



January 24, 2000

Mr. Clyde A. Pine Jr.
Mounce, Green, Myers, Safi & Galatzan
P. O. Box 1997
El Paso, Texas 79950-1977

OR2000-0228

Dear Mr. Pine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130886.

The El Paso Independent School District ("EPISD") received a request for copies of all proposals submitted in response to EPISD's Request for Proposal (the "RFP") for certain third-party administrator and network services pursuant to its Employee Group Medical Plan. You claim that some information in the proposals is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state that all information submitted in the proposals must be withheld pursuant to a promise of confidentiality on page 8 of the RFP. Information, however, is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977), *see* Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Thus, the information at issue is subject to disclosure under the Act.

You argue that the information EPISD wishes to withhold is protected from disclosure under section 552.104. Section 552.104 of the Government Code excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders."

The purpose of section 552.104 is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990). Section 552.104 does not, however, protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. You state, however, that the contract was awarded and confirmed by the EPISD Board of Trustees on October 12, 1999. Section 552.104 of the Government Code is temporal in nature and does not apply once the contract has been awarded. Open Records Decision No. 541 at 5 (1990). Therefore, you may not withhold information under section 552.104.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, you notified those companies whose information is responsive to the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). CCN-Managed Care, Inc. ("CNN") and Assured Benefits Administrators responded to the notification.

The remaining six companies whose information is responsive to this request did not submit objections to the release of their respective information; therefore, we have no basis to conclude that these companies' information is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The proposal information for Access Administrators, Inc., Blue Cross Blue Shield of Texas, Texas Association of School Boards Risk Management Fund, BDI Benefits Design, Inc., UniCare, and Prudential Health Care must, therefore, be released to the requestor.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial 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.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

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 a single or ephemeral event 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. [Emphasis added.]

Restatement of Torts § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).¹

Section 552.110(b) excepts from required public 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.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. See generally *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information.

Assured Benefits Administrators submitted a letter to protest the release of information pertaining to its response. However, we conclude that the company has made only unsubstantiated, conclusory statements regarding the confidentiality of its proposal information. See also *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(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 (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Cir. 1974). Consequently, it has not established that its proposal information is either trade secret information or commercial or financial information excepted from disclosure under section 552.110. See Open Records Decision No. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), Open Records Decision No. 542 at 3 (1990); (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure) Open Records Decision No. 552 at 5 (1990). EPISD must, therefore, release Assured Benefits Administrator's proposal information in its entirety to the requestor.

CNN submitted a brief in which it claims that the pages marked A1 through A-27 of its proposal are protected from disclosure under sections 552.101 and 552.110 as trade secret information. After a review of CNN's arguments, we conclude that the company has not established a prima facie case for protection from disclosure of the information at issue under the "trade secrets" branch of section 552.110. Thus, EPISD must release the pages marked A1 through A-27 in addition to the remaining information of CNN's proposal. This letter ruling is limited to the particular records 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 records or any other circumstances.

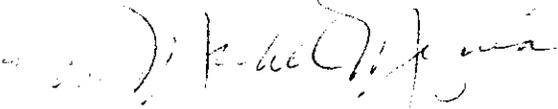
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rose-Michel Munguia
Assistant Attorney General
Open Records Division

RMM/ch

Ref: ID# 130886

Encl. Submitted documents will be mailed under separate cover

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