



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2005

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

OR2005-02604

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 220017.

The Teacher Retirement System of Texas (the "system") received a request for: 1) the final contract awarded in response to RFP #0929039FDP; 2) copies of all proposals submitted in response to the solicitation, excluding a named company's response; and 3) any documents related to the evaluation of bidder proposals and the selection of Aetna Life Insurance Company ("Aetna").¹ You state that the system has released some of the responsive information.² You do not take a position on the public availability of the submitted information which pertains to the evaluation of bidder proposals, but you state that the release of this information may implicate the proprietary interests of Aetna, First Data Resources, Inc. ("First Data"), and SHPS, Inc. ("SHPS"). You inform us that you have notified these interested third parties of the system's receipt of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542

¹We note the requestor subsequently narrowed his request to exclude the proposals submitted in response to the solicitation. These proposals were addressed in Open Records Letter No. 2004-9504 (2004).

²You inform us that the system has released "all publicly available information to the requestor." We understand you to state that you have released the requested contract and some of the information responsive to the evaluation of bidder proposals. We note that the requested contract was ordered released in Open Records Letter No. 2004-9037 (2004).

(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 in certain circumstances). Aetna and First Data have responded to the notice and argue that some of the requested information is excepted under sections 552.110 and 552.139 of the Government Code.

Initially, we note that First Data states that some of the requested information has been previously ruled upon by this office in Open Records Letter Nos. 2004-9037 (2004) and 2004-9504 (2004) and that these rulings should be relied on as previous determinations.³ In Open Records Letter 2004-9037, we ruled upon the availability of the final contract awarded in response to RFP #0929039FDP. In Open Records Letter 2004-9504, we ruled upon the availability of proposals provided in response to RFP #0929039FDP. The information at issue pertains to the evaluation of bidder proposals. Because the information at issue is different than the information ruled upon in these two previous rulings, Open Records Letter Nos. 2004-9037 and 2004-9504 cannot be relied on as previous determinations. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, the 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).

Next, we note that 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, SHPS has not submitted to this office its reasons explaining why the requested information relating to it should not be released. Consequently, SHPS has provided this office with no basis to conclude that its responsive information is excepted from disclosure. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that you may not withhold any portion of the submitted information relating to SHPS on the basis of its proprietary interests.

First Data asserts that the submitted information pertaining to its company is excepted from public disclosure under section 552.139 of the Government Code, which provides as follows:

³The system also asserts that 2004-9504 should be relied on as a previous determination for a portion of the information at issue.

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, 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 is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. Upon review of the information at issue, we determine that First Data has not demonstrated that the submitted information relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, First Data has not demonstrated that this information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, this information is not excepted from disclosure under section 552.139.

First Data also asserts that its information constitutes a trade secret that is excepted from disclosure under section 552.110(a) of the Government Code. *See* Gov't Code § 552.110(a) Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining 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 this 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 (1939); *see also* Open Records Decision No. 232 (1979). 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. Open Records Decision No. 552 (1990). 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. Open Records Decision No. 402 (1983). We find that First Data has not shown that the information it seeks to withhold meets the definition of a trade secret. Therefore, the information pertaining to First Data may not be withheld under section 552.110(a).

Next, Aetna and First Data have submitted comments contending that portions of their information are excepted from disclosure under section 552.110(b) of the Government Code. 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. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

We find that Aetna has made specific factual or evidentiary showings that the release of some of the information it seeks to withhold would cause the company substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b). However, we find that First Data has not shown that release of its information would cause that company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, the information pertaining to First Data may not be withheld pursuant to section 552.110(b).

In summary, we have marked the information that the system must withhold under section 552.110. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

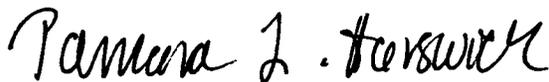
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

TLH/jev

Ref: ID# 220017

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