



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 23, 2016

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

OR2016-04302

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# 599221 (TRS Reference Health Net, Inc. 16-1).

The Teacher Retirement System of Texas (the "system") received a request for the bid assessment and evaluation of a specified request for proposals for the system's health care benefits. You state you will redact information pursuant to sections 552.0038(c) and 552.136(c) of the Government Code and pursuant to section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).¹ You further state you will

¹Section 552.0038(c) of the Government Code provides that a governmental entity that maintains records of a participant in a retirement system's retirement program in cooperation with or on behalf of a retirement system is not required to accept or comply with a request for such information or to seek an opinion from the attorney general because the records are exempt from the provisions of the Act. *See* Gov't Code § 552.0038(c). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

redact information pursuant to section 825.507 of the Government Code.² You claim the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state the submitted information may be protected by copyright law. Additionally, you state release of the submitted information may implicate the interests of Aetna Life Insurance Company (“Aetna”) and Blue Cross Blue Shield of Texas (“BCBS”). Accordingly, you notified Aetna and BCBS of the request for information and of their right to submit arguments stating why their information should not be released. *See Gov’t Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *Open Records Decision No. 542 (1990)* (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Aetna and BCBS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Aetna argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the system has submitted to us for our review. *See Gov’t Code § 552.301(e)(1)(D)* (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the system submitted as responsive to the request for information.

Next, you state some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-03649 (2015). In that ruling, we determined the system must withhold certain information under section 552.110(b) of the Government Code and must release the remaining information pursuant to copyright law. In response to Open Records Letter No. 2015-03649, Aetna has filed a lawsuit against our office. *See Aetna Life Ins. Co. v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-15-000876 (353rd Dist. Ct., Travis County, Tex.). Accordingly, with regard to the information at issue in this lawsuit, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public.³

With regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuit, there is no indication the law, facts, and circumstances on which Open Records Letter

²We understand this information is being redacted pursuant to the previous determination issued to the system in Open Records Letter No. 2001-4873 (2001). Open Records Letter No. 2001-4873 is a previous determination issued to the system authorizing it to withhold a list of participant names, addresses, and social security numbers, unless the executive director makes the determination described in subsection (f) of section 825.507. *See Gov’t Code § 825.507(f)*.

³As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

No. 2015-03649 was based have changed. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the system may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. Although the system raises sections 552.104 and 552.111 of the Government Code for the information at issue, these exceptions do not prohibit the release of information or make information confidential. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Thus, the system may not now withhold the previously released information under sections 552.104 and 552.111 of the Government Code. Accordingly, with regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuit, the system must continue to rely on Open Records Letter No. 2015-03649 as a previous determination and withhold or release the identical information in accordance with that ruling. *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 information is or is not excepted from disclosure). We will address the submitted arguments for the remaining information not encompassed by Open Records Letter No. 2015-03649.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You represent the remaining information pertains to a competitive bidding situation pertaining to the procurement of health-plan-administration services. In addition, you state, if ongoing negotiations with the current health-plan administrator are not successful, the system could be issuing a new request for proposals for the same services. You assert release of the remaining information would compromise the system's bargaining position with prospective bidders in a future procurement process for these services. After review of the information at issue and consideration of the arguments, we find the system has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the

system may withhold the remaining information under section 552.104(a) of the Government Code.⁴

In summary, we will allow the trial court to resolve the issue of whether the information that is the subject of Cause No. D-1-GN-15-000876 must be released to the public. With regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuit, the system must continue to rely on Open Records Letter No. 2015-03649 as a previous determination and withhold or release the identical information in accordance with that ruling. The system may withhold the remaining information under section 552.104(a) of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 599221

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Mr. Matt C. Wood
Counsel for Aetna Life Insurance Co.
Weisbart Springer Hayes
212 Lavaca Street, Suite 200
Austin, Texas 78701
(w/o enclosures)

Mr. Robert F. Johnson, III
Counsel for Blue Cross Blue Shield of Texas
Gardere Wynne Sewell, LLP
600 Congress Avenue
Austin, Texas 78701
(w/o enclosures)