



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 21, 2010

Ms. Leena Chaphekar  
Assistant General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR2010-14268

Dear Ms. Chaphekar:

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# 392882.

The Employees Retirement System of Texas (the "system") received two requests for information pertaining to the system's PBM and Claims Audit Services contract. You state that you will make some information available to both requestors. You claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.110 of the Government Code.<sup>1</sup> You also state the submitted information may implicate the proprietary interests of certain third parties. Accordingly, pursuant to section 552.305 of the Government Code, you notified Milliman, Inc. ("Milliman"), Sagebrush Solutions, LLC ("Sagebrush"), and Health Management Systems, Inc. ("HMS") of the request and of their right to submit arguments to this office as to why each company's information should not be released. *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 applicability of exception to disclosure under

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with sections 552.104 and 552.110 of the Government Code, section 552.101 does not encompass other exceptions in the Act. You also raise section 552.022 of the Government Code; we note, however, section 552.022 is not an exception to disclosure. Rather, section 552.022 lists categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

Act in certain circumstances). We have received comments from Milliman, Sagebrush, and HMS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the information Sagebrush seeks to withhold was not submitted by the system to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the system. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). However, we will address Sagebrush's arguments against the disclosure of its information submitted by the system.

Next, you raise section 552.104 of the Government Code, which protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. The purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Although HMS also raises section 552.104, because this section is a discretionary exception that protects only the interests of a governmental body, we only address the system's claim under section 552.104. *See id.* (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), Open Records Decision No. 522 (1989) (discretionary exceptions in general). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990).

The submitted information consists of bid proposals, proposal amendments, and supplementary materials from the three bidders for the contract at issue. This information pertains to a contract the system has already awarded. Moreover, you have failed to provide any arguments explaining how this information otherwise pertains to an ongoing competitive situation. Therefore, we find the submitted information does not pertain to a competitive situation for purposes of section 552.104. Consequently, the system may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, Milliman, Sagebrush, and HMS all raise section 552.110 of the Government Code for portions of their respective information. Although the system argues the responsive information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the system's argument under section 552.110. We will, however, address the third parties' arguments under section 552.110.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). 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. 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); *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>2</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person’s claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We note that 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

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<sup>2</sup>The following are the six factors that the Restatement gives 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 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).

continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines.*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* 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):

Sagebrush and HMS claim portions of their proposals are trade secrets that should be protected by section 552.110(a). Having reviewed the arguments of Sagebrush and HMS, we find HMS has demonstrated that some of its client information constitutes trade secrets. We have marked the client information in HMS’s proposal that the system must withhold under section 552.110(a) of the Government Code. However, we note HMS has made the identities of some of its listed clients publicly available on its website, and HMS has failed to demonstrate how information it has published on its website is a trade secret. *See* ORD 402. Accordingly, HMS may not withhold these clients under section 552.110(a). HMS also asserts portions of the “Implementation Plan” and “Interrogatories” sections of its proposal should be withheld as trade secrets. Having considered its arguments, we find that HMS has failed to demonstrate how any of the information it seeks to withhold in its “Implementation Plan” or “Interrogatories” sections meets the definition of a trade secret, nor has HMS demonstrated the necessary factors to establish a trade secret claim for this information. Thus, the system may not withhold this information under section 552.110(a). *See* ORD 402; Restatement of Torts § 757 cmt. b. Although Sagebrush and HMS argue the pricing information in their proposals should be withheld as trade secrets, pricing information pertaining to a particular solicitation or 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Thus, none of the pricing information at issue may be withheld under section 552.110(a). Lastly, we find Sagebrush has not demonstrated how the non-pricing portions of its information meet the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the system may not withhold any of Sagebrush’s information under section 552.110(a) of the Government Code.

Milliman, HMS, and Sagebrush raise section 552.110(b) for portions of their respective proposals. Upon review, we find Sagebrush has established its pricing information constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Thus, the system must withhold the portions of Sagebrush's pricing information we have marked under section 552.110(b). HMS also seeks to withhold its pricing information. We note, however, that pricing information of a winning bidder is generally not excepted under section 552.110(b), because this office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *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). Accordingly, as HMS was the winning bidder in this instance, the system may not withhold any of HMS's pricing information under section 552.110(b). Furthermore, we find Milliman, Sagebrush, and HMS have made only conclusory allegations that the release of their remaining information would result in substantial damage to the companies' competitive position. Thus, Milliman, Sagebrush, and HMS have not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORD Nos. 661 at 5-6, 509 at 5. Accordingly, the system may not withhold any of the remaining information under section 552.110(b).

We note some of the remaining information is confidential under section 552.136 of the Government Code. Section 552.136 of the Government Code states, "[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." Gov't Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. The system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>3</sup>

In summary, the system must withhold the portions of HMS's information we have marked under section 552.110(a) of the Government Code. The system must withhold the portions of Sagebrush's information we have marked under section 552.110(b) of the Government Code. The system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released to the individuals who requested that information.

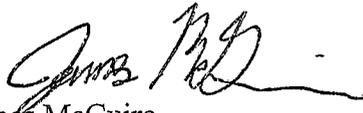
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<sup>3</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James McGuire  
Assistant Attorney General  
Open Records Division

JM/dls

Ref: ID# 392882

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

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