



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Mr. Wm. Clarke Howard
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Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2013-05750

Dear Mr. Howard:

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# 483538.

The Teacher Retirement System of Texas ("TRS") received two requests for information pertaining to RFP 323-MAP-12JD.¹ The first request seeks information pertaining to Aetna Life Insurance Company ("Aetna") and Humana Insurance Company ("Humana") and the second request seeks information pertaining to the winning bidder, Aetna. You state TRS will redact the information you have marked pursuant to section 552.136(c) of the Government Code.² You claim some of the submitted information is excepted from

¹You state TRS received clarification of each of the requests for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S. W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

²Section 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).

disclosure under section 552.137 of the Government Code. Additionally, you state release of the requested information may implicate the proprietary interests of Aetna and Humana. Accordingly, you have notified these companies of the request 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 Aetna and Humana. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have marked some information as not responsive to the instant requests. This ruling does not address the public availability of non-responsive information, and TRS is not required to release non-responsive information in response to the request.

Next, 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.

Aetna and Humana raise section 552.110 of the Government Code for portions of the information at issue. 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny 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) (citation omitted); *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 See RESTATEMENT OF TORTS § 757 cmt. b. 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. ORD 552 at 5-6. 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. *Id.* § 552.110(b); 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).

Aetna and Humana claim some of their information constitutes trade secrets. Upon review, we find Aetna has established a *prima facie* case its references constitute trade secrets. Additionally, Humana has also established some of its information, including its customer list, constitutes a trade secret. Accordingly, TRS must withhold the information we have marked under section 552.110(a).⁴ However, we find Aetna and Humana have failed to demonstrate their remaining information at issue meets the definition of a trade secret. Additionally, we find these companies have not demonstrated the necessary factors to establish a trade secret claim for this information. We note pricing information pertaining to a particular proposal 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

³There are six factors the Restatement gives as indicia of 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 the 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

⁴As our ruling for this information is dispositive, we need not address your claim under section 552.137 of the Government Code for portions of this information.

process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (citation omitted); *see also Huffines*, 314 S.W.2d at 776. Accordingly, TRS may not withhold the remaining information at issue under section 552.110(a).

Aetna and Humana also claim the remaining information at issue constitutes commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we conclude Humana has established the release of some of its information would cause it substantial competitive injury. Accordingly, TRS must withhold Humana’s pricing information, which we have marked, under section 552.110(b). However, we find Aetna and Humana have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 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 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). We note the pricing information of winning bidders of a government contract, such as Aetna, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see* ORD 319 at 3. *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. We therefore conclude TRS may not withhold any of the remaining information under section 552.110(b) of the Government Code.

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 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). The e-mail addresses you seek to withhold are subject to section 552.137(c)(3). Therefore, TRS may not withhold this information under section 552.137. *See id.* § 552.137(a).

You and Humana note 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.

In summary, TRS must withhold the information we have marked under section 552.110 of the Government Code. The remaining responsive information must be released, 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,



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Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 483538

Enc. Submitted documents

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