



January 28, 2002

Mr. Hans P. Graff  
Assistant General Counsel  
Houston Independent School District  
3830 Richmond Avenue  
Houston, Texas 77027-5838

OR2002-0416

Dear Mr. Graff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157830.

The Houston Independent School District (the "district") received a request for copies of "the bids received for group health insurance, (RFP# RT2283-01) for Blue Cross Blue Shield, United Health Care and Cigna." The district also received a second request for:

1. Any contract executed between [the district] and Cigna Corporation. . .within the past year, or any such contract or policy effective during such time period or to be effective in 2002. . . .
2. Any and all proposals, correspondence, memoranda, records and documents from Cigna to the [d]istrict within the past year.
3. Any and all requests for proposal, correspondence, memoranda, records and documents from the [d]istrict to Cigna within the past year.

You claim that the requested information may be excepted from disclosure pursuant to sections 552.101, 552.110, and 552.128 of the Government Code. However, you state that you do not intend to submit any statements in support of reasons for withholding or releasing the requested information. You also state, and provide documentation showing, that you notified three third parties whose proprietary interests may be implicated by the requests, United Healthcare of Texas, Inc. ("United"), Blue Cross Blue Shield of Texas ("Blue Cross"), and Cigna Healthcare ("Cigna"), pursuant to section 552.305 of the Government

Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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). We have considered the claimed exceptions and have reviewed the submitted information.<sup>1</sup>

We note at the outset that the district failed to comply with the procedural requirements of section 552.301 of the Government Code. Section 552.301 provides that a governmental body that requests an attorney general decision concerning a request for information must, within a reasonable time but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general a copy of the specific information requested or submit representative samples of the information if a voluminous amount of information was requested. *See* Gov't Code § 552.301(e)(1)(D). Although the district claims that all of the requested information is excepted from disclosure, it did not submit a copy of any contract executed between the district and Cigna.

When a governmental body fails to submit a copy of the specific information requested or representative samples of the specifically requested information, the information at issue is presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must demonstrate a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is a demonstration that some other source of law makes the requested information confidential or that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the district claims that the release of the requested information may implicate third parties' proprietary interests under section 552.110, we have no basis on which to conclude that the requested contract is excepted from disclosure under the Public Information Act, since the district did not submit a copy of it for our review. Accordingly, we conclude that the district must release the entirety of the requested contract to the requestor to the extent that it exists.

Next, we note that, as of the date of this letter, our office has not received any comments from Blue Cross explaining why any portion of its bid proposal should not be released to the requestor. We, therefore, have no basis on which to conclude that any portion of Blue Cross' bid proposal is excepted from disclosure pursuant to section 552.110. *See* Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney

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<sup>1</sup> Although you claim that the requested information may be excepted from disclosure pursuant to sections 552.101 and 552.128 of the Government Code, you did not provide us with any independent reasons why these exceptions apply to the requested information. *See* Gov't Code § 552.301(e)(1)(A). Accordingly, we do not address these claims with regard to the requested information.

general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we do not address section 552.110 of the Government Code with respect to Blue Cross' bid proposal.

United and Cigna, however, did respond to the district's section 552.305 notice by claiming that portions of their respective bid proposals are excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110(a) protects trade secrets of private parties. 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.

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.<sup>2</sup> *See* Open Records Decision No. 552 at 5 (1990).

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<sup>2</sup>The 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).

Section 552.110(b) excepts from 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. *Cf. 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. *See* Open Records Decision No. 639 at 4 (1996) (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).

Both United and Cigna argue that portions of their respective bid proposals should be withheld from disclosure under section 552.110 because each proposal either contains trade secret information or constitutes information the release of which would cause substantial competitive harm to each company. However, based on our review of United’s and Cigna’s arguments and their respective bid proposals, we conclude that neither company has demonstrated that the release of their proposals would constitute a release of trade secret information or would cause substantial competitive harm to either company. Accordingly, we conclude that the district may not withhold any portion of United’s or Cigna’s bid proposals pursuant to section 552.110 of the Government Code.

However, we note that some portions of United’s and Cigna’s bid proposals appear to be protected by 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. *See* Attorney General Opinion JM-672 (1987). However, a governmental body must allow inspection of copyrighted materials, unless an exception to disclosure applies to the information. *See id.* 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 such copies, we note that the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the district must allow the requestor to inspect United’s and Cigna’s copyrighted bid proposal materials. However, if the requestor wishes to make copies of such materials, the requestor assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

We also note that portions of Blue Cross’, United’s, and Cigna’s bid proposals contain email addresses that may be excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, unless the members of the public in question have affirmatively consented to their release, the district must withhold from disclosure email addresses contained within Blue Cross', United's, and Cigna's bid proposals that were provided for the purpose of communicating electronically with the district pursuant to section 552.137 of the Government Code. However, the district must release the remaining submitted portions of all three proposals to the requestor.

In summary, the district must release the entirety of the requested contract to the requestor to the extent that it exists. Unless the members of the public in question have affirmatively consented to their release, the district must withhold from disclosure email addresses contained within Blue Cross', United's, and Cigna's bid proposals that were provided for the purpose of communicating electronically with the district pursuant to section 552.137 of the Government Code. The district must release the remaining portions of all three proposals to the requestor.

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

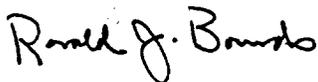
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 157830

Enc. Submitted documents

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