



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 8, 2019

Ms. Jennifer Burnett  
Senior Attorney & Public Information Coordinator  
University of Texas System  
210 West Seventh Street  
Austin, Texas 78701-2901

OR2019-06564

Dear Ms. Burnett:

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# 754088 (OGC# 186228).

The University of Texas System (the "system") received a request for six categories of information pertaining to a specified system program. You state the system released some information. You state the system has no information responsive to portions of the request.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.139 of the Government Code. You also state you notified Fidelity Investments ("Fidelity"), Lincoln Financial Group ("LFG"), Met Life, ING Life Insurance and Annuity Company, TIAA, The Variable Annuity Life Insurance Company ("VALIC"), and VOYA Financial of the request for information and of the 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

---

<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

comments from Fidelity, LFG, and VALIC. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from the remaining third parties. Thus, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the system may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

VALIC asserts some of the submitted information is not responsive to the request for information. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). The system has reviewed its records and determined the documents it has submitted are responsive to the request. Thus, we find the system has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether the system must release the submitted information under the Act.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). You state the information you indicated pertains to a competitive bidding situation. In addition, you state release of the information you marked "could impair UT System's efforts at procuring and negotiating a contract for the services at issue." After review of the information at issue and consideration of the arguments, we find the system has established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the system may withhold the information you marked under section 552.104(a) of the Government Code.<sup>2</sup>

Fidelity and VALIC assert some of the information at issue is protected under section 552.104 of the Government Code. As noted above, section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may also invoke this exception, which is

---

<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. Fidelity and VALIC each state they have competitors. In addition, Fidelity and VALIC each state release of some of its information at issue would give its competitors an advantage. After review of the information at issue and consideration of the arguments, we find Fidelity and VALIC have established the release of the remaining information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold information we indicated under section 552.104(a) of the Government Code.<sup>3</sup>

VALIC claims portion of its information are 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. 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* ORD 552. 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>4</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that

---

<sup>3</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

<sup>4</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;

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 section 552.110(a) is applicable unless it has been shown 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 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 Huffines*, 314 S.W.2d at 776; Open Record Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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* ORD 661 at 5-6 (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).

VALIC contends some of its information is commercial or financial information, the release of which would cause substantial competitive harm to the companies. We note VALIC was a winning bidder in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted 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 cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3); ORD 541 at 8. Upon review, we find VALIC has established the

- 
- (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).

release of some of its information constitutes commercial or financial information, the release of which would cause substantial competitive injury to VALIC. Therefore, the system must withhold the customer information VALIC indicated, to the extent the customer information is not publicly available VALIC's website, under section 552.110(b) of the Government Code. However, upon review, we find VALIC failed to demonstrate by specific factual evidence the release of the remaining information at issue would result in substantial harm to their competitive positions. *See* ORD 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); *see also* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the system may not withhold any portion of the remaining information under section 552.110(b) of the Government Code.

VALIC also asserts some of its remaining information constitutes trade secrets. To the extent the customer information VALIC indicated is publicly available on its website, it may not be withheld under section 552.110(a). Furthermore, upon review, we find VALIC failed to demonstrate a *prima facie* case any portion of the remaining information at issue meets the definition of a trade secret and has not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 402. Therefore, the system may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Section 552.139 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(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[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). The system states the information it marked “provides detailed information regarding [third parties’] security characteristics.” The system argues release of the information at issue “would provide a roadmap of the network security that is now in place to protect [u]niversity information in the hands of the government contractors.” The system also states release of the information at issue, “which relates to computer network security, would make such information vulnerable to unauthorized access or harm.” Based on these representations and our review of the information, we conclude the system must withhold the information it marked under section 552.139 of the Government Code. Fidelity also seeks to withhold a portion of its remaining information under section 552.139(a) because the information pertains to “security or infrastructure issues for computers.” However, after review of Fidelity’s arguments, we find it has failed to demonstrate the information at issue relates to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Therefore, the system may not withhold any portion of the remaining information under section 552.139 of the Government Code.

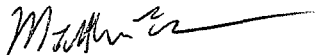
We note some of the remaining information appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection 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 may withhold the information you marked and we indicated under section 552.104(a) of the Government Code. To the extent the customer information is not publicly available VALIC's website, the system must withhold the customer information VALIC indicated under section 552.110(b) of the Government Code. The system must withhold the information it marked under section 552.139 of the Government Code. The system must release the remaining information; however, any 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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/eb

Ref: ID# 754088

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

9 Third Parties  
(w/o enclosures)