



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 26, 2019

Mr. Ryan Kerr
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2019-20492

Dear Mr. Kerr:

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# 777471 (File No. OP-19-338).

El Paso County (the "county"), received a request for information pertaining to a specified request for proposals.¹ 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 AXA Equitable Life Insurance Company ("AXA"); Empower Retirement; Horace Mann Educators Corporation ("Horace"); ISC Group, Inc.; Lincoln National Corporation; National Life Group; Nationwide; TCG Group Holdings, LLP; Variable Annuity Life Insurance Co. ("VALIC"); and Voya Retirement Insurance and Annuity Company.² Accordingly, you state, and provide documentation showing, the county

¹You state the county sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing 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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you raise sections 552.101, 552.104, 552.110, 552.113, 552.131, and 552.136 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume you have withdrawn your claim under these exceptions. *See* Gov't Code §§ 552.301, 552.302.

notified these third parties of the request for information and of their 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 AXA, Horace, and VALIC. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us the requestor has excluded login names, passwords, social security numbers, participant identification numbers, and insurance policy numbers from his request for information. Therefore, such information is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the instant request, and the county is not required to release that information in response to this request.³

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of these third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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 county may not withhold any of the responsive information on the basis of any proprietary interest any of the remaining third parties may have in it.

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). 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. AXA, Horace, and VALIC state they have competitors. AXA, Horace, and VALIC further assert release of portions of their information at issue would give their competitors an advantage. After review of the information at issue and consideration of the arguments, we find AXA, Horace, and VALIC have established the release of the information at issue, which we marked, would give advantage to a competitor or bidder.

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

Thus, we conclude the county may withhold the information we marked under section 552.104(a) of the Government Code.⁴

VALIC also claims portions 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.⁵ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that

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

⁵The 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).

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 company. Upon review, we find VALIC has established its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury to VALIC. Accordingly, the county must withhold VALIC’s pricing information, which we marked, under section 552.110(b) of the Government Code.

VALIC also asserts some of its remaining information constitutes trade secrets. Upon review, we find VALIC has established a *prima facie* case that its customer information, which we marked, constitutes trade secret information. Accordingly, to the extent VALIC’s customer information at issue is not publicly available on VALIC’s website, the county must withhold the customer information we marked under section 552.110(a) of the Government Code.

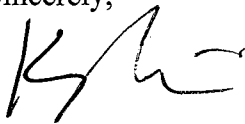
We note some of the remaining information at issue appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection 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 county may withhold the information we marked under section 552.104(a) of the Government Code. The county must withhold the information we marked under section 552.110(b) of the Government Code. To the extent VALIC's customer information at issue is not publicly available on VALIC's website, the county must withhold the information we marked under section 552.110(a) of the Government Code. The county must release the remaining responsive information; however, the county may only release any information subject to copyright 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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/be

Ref: ID# 777471

Enc. Submitted documents

c: Requestor
(w/o enclosures)

10 Third Parties
(w/o enclosures)