



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 23, 2016

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

OR2016-14254

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# 615761 (TRS Ref. Market Analytics 16-1).

The Teacher Retirement System of Texas (the "system") received a request for specified contracts pertaining to healthcare and prescription drug insurance.¹ You state the system will redact account numbers under section 552.136(c) of the Government Code.² Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Express Scripts, Inc. ("Express Scripts"). Accordingly, you state, and provide documentation showing, you notified Express Scripts 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

¹You state the system sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²Section 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).

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

Initially, you inform us some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-06185 (2013) and 2015-10191 (2015). In response to Open Records Letter Nos. 2013-06185 and 2015-10191, Express Scripts has filed two lawsuits against our office. *See Medco Health Solutions, Inc. and Express Scripts, Inc. v. Greg Abbot, Attorney Gen. of Tex.*, No. D-1-GN-13-001399 (98th Dist. Ct., Travis County, Tex.); *Medco Health Solutions, Inc. and Express Scripts, Inc. v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-15-002235 (345th Dist. Ct., Travis County, Tex.). Accordingly, with regard to the information at issue in these lawsuits, we will allow the trial courts to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public.³ However, to the extent the information in the current request is not encompassed by these lawsuits, we will consider the submitted arguments.

Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Express Scripts states it has competitors. In addition, Express Scripts states release of the information at issue would benefit its competitors because they would know its “pricing data and strategy and could more effectively and efficiently compete against Express Scripts” and seeks to withhold the terms of the contract. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *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). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839.

³As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

After review of the information at issue and consideration of the arguments, we find Express Scripts has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information we marked under section 552.104(a) of the Government Code.⁴

We note 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. 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, we will allow the trial courts to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. The system may withhold the information we marked under section 552.104(a) of the Government Code. The system must release the remaining information; however, any information subject to 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.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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/dls

⁴As our ruling is dispositive, we need not address Express Scripts' remaining arguments against disclosure of this information.

Ref: ID# 615761

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)