



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2012

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

OR2012-02190

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# 445041.

The Employees Retirement System of Texas (the "system") received a request for Minnesota Life Insurance Company's ("Minnesota Life") response to a specified request for proposals, the signed contract, and all documents or other information submitted by Minnesota Life. You state you have released some of the requested information. You claim portions of the submitted information are excepted from disclosure under section 552.139 of the Government Code. You also explain this information may contain third party proprietary information subject to exception under the Act. Accordingly, you have notified Minnesota Life of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code* § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Minnesota Life. We have considered the submitted arguments and reviewed the submitted information.

Minnesota Life and the system both raise section 552.139 of the Government Code for portions of the submitted information.¹ Section 552.139 provides in part:

¹Although Minnesota Life also asserts the information at issue is excepted under section 552.101 of the Government Code, we will address its claim only under section 552.139, as that is the proper exception for the substance of its argument.

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report;

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139. The system states the information it marked under section 552.139 consists of portions of the request for proposals that relate to the system's security systems and the transfer of data. The system asserts the information at issue consists of security control measures, test sites, schedule change plans, a security review report, and vulnerability assessments and contends release of this information could facilitate unauthorized access to confidential data and compromise the system's network security. Based on your representations and our review, we find you have demonstrated the information you have marked relates to computer network security, defense of the system's computer network, or an assessment of the system's computer network vulnerabilities. Accordingly, the system must withhold the information you have marked, and the additional information we have marked, under section 552.139 of the Government Code.² Minnesota Life asserts the remaining information it has indicated contains information relative to Minnesota Life security control measures, test sites, schedule change plans, security review reports, vulnerability assessments, and business continuation plans. However, we find Minnesota Life has not demonstrated that the remaining information relates to computer network security or the design, operation, or defense of a computer network, or consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of the remaining information is excepted from disclosure under section 552.139.

Minnesota Life also 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 id.* § 552.110(a), (b). Section 552.110(a)

²As our ruling is dispositive, we need not address the remaining arguments for this information.

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 at 5 (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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 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. *See* Open Records Decision No. 402 (1983).

³The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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. *Id.*; *see also* Open Records Decision No. 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).

Having considered Minnesota Life’s arguments, we determine Minnesota Life has failed to demonstrate that any portion of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. We note 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 business.” rather than “a process or device for continuous use in the operation of the business.” *See* Restatement of Torts § 757 cmt. b; *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1983), 306 at 3 (1982). Accordingly, the system may not withhold any of the remaining information on the basis of section 552.110(a) of the Government Code.

Upon review of Minnesota Life’s arguments under section 552.110(b), we find Minnesota Life has made only conclusory allegations that the release of any of the remaining information would result in substantial damage to Minnesota Life’s competitive position. Thus, Minnesota Life has not demonstrated that substantial competitive injury would result from the release of any of the remaining information. *See* Open Records Decision No. 661 (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). Accordingly, the system may not withhold any of the remaining information under section 552.110(b).

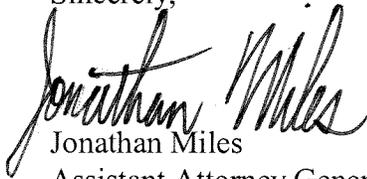
Some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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 must withhold the information you have marked, and the additional information we have marked, under section 552.139 of the Government Code. The remaining information must be released to the requestor, but any information protected by copyright may only be released 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.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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 445041

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Theodore J. Schmelzle
Minnesota Life Insurance Company
400 Robert Street North
St. Paul, Minnesota 55101-2098
(w/o enclosures)