



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 29, 2009

Ms. Sylvia N. Salazar  
Assistant General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR2009-13685

Dear Ms. Salazar:

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# 356707.

The Employees Retirement System of Texas (the "system") received a request for the proposals submitted by Great West Life and ACS State & Local Solutions, Inc. ("ACS") in response to a specified Request for Proposal as well as the related scoring sheets, recommendation, and attachments. The system states it has released some of the requested information to the requestor. The system claims portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code.<sup>1</sup> The system states, and provides documentation showing, it has notified ACS of this request for information and of its right to submit arguments to this office as to why the requested 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); *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 applicability of exception in Act in certain circumstances). We have

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<sup>1</sup>Although the system also raises section 552.101 of the Government Code, the system has provided no arguments explaining how this exception is applicable to the submitted information. Therefore, we assume that the system no longer asserts this section. *See Gov't Code* §§ 552.301, .302.

received comments from ACS. We have considered the submitted arguments and reviewed the submitted information.

ACS asserts that portions of the submitted information may not be disclosed because they were marked confidential or have been made confidential by agreement or assurances. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

ACS argues that portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This section, however, only protects the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the system does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the information at issue. *See* ORD 592 (governmental body may waive section 552.104). Therefore, the system may not withhold any of the submitted information pursuant to section 552.104.

ACS raises section 552.110 of the Government Code for portions of the submitted information. Although the system also argues that the information at issue is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of private third parties, not the interests of a governmental body. Thus, we do not address the system’s arguments under section 552.110.

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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A “trade secret” is

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 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* ORD 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. *See* ORD 552 at 5. 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. *Id.*; *see also* Open Records Decision No. 661 at 5-6.

After reviewing the information at issue and the submitted arguments, we find that ACS has made a *prima facie* case that its customer information, which we have marked, is protected as trade secret information. Accordingly, the system must withhold the marked information under section 552.110(a). However, we find that ACS has failed to establish that any of the remaining information at issue meets the definition of a trade secret, nor has this company demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

We further conclude that ACS has established that release of its pricing information would cause the company substantial competitive harm. Accordingly, the system must withhold the information we have marked under section 552.110(b). However, we find that ACS has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive harm and has provided no specific factual or evidentiary showing to support such an allegation for purposes of section 552.110(b). *See* ORD 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 was entirely too speculative). Therefore, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note that some of the remaining information appears to 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. 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, the system must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released, but 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](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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/fl

Ref: ID# 356707

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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