OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

March 13, 2002

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

OR2002-1207

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#159895.

The Houston Independent School District (the "district") received a request for copies of the "bids received for group health insurance, (RFP#RT228301) for Blue Cross Blue Shield ("Blue Cross"), Aetna, Cigna, and Benefit Planners." You state that Benefit Planners did not submit a proposal in response to RFP#RT228301 and that, thus, the district does not maintain any responsive information pertaining to that company. You claim, however, that the remaining requested information may be excepted from disclosure pursuant to sections 552.101, 552.110, and 552.128 of the Government Code. 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 that you are making a good faith attempt to notify each of the third parties whose proprietary interests may be implicated by the request 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.[1]

[1] 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 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.

We note at the outset that this office has previously addressed Blue Cross' bid proposal in Open Records Letter No. 2002-0416 (2002). Specifically, we ruled that, with the exception of certain e-mail addresses that were excepted from disclosure under section 552.137 of the Government Code, Blue Cross's proposal must be released. Accordingly, with respect to Blue Cross' bid proposal, the district should rely on our decision in Open Records Letter No. 2002-0416 (2002). *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001).

Cigna responded to the district's section 552.305 notice by claiming that portions of its bid proposal are excepted from disclosure under section 552.110. However, we note that this office also previously ruled in Open Records Letter No. OR2002-0416 (2002) that the district must release particular portions of Cigna's bid proposal. *See* Open Records Letter No. 2002-0416 (2002). We also note that Cigna has filed a lawsuit against the Office of the Attorney General over the release of the documents in question and this suit is now pending before the 250th Judicial District Court in Travis County. *See Connecticut General Life Insurance Company v. John Cornyn, Attorney General of Texas and the Houston Independent School District*, Cause Number GN-200428. Accordingly, we are closing our file on your current request with respect to Cigna's bid proposal without a finding and will allow the courts to resolve the issue of whether portions of Cigna's bid proposal must be released.

Aetna responded by claiming that the entirety of its bid proposal is excepted from disclosure pursuant to section 552.110. 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.[2] *See* Open Records Decision No. 552 at 5 (1990).

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).

Aetna argues that the entirety of its bid proposal should be withheld from disclosure pursuant to section 552.110 because it constitutes information the release of which would cause substantial competitive harm to Aetna. Aetna argues that the release of particular portions of its bid proposal would allow competitors to easily adjust their pricing through base administrative fees, performance and fee guarantees, manufacturer rebate opportunities, and supplemental management reporting and other support services to compete more effectively against Aetna for district business in the future or for other current or prospective customers. In addition to the unfair pricing advantages that could result, Aetna also states that the release of this information would provide competitors with a benchmark or point of reference to evaluate their products and services and identify areas of relative weakness and strength in their underlying cost structures, products, services, operations, and systems. Finally, Aetna argues that the release of this information would make proprietary information about Aetna's services, systems, methodologies, formats, and processes available to competitors who could then review their own management organizations and operations to determine whether changes or improvements were necessary.

Based on our review of Aetna's arguments and bid proposal, we conclude that the district must withhold the information that we have marked from disclosure pursuant to section 552.110(b). *See* Open Records Decision No. 639 at 4 (1996). However, Aetna has

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[2]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).

not sufficiently demonstrated how the remaining bid proposal information constitutes information the release of which would cause substantial competitive harm to Aetna. Accordingly, we conclude that the district may not withhold any portion of the remaining information in Aetna's bid proposal from disclosure under section 552.110 of the Government Code. *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted under section 552.110).

However, we note that portions of Aetna's bid proposal contains 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 the representative sample of email addresses that we have marked in Aetna's bid proposal pursuant to section 552.137 of the Government Code.

We also note that portions of Aetna's bid proposal appears 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. We note that the member of the public assumes a duty of compliance with the copyright law and the risk of a copyright infringement suit in making such copies. *See* Open Records Decision No. 550 (1990). Accordingly, the district must allow the requestor to inspect the portions of Aetna's bid proposal that are copyrighted. However, if the requestor wishes to make copies of such materials, the requestor assumes a duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, with respect to Blue Cross' bid proposal, the district should rely on our decision in Open Records Letter No. 2002-0416 (2002). We are closing our file on your current request with respect to Cigna's bid proposal without a finding and will allow the courts to resolve the issue of whether portions of Cigna's bid proposal must be released. The district must withhold from disclosure the information that we have marked in Aetna's bid proposal

pursuant to section 552.110(b) of the Government Code. Unless the members of the public in question have affirmatively consented to their release, the district must withhold from disclosure the representative sample of email addresses that we have marked in Aetna's bid proposal pursuant to section 552.137 of the Government Code. The district must release the remaining information to the requestor. However, the district must release that information in accordance with copyright law, where applicable.

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).

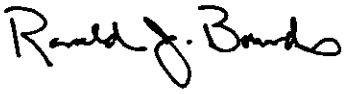
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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
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Open Records Division

RJB/seg

Ref: ID#159895

Enc. Marked documents

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