



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2013

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

OR2013-05678A

Dear Mr. Ballard:

This office issued Open Records Letter No. 2013-05678 (2013) on April 9, 2012. In that ruling we determined Gartner, Inc. ("Gartner") had not submitted comments to this office explaining why its information should not be released. Thus, we had no basis to withhold Gartner's information and ordered it released. Gartner has now submitted comments to this office explaining why its information should not be released. Consequently, this decision serves as the correct ruling and is a substitute for the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID # 490639.

The Teacher Retirement System of Texas ("TRS") received two requests for information pertaining to RFO No. 0907121C-JD. You claim some of the submitted information is excepted from disclosure under sections 552.136 and 552.137 of the Government Code. Additionally, you state release of the requested information may implicate the proprietary interests of Bridgepoint Consulting; Computer Aid, Inc.; Ernst & Young, L.L.P.; Gartner; Grant Thornton, L.L.P. ("Grant Thornton"); The Greentree Group, Inc.; KPMG, L.L.P.; and Visionary Integration Professionals, L.L.C.. Accordingly, you have notified these companies of the requests and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third parties to submit to attorney general reasons why requested information should not be released); 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 Gartner and Grant Thornton. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address your assertion some of the information at issue is subject to a previous determination issued by our office in Open Records Letter No. 2006-04557 (2006). In that ruling, we determined, in part, the Texas Comptroller of Public Accounts (the "comptroller's office") was not required to release certain information pursuant to section 552.002 of the Government Code. Although you seek to rely on that prior ruling, that request for information was submitted to the comptroller's office, which is a different governmental body. We find the previous ruling does not apply to TRS. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, based on your arguments and markings in the submitted information, we understand you to assert portions of the information are not subject to the Act. Accordingly, we address this assertion, as well as your remaining arguments for the submitted information.

The Act is applicable to "public information," which consists of:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Upon review of that decision and the information at issue, we find the marked file names in the submitted bid proposals do not constitute information that was used solely for the maintenance, manipulation, or protection of public property. Therefore, we conclude the marked file names are subject to the Act and must be released unless they fall within an exception to public disclosure.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has only received comments from Gartner and Grant Thornton explaining why their information should not be released. Thus, we have no basis to conclude the release of any of the information pertaining to the other notified third parties would implicate their proprietary interests. *See id.* § 552.110(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, we conclude TRS may not withhold any of the information on the basis of any interest the remaining notified third parties may have in the information.

We understand Gartner and Grant Thornton to argue some of their information is protected by common-law privacy. Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate or 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. *Id.* at 683. We note an individual’s name, address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person’s name, address, or telephone number not an invasion of privacy). Upon review, we find Gartner and Grant Thornton have not demonstrated how any portion of their information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the information at issue may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Gartner and Grant Thornton raise section 552.110 of the Government Code for some of their information. 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 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 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. 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* ORD 661 at 5-6 (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).

In advancing its arguments, Gartner relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks &*

¹The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied requires a specific factual demonstration the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Gartner's interest in the submitted information.

Upon review, we find Gartner and Grant Thornton have demonstrated some of their client information, which we have marked, constitutes trade secrets of the companies. Accordingly, TRS must withhold the information we have marked under section 552.110(a) of the Government Code. However, Grant Thornton has made some of its client information publicly available on its website. In light of Grant Thornton's own publication of some information, we cannot conclude the identities of these published clients qualify as trade secrets. Furthermore, we find Gartner and Grant Thornton have failed to establish a *prima facie* case that any portion of the remaining information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim. See RESTATEMENT OF TORTS § 757 cmt. b; Open Records Decision Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Accordingly, none of the remaining information may be withheld under section 552.110(a).

Gartner and Grant Thornton argue release of some of their remaining information would cause each company substantial competitive harm. Upon further review, we find Gartner has demonstrated that release of its pricing information would result in substantial damage to its competitive position. See ORD 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, TRS must withhold the information we have marked under section 552.110(b). However, as previously stated, Grant Thornton has made some of its client information publicly available on its website. Because Grant Thornton has published this information, we find Grant Thornton has failed to demonstrate how release of this information would cause the company substantial competitive harm. Furthermore, Gartner and Grant Thornton have only provided conclusory arguments that release of any of

the remaining information would cause each company substantial competitive harm. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, we find none of the remaining information may be withheld under section 552.110(b) of the Government Code.

You state TRS will redact the information you have marked pursuant to section 552.136(c) of the Government Code. We note section 552.136(c) allows a governmental body to redact information that must be withheld under section 552.136(b) without requesting a decision from the attorney general. *See* Gov't Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general, and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor). Section 552.136(b) provides "[n]otwithstanding any other provision of this chapter, 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." *Id.* § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 (2009). We have marked insurance policy numbers TRS must withhold under section 552.136 of the Government Code. However, we find you have failed to establish how the remaining information you have marked constitutes an access device number for purposes of section 552.136(b) of the Government Code. Accordingly, none of the remaining information may be withheld on this basis.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note section 552.137 does not apply to an e-mail address maintained by a governmental entity for one of its officials or employees. Additionally, section 552.137 does not apply to an e-mail address "contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential

contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract[.]” *See id.* § 552.137(c)(3). We have marked e-mail addresses TRS must withhold under section 552.137. However, the remaining e-mail addresses you seek to withhold are subject to section 552.137(c)(3) or are provided by a governmental entity for its employees. Therefore, TRS may not withhold this information under section 552.137. *See id.* § 552.137(a).

You have noted 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. 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. We note blank forms may not be copyrighted. 37 C.F.R. § 202.1(c).

In summary, TRS must withhold the information we have marked under sections 552.110, 552.136, and 552.137 of the Government Code. The remaining information must be released, but any information subject to 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,



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Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 490639

Enc. Submitted documents

c: 2 Requestors
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