



OFFICE *of the* ATTORNEY GENERAL
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Mr. John Knight
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City of Lubbock
P.O. Box 2000
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OR2003-1563

Dear Mr. Knight:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177594.

The City of Lubbock (the "City") received a request for information concerning Request for Proposal 159-02/DC initiated by the City for pharmacy benefit management services.¹ You inform us you have released responsive information supplied by one vendor as the information contained no copyrighted material. However, with respect to information submitted to the City by the remaining bidders, you assert the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You indicate, and provide documentation showing, that the City has notified Advance PCS ("Advance"), Eckerd Health Services ("Eckerd"), and United Provider Services ("United") to afford each entity an opportunity to supply objections to release of the submitted information. *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). We have

¹ Though you refer to the copy of the request for information as "Attachment A" in your brief to this office, we have not received this attachment. Accordingly, we have ascertained the general subject matter of the request from the context of the submitted documents.

reviewed the submitted information and we have considered the exceptions asserted by the City, Eckerd, and Advance.

Initially, we address the City's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Though you refer to the copy of the request for information as "Attachment A" in your brief to this office, we have not received this attachment. Therefore, the City has not complied with the requirements of section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, when some other source of law makes the information confidential or the information impacts the interests of a third party, a compelling interest exists. Open Records Decision No. 150 at 2 (1977). You assert sections 552.101, 552.104, and 552.110 of the Government Code; Advance and Eckerd both claim section 552.110 of the Government Code. Section 552.104, a discretionary exception under the Public Information Act (the "PIA"), does not constitute compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision Nos. 592 (1991) (governmental body may waive section 552.104), 522 (1989) (discretionary exceptions in general). However, sections 552.101 and 552.110, which protect the interests of third parties, qualify as compelling reasons to overcome the presumption of openness. Accordingly, we will address these arguments.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The City asserts section 252.049 of the Local Government Code to protect certain information responsive to the request. Section 252.049 provides as follows:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

(b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This provision merely duplicates the protection section 552.110 of the Government Code provides to trade secret and commercial or financial information. The City does not demonstrate that any of the requested information qualifies as either trade secret or confidential commercial or financial information under section 552.110. Thus, the City may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.

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, United Provider Services ("United") has not submitted to this office its reasons explaining why the City should not release United's information. Therefore, United has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *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).

However, our review of United's proposal reveals some of the submitted materials are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *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 copies, 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).

Finally, we address Eckerd's and Advance's assertions of section 552.110 to except certain information from disclosure. Section 552.110 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 the proprietary interests of private parties by excepting from

disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others 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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that 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).

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. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Eckerd argues its clinical information and pricing information are confidential commercial and financial information and release of such information would cause it substantial competitive harm. Although Eckerd asserts the City should withhold its entire proposal, it makes specific arguments in reference to clinical information on pages 16-17 and 30-35 regarding its retrospective drug utilization review and pricing information on pages 7-8, 26-27, 40-42, and the attached rate sheet. Eckerd contends that its clinical information, namely its retrospective drug utilization review, enables it to perform quality medical management within 24 hours, a timeliness factor unique to Eckerd that gives it a competitive advantage. Further, Eckerd claims that it has developed the 24-hour turn-around aspect of its drug utilization review over a period of approximately seven years at a cost of \$7 million. Eckerd informs us it has restricted access its clinical information and it has implemented internal policies and procedures designed to ensure the secrecy of this information. Regarding the pricing information, Eckerd explains it derived the information from its price formula model. According to Eckerd, the formula model calculates prices based on client size. Further, Eckerd contends release of this information could have the following implications: 1) competitors could "unfairly out-compete [Eckerd] on a future contract" involving a similarly-sized client and 2) competitors could "unfairly out-compete" Eckerd in "virtually all contracts" by recreating Eckerd's pricing model to predict Eckerd's pricing proposals. Finally, Eckerd states it uses the pricing information continuously in its contracts; the pricing information is not fact or client-specific. Therefore, Eckerd argues release of the pricing information would result in unfair competitive advantage to competitors. Based on Eckerd's arguments and our review of the submitted information, we conclude that Eckerd has established that some of the information on the specified pages constitutes confidential commercial and financial information. Thus, the City must withhold the information we have marked on the referenced pages under section 552.110(b) of the Government Code. However, as Eckerd has not established a *prima facie* case that the rest of the information it

seeks to withhold is a trade secret under section 552.110(a) of the Government Code, the City must release the remainder of Eckerd's proposal.

Advance also asserts section 552.110 of the Government Code to except some of its proposal, which it has marked, from disclosure. Specifically, Advance seeks to withhold information pertaining to pricing and rebate payments, the Formulary, service utilization fees, performance guarantees, financial proposals, network analysis, and details of select programs. Advance informs us it limits access to the designated information in the proposal by granting access to such information on a "need-to-know" basis, requiring confidentiality agreements from its employees, and utilizing password-protected computer programs to store the information. Additionally, Advance states release of the information it seeks to withhold would result in substantial competitive harm because competitors could access product cost and pricing strategies, and commercial processes unique to Advance. Further, Advance explains disclosure would allow competitors to undercut Advance's bids by using the information to estimate Advance's profit margins and replicate its proprietary processes. According to Advance, knowledge of this information by competitors would adversely impact Advance's ability to effectively negotiate with other clients for similar contracts. Based on these arguments and our review of the submitted information, we find Advance has asserted specific factual allegations sufficient to demonstrate Advance would incur substantial competitive injury if the City released most of the information. Therefore, we conclude the City must withhold the information we have marked under section 552.110(b) of the Government Code. Further, with the exception of the client list, which we have marked, Advance has not established a prima facie case that the rest of the information it seeks to withhold is a trade secret under section 552.110(a) of the Government Code. Accordingly, the City must withhold the client list under section 552.110(a) and release the remainder of the information contained in the Advance proposal.

In summary, the City must release the United proposal; however, though the City must allow for the inspection of copyrighted information, it need not furnish copies of the copyrighted information contained in the United proposal. The City must withhold the information we have marked in the Eckerd and Advance proposals under section 552.110 of the Government Code. The City must release all other information.

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 Dep't of Pub. 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,



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Open Records Division

CHS/seg

Ref: ID# 177594

Enc: Submitted documents

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