



OFFICE of the ATTORNEY GENERAL  
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OR2003-3212

Dear Mr. McCandless:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180946.

The Texas Health Insurance Risk Pool (the "pool"), which you represent, received a request for:

1. the Request for Proposal ("RFP") response submitted by Blue Cross and Blue Shield of Texas ("Blue Cross") pertaining to a specific awarded contract;
2. the successful RFP response submitted by the incumbent vendor for the "UM, CM and Disease Management"; and
3. the list of bidders for the "TPA RFP."

You state that you have produced some responsive information pertaining to request item #1 to the requestor. You indicate that information that would be responsive to request item #2 does not exist.<sup>1</sup> You claim that the requested information pertaining to request item #3 is

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

excepted from disclosure pursuant to section 552.104 of the Government Code. You also claim that the remaining requested information pertaining to request item #1 is subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the pool notified an interested third party, Blue Cross, of the pool's receipt of the request and of Blue Cross's right to submit arguments to this office as to why information relating to Blue Cross should not be released to the requestor. *See Gov't Code § 552.305(d)*; *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 of the Government Code permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have considered your claims and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body that requests an attorney general decision under section 552.301(a) 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, among other items, a copy of the specific information requested, or representative samples of it, if a voluminous amount was requested, labeled to indicate which exceptions apply to which parts of the copy. *See Gov't Code § 552.301(e)*. To date, the pool has not submitted any information to us for our review pertaining to request item #3 that the pool claims to be excepted from disclosure pursuant to section 552.104 of the Government Code. Accordingly, we conclude that the pool failed to comply with section 552.301 of the Government Code with respect to this particular portion of the written request for information.

Because the pool failed to comply with the procedural requirements of section 552.301 in regard to request item #3, the information that is responsive to that particular request item is now 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 pool must demonstrate a compelling interest in order to overcome the presumption that this information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the pool claims that this particular information is excepted from disclosure under section 552.104, we note that this exception to disclosure is a discretionary exception to disclosure under the Act that does not constitute a compelling interest that is sufficient to overcome the presumption that this information is now public.<sup>2</sup>

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only

Consequently, we conclude that the pool must release to the requestor the information that is responsive to request item #3 in its entirety.

We now address the submitted information that is responsive to request item #1 of the written request. Although you state that some of the information in Blue Cross's proposal has been designated by Blue Cross as confidential and/or proprietary, we note that information is not considered to be confidential under the Act simply because the party submitting the information to the governmental body anticipates or requests that it be kept confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. See Attorney General Opinion JM-672 (1987); see also Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We note that 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 requested information relating to that party should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Blue Cross has not submitted comments to this office explaining why any portion of the information pertaining to Blue Cross should not be released to the requestor. Therefore, we have no basis to conclude that the release of any portion of the submitted information pertaining to Blue Cross would implicate its proprietary interests. See Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the pool may not withhold any portion of the submitted information on the basis of any third party proprietary interest.

We also note that portions of the submitted information 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. See Attorney General Opinion JM-672 (1987). 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

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to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such 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).

In summary, the pool must release to the requestor the information that is responsive to request item #3 in its entirety. The pool must also release the entirety of the submitted information in compliance with applicable copyright law.

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).

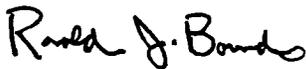
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 180946

Enc. Submitted documents

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