L.L.P.
1285 Avenue of the Americas, 38th Floor
New York, New York 10019
(w/o enclosures)

Mr. Nicholas Chimicles
Chimicles & Tikellis, L.L.P.
361 West Lancaster Avenue
One Haverford Centre
Haverford, Pennsylvania 19041
(w/o enclosures)

Ms. Nikole Davenport
Chitwood, Harley & Harnes, L.L.P.
2300 Promenade II
1230 Peachtree Street, North East
Atlanta, Georgia 30309
(w/o enclosures)

Mr. Mark Willis
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.
1100 New York Avenue NorthWest
Suite 500
Washington, D.C. 20005
(w/o enclosures)

Mr. Andrew Entwistle
Entwistle & Cappucci, L.L.P.
280 Park Avenue, 26th Floor West
New York, New York 10017
(w/o enclosures)

Mr. Jay Eisenhofer
Grant & Eisenhofer, P.A.
1201 North Market Street, 21st Floor
Chase Manhattan Centre
Wilmington, Delaware 19801
(w/o enclosures)

Mr. Daniel DeMarco
Hahn, Loeser & Parks, L.L.P.
200 Public Square
3300 BP Tower
Cleveland, Ohio 44114
(w/o enclosures)

Mr. Dylan McFarland
Heins, Mills & Olson, P.C.
80 South 8th Street
3550 IDS Center
Minneapolis, Minnesota 55402
(w/o enclosures)

Mr. Donald Hall
Kaplan, Fox & Kilsheimer, L.L.P.
805 Third Avenue, 22nd Floor
New York, New York 10022
(w/o enclosures)

Ms. Joanne Cicala
Kirby, McInerney & Squire, L.L.P.
830 Third Avenue, 10th Floor
New York, New York 10022
(w/o enclosures)

Mr. Thomas Dubbs
Labaton, Sucharow & Rudoff, L.L.P.
100 Park Avenue, 12th Floor
New York, New York 10017
(w/o enclosures)

Ms. Martha Owen
Deats, Durst, Owen & Levy, P.L.L.C.
1204 San Antonio, Suite 203
Austin, Texas 78701
(w/o enclosures)

Mr. William Lerach
Lerach, Coughlin, Stoia, Geller, Rudman &
Robbins, L.L.P.
655 West Broadway, Suite 1900
San Diego, California 92101
(w/o enclosures)

Mr. Bruce Leppla
Lieff, Cabraser, Heimann & Bernstein,
L.L.P.
275 Battery Street, 30th Floor
Embarcadero Center West
San Francisco, California 94111
(w/o enclosures)

Mr. Charles Parker
Locke, Liddell & Sapp, L.L.P.
600 Travis, Suite 2900
JP Morgan Chase Tower
Houston, Texas 77002
(w/o enclosures)

Mr. Neil Selinger
Lowey, Dannenberg, Bernporad &
Selinger, P.C.
1 North Lexington Avenue, 11th Floor
The Gateway
White Plains, New York 10601
(w/o enclosures)

Mr. Brad Beckworth
Nix, Patterson, & Roach, L.L.P.
205 Linda Drive
Daingerfield, Texas 75638
(w/o enclosures)

Mr. Richard Adams
2900 St. Michael Drive, Suite 400
Century Bank Plaza
Texarkana, Texas 75503
(w/o enclosures)

Mr. Stanley Grossman
100 Park Avenue, 26th Floor
New York, New York 10017
(w/o enclosures)

Mr. Bryan Brown
Porter & Hedges, L.L.P.
1000 Main Street, 36th Floor
Reliant Energy Plaza
Houston, Texas 77002
(w/o enclosures)

Ms. Margaret Niles
Preston, Gates & Ellis, L.L.P.
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
(w/o enclosures)

Mr. Steven Huff
Reinhart, Boerner, Van Deuren, S.C.
P.O. Box 2965
Milwaukee, Wisconsin 53201
(w/o enclosures)

Ms. Susan Denmon Gusky
Vinson & Elkins, L.L.P.
2801 Via Fortuna, Suite 100
The Terrace 7
Austin, Texas 78746-7568
(w/o enclosures)

Mr. Robert Roseman
Spector, Roseman, & Kodroff, P.C.
1818 Market Street, Suite 2500
Philadelphia, Pennsylvania 19103
(w/o enclosures)

Mr. Jerry Turner
Vinson & Elkins, L.L.P.
2801 Via Fortuna, Suite 100
The Terrace 7
Austin, Texas 78746-7568
(w/o enclosures)

Mr. Edward Peterson
Winstead, Sechrest & Minick, P.C.
1201 Elm Street, Suite 5400
Renaissance Tower
Dallas, Texas 75270
(w/o enclosures)

Mr. Mark Rifkin
Wolf, Haldenstein, Adler, Freeman &
Herz, L.L.P.
270 Madison Avenue, 10th Floor
New York, New York 10016
(w/o enclosures)

Ms. Marian Rosner
Wolf & Popper, L.L.P.
845 Third Avenue, Suite 1200
New York, New York 10022
(w/o enclosures)

Mr. Nelson Ebaugh
Zimmerman, Axelrad, Meyer, Stern &
Wise, P.C.
3040 Post Oak Boulevard, Suite 1300
Houston, Texas 77056
(w/o enclosures)

Ms. Amanda L. Moore
SimmonsCooper, L.L.C.
209 South LaSalle, Suite 701
Chicago, Illinois 60604
(w/o enclosures)

Mr. Darren Check
Schiffrin & Barroway, L.L.P.
280 King of Prussia Road
Radnor, Pennsylvania 19087
(w/o enclosures)