



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2009

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

OR2009-00493

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# 332103.

The Teacher Retirement System of Texas ("TRS") received two requests for proposals submitted in response to "RFP# 0501081F-DB."¹ You state that you have released some of the requested information to the requestors. You claim that some of the submitted information is excepted from disclosure under sections 552.136 and 552.137 of the Government Code. You also believe that this request for information implicates the proprietary interests of third parties. You state, and provide documentation showing, that you have notified the interested third parties of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestors.² See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under the Act in certain circumstances). We have received comments from GCI and Thompson. We have considered the claimed exceptions and reviewed the submitted information.

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 information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Cartis, Edelman, TAH, and Weber have not submitted to this office any reasons explaining why their information should

¹We note that the second requestor excluded from her request her company's proposal.

²TRS notified the following third parties pursuant to section 552.305 of the Government Code: Cartis Group, Inc. ("Cartis"); Edelman Southwest ("Edelman"); GCI Group c/o Cohn & Wolfe ("GCI"); Tate Austin Hahn ("TAH"); Thompson Marketing ("Thompson"); and Weber Shandwick ("Weber").

not be released. Therefore, these companies have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *See, e.g., 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. Accordingly, we conclude that TRS may not withhold any portion of the submitted information on the basis of any proprietary interest Cartis, Edelman, TAH, and Weber may have in the information.

GCI and Thompson each raise section 552.110 of the Government Code.³ 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). 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.); Open Records Decision Nos. 552 at 2, 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;

³We note that TRS did not submit GCI's Tab 2, pages 2-3; Tab 5, pages 5-8; or Form A. This ruling does not address information that was not submitted by TRS and is limited to the information submitted as responsive by TRS. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

(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; *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255, 232. 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. 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).

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 id.*; Open Records Decision Nos. 661 (1999); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Upon review of the submitted information and arguments, we find that GCI and Thompson have demonstrated that the release of some of their information, which we have marked, would cause the companies substantial competitive harm. Therefore, TRS must withhold the information we have marked under section 552.110(b). However, GCI and Thompson have failed to provide specific factual evidence demonstrating that release of the remaining submitted information would result in substantial competitive harm to these companies. Furthermore, we note that the pricing information of a winning bidder, such as GCI in this instance, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with

government). We therefore conclude that none of the remaining information is excepted from disclosure under section 552.110(b). *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 costs, 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 2 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110).

We also find that GCI and Thompson have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Thus, no portion of the remaining information pertaining to these companies may be withheld under section 552.110(a).

The remaining submitted information contains insurance policy numbers. Section 552.136(b) of the Government Code states that “[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.” Gov’t Code § 552.136. TRS must withhold the insurance policy numbers you have marked, and the additional information we have marked, under section 552.136.

We next address the claims of TRS and GCI under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides as follows:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
 - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) 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; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Upon review, we find that the e-mail addresses you have marked are not protected under section 552.137, and TRS may not withhold the information on that basis.

Finally, we note that some of the submitted information bears notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, TRS must withhold (1) the information we have marked under section 552.110 of the Government Code and (2) the insurance policy numbers marked under section 552.136 of the Government Code. The remaining submitted information must be released to the requestor, but any information protected by copyright must be released in accordance with copyright law.

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 file suit in

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

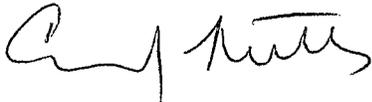
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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 Office of the Attorney General 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. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jb

Ref: ID# 332103

Enc: Submitted documents

c: 2 Requestors
(w/o enclosures)

Ms. Shannon Carter
Cartis Group, Inc.
3011 North Lamar
Austin, Texas 78705
(w/o enclosures)

Ms. Teresa Henderson
Edelman Southwest
701 Brazos Street, Suite 950
Austin, Texas 78731
(w/o enclosures)

Ms. Christine Farazi
Weber Shandwick
700 Lavaca, Suite 1505
Austin, Texas 78701
(w/o enclosures)

Ms. Amy Shields
GCI Group c/o Cohn & Wolfe
327 Congress Avenue, Suite 500
Austin, Texas 78701
(w/o enclosures)

Mr. James L. Johnston
Davis & Gilbert, L.L.P.
1740 Broadway
New York, New York 10019
(w/o enclosures)

Mr. Brian Dolezal
Tate Austin Hahn
1105 North Lamar Boulevard
Austin, Texas 78703
(w/o enclosures)

Mr. Matt Mohr
Thompson Marketing
70 North East Loop 410, Suite 750
San Antonio, Texas 78216
(w/o enclosures)