



January 8, 2015

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

OR2015-00323

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# 549353.

The Teacher Retirement System of Texas (the "system") received a request for the request for proposals submission, sales deck, and scoring and evaluation information for Express Scripts, Inc. ("ESI") for a specified request for proposals.<sup>1</sup> You state the system will redact insurance policy numbers pursuant to section 552.136(c) of the Government Code.<sup>2</sup> Although you take no position as to whether the submitted information is excepted under the

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<sup>1</sup>We note the requestor narrowed the scope of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 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).

Act, you state release of this information may implicate the proprietary interests of ESI. Accordingly, you state, and provide documentation showing, you notified ESI of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from ESI. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have marked portions of the submitted information as not responsive to the request for information. This ruling does not address the public availability of non-responsive information, and the system need not release non-responsive information to the requestor.

ESI claims some of its information is excepted under section 552.110 of the Government Code, which 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 trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *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.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception 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. *See* Open Records Decision No. 402 (1983). However, pricing information pertaining to a particular 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.” RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 319 at 3, 306 at 3.

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 6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Upon review, we find the release of some of ESI’s pricing information would cause the company substantial competitive injury. Accordingly, the system must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we note some of ESI’s pricing information pertains to prices charged to the system under a prior contract with the system. We note section 552.110(b) generally does not except from release the pricing information of a winning bidder. *See* Open Records Decision Nos. 514 at 4-5 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing not ordinarily excepted

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<sup>3</sup>The Restatement of Torts lists the following six factors 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 other 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

from disclosure under statutory predecessor to section 552.110). *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). Further, we find ESI has not demonstrated release of the remaining information at issue would cause it substantial competitive injury. *See* Gov't Code § 552.110(b). Accordingly, the system may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Upon review, we find ESI has established a *prima facie* case its customer information constitutes trade secret information for purposes of section 552.110(a). Nevertheless, to the extent ESI has published any of the customer information at issue on its website, this information is not confidential under section 552.110. Accordingly, the system must withhold ESI's customer information in the submitted documents under section 552.110(a), provided ESI has not published the information on its website. However, we find ESI has not shown any of the remaining information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See id.* § 552.110(a). Accordingly, the system may not withhold any of the remaining information under section 552.110(a) of the Government Code.

We note some of the submitted 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the system must withhold the pricing information we have marked under section 552.110(b) of the Government Code. The system must also withhold ESI's customer information in the submitted documents under section 552.110(a), provided ESI has not published the information on its website. The system must release the remaining responsive information; however, the system may release information subject to copyright only 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.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,



Kristi L. Godden  
Assistant Attorney General  
Open Records Division

KLG/cz

Ref: ID# 549353

Enc. Submitted documents

c: Requestor  
(w/o enclosures)