



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2011

Ms. Leena Chaphekar
Assistant General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 13207

OR2011-05138

Dear Ms. Chaphekar:

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# 414433.

The Employees Retirement System of Texas (the "system") received a request for multiple categories of information related to the Dependent Eligibility Audit Request for Proposals, including a copy of the original request for proposals, all subsequent amendments or modifications, all information related to how and when the request for proposals was posted, a copy of each proposal received, and any information used to determine the winning bidder. You state that you will make some of the responsive information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state the submitted information may implicate the proprietary interests of certain third parties. Accordingly, pursuant to section 552.305 of the Government Code, you notified ADP, Inc. ("ADP"), Aon Hewitt Consulting ("AonHewitt"), and Secova, Inc. ("Secova") of the request and of their right to submit arguments to this office as to why each company's information should not be released.¹ 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 applicability of exception to disclosure under

¹We note the system also notified Chapman Kelly, Inc. ("Chapman Kelly") of the request. We further note the requestor is a representative of HMS, which has merged with Chapman Kelly.

Act in certain circumstances). We have received comments from ADP, AonHewitt, and Secova. We have considered the submitted arguments and reviewed the submitted information.

Initially, ADP and AonHewitt, argue portions of their submitted information contain information each company considers confidential. Additionally, Secova argues its entire proposal is confidential. We note that information is not confidential under the Act simply because the party that submits 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 overrule or repeal provisions of the Act through an agreement or contract. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 expectation or agreement to the contrary.

Next, you raise section 552.104 of the Government Code, which protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. See Open Records Decision No. 592 (1991). Although ADP, AonHewitt, and Secova also raise section 552.104, because this section is a discretionary exception that protects only the interests of a governmental body, we only address the system’s claim under section 552.104. See *id.* (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), Open Records Decision No. 522 (1989) (discretionary exceptions in general). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. See Open Records Decision No. 463 (1987). Generally, section 552.104 does not exempt bids from disclosure after bidding is completed and the contract has been executed. See Open Records Decision No. 541 (1990).

The submitted information consists of bid proposals, proposal amendments, and supplementary materials from the three bidders for the contract at issue. This information pertains to a contract the system has already awarded. Moreover, you have failed to provide any arguments explaining how this information otherwise pertains to an ongoing competitive situation. Therefore, we find the submitted information does not pertain to a competitive situation for purposes of section 552.104. Consequently, the system may not withhold any of the submitted information under section 552.104 of the Government Code.

Secova raises section 552.102(a) of the Government Code for portions of its proposal. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See* Open Records Decision No. 645 (1982). In this instance, the information at issue is related to a private entity, Secova. Therefore, the system may not withhold any portion of Secova's proposal under section 552.102(a) of the Government Code.

ADP raises section 552.110 for portions of its submitted information. AonHewitt and Secova generally raise section 552.110 of the Government Code for their respective information. Although the system argues the responsive information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the system's argument under section 552.110. We will, however, address the third parties' arguments under section 552.110.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that 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 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We note that 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 process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3.

Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* 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).

ADP claims some of its proposal is a trade secret that should be protected by section 552.110(a). Additionally, AonHewitt and Secova generally claim their proposals constitute trade secrets under section 552.110(a). Upon review, we find that ADP, AonHewitt, and Secova have failed to demonstrate how any of the information they seek to withhold meets the definition of a trade secret, nor have ADP, AonHewitt, and Secova demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, professional references, and qualifications and experience are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Therefore, the system may not withhold any of the information at issue under section 552.110(a) of the Government Code.

²The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (1) the extent to which the information is known outside of [the company]; (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 [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (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 Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

ADP raises section 552.110(b) for portions of its submitted proposal. AonHewitt and Secova generally raise section 552.110(b) for their respective proposals. Upon review, we find ADP has demonstrated that release of some of its information would cause it substantial competitive harm. Accordingly, the system must withhold the information in ADP's proposal we have marked under section 552.110(b) of the Government Code. However, we find that AonHewitt and Secova have failed to provide specific factual evidence demonstrating that release of any of their submitted information would result in substantial competitive harm to the companies. *See* ORDs 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, 319 at 3. Furthermore, we note that the pricing information of a winning bidder, such as AonHewitt, 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* 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 a cost of doing business with government). Accordingly, we determine that no portion of the AonHewitt or Secova's information is excepted from disclosure under section 552.110(b) of the Government Code.

Secova asserts that portions of its submitted proposal consist of personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). However, we note section 552.137(c)(3) states section 552.137(a) does not apply to an e-mail address "contained in a response to a request for bids or proposals, [or] contained in a response to similar invitations soliciting offers" *Id.* § 552.137(c)(3). Accordingly, the system may not withhold any of the e-mail addresses contained in Secova's proposal under section 552.137 of the Government Code.

Next, Secova asserts portions of its submitted proposal are excepted from disclosure under section 552.139 of the Government Code.³ Section 552.139 of the Government Code provides in part:

(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.

³Although Secova raises section 552.101 of the Government Code in conjunction with section 552.139 of the Government Code, we note that section 552.101 does not encompass other exceptions in the Act.

(b) The following information is confidential:

...

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, 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 containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

Id. § 552.139(a), (b)(2). After review of the information at issue, we conclude it is not information excepted under section 552.139. Accordingly, none of the Secova's submitted information may be withheld under section 552.139 of the Government Code.

We note some of the remaining information is confidential under section 552.136 of the Government Code.⁴ Section 552.136 of the Government Code states, "[n]otwithstanding any other provision of [the Act], 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."

Id. § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. The system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁵

In summary, the system must withhold the information we have marked under section 552.110(b) of the Government Code. The system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. As no further exceptions to disclosure are raised, the remaining information must be released.

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.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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

VB/em

Ref: ID# 414433

Enc. Submitted documents

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(w/o enclosures)

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