



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2004

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P. O. Box 1562
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OR2004-10581

Dear Ms. Chang:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 214797.

The City of Houston (the "city") received a request for "health care insurance vendor proposals and rates from your health care bid process within the last two years." You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.104 and 552.137 of the Government Code.¹ Although the city otherwise defers to the interested third parties who may have a proprietary interest in the requested information, or portions thereof, to raise arguments for withholding the information, you state that the information is subject to third party confidentiality claims under sections 552.101, 552.110, 552.113, and 552.131 of the Government Code. You also state, and provide documentation showing, that pursuant to section 552.305(d), the city notified the interested third parties, Texas HealthSpring ("HealthSpring"), United Health Care ("United"), Blue Cross Blue Shield ("BCBS"), Eckerd's, Cigna, Houston Independent School District ("HISD"), Humana, Aetna, CareMark, Walgreens, and Texan Plus, of the city's receipt of the request and of each company's right to submit arguments to us as to why any portion of the requested information should not be released to the requestor. *See Gov't*

¹ As the city did not submit written comments to us stating the reasons why section 552.104 of the Government Code would allow any portion of the requested information to be withheld from disclosure, we find that the city has waived this particular exception to disclosure. *See Gov't Code §§ 552.301, .302.*

Code § 552.305(d); *see also* Open Records Decision No.542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the “Act”) in certain circumstances). We have considered arguments submitted to us by Cigna, CareMark, Humana, and Walgreens and have reviewed the submitted information.²

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body’s notice under section 552.305(d) of the Government Code 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, HealthSpring, United, BCBS, Eckerd’s, HISD, Aetna, and Texan Plus have not submitted comments to us explaining why any portion of the submitted information relating to each entity should not be released. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to each entity would implicate that entity’s proprietary interests. *See, e.g.*, 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 city may not withhold any portion of the submitted information pertaining to HealthSpring, United, BCBS, Eckerd’s, HISD, Aetna, or Texan Plus on the basis of any proprietary interest that each entity may have in the information under sections 552.101, 552.110, 552.113, and 552.131 of the Government Code.

Next, we address CareMark’s claim under section 552.101 of the Government Code. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101; *see also* Open Records Decision Nos. 611 at 1 (1992) (relating to common-law privacy), 600 at 4 (1992) (relating to constitutional privacy), 478 at 2 (1987) (relating to statutory confidentiality). We note, however, that CareMark has not asserted any law, and we are not aware of any law, that makes any portion of the submitted information relating to CareMark confidential for purposes of section 552.101. Accordingly, we conclude that the city may not withhold any portion of the submitted information relating to CareMark under section 552.101 of the Government Code.

² We note that Walgreens seeks to have certain information withheld from the requestor that was not submitted to us for review by the city. Accordingly, this ruling does not address information related to Walgreens beyond that which was submitted to us for review by the city and is limited to the information submitted as responsive by the city. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

Further, we address Walgreens' claim under section 552.104 of the Government Code. We note that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). We note that the city has not argued that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Accordingly, we conclude that the city may not withhold any portion of the submitted information relating to Walgreens under section 552.104 of the Government Code.

We now address the arguments submitted to us by Cigna, CareMark, Humana, and Walgreens under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision 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. We note that the Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, 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 also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception

and no one submits an argument that rebuts the claim as a matter of law.³ See Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) of the Government Code exempts 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.” Gov’t Code § 552.110(b). 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).

Based on our review of CareMark’s, Humana’s, and Walgreens’ arguments and the submitted information relating to each entity, we find that these entities have sufficiently demonstrated that portions of their respective information constitute trade secret information for purposes of section 552.110(a) and we have received no argument that rebuts this claim as a matter of law. Accordingly, we conclude that the city must withhold the portions of the submitted information relating to CareMark, Humana, and Walgreens that we have marked pursuant to section 552.110(a) of the Government Code. We also find that CareMark has adequately demonstrated that portions of the remaining submitted information relating to CareMark constitute commercial and financial information, the release of which would cause CareMark substantial competitive harm for purposes of section 552.110(b). Accordingly, we also conclude that the city must withhold the portions of the submitted information relating to CareMark that we have marked pursuant to section 552.110(b) of the Government

³ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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).

Code. However, we also find that neither Cigna, CareMark, Humana, nor Walgreens has adequately demonstrated that any other portion of the submitted information constitutes trade secret information under section 552.110(a) or commercial or financial information, the release of which would cause each entity substantial competitive harm, under section 552.110(b). Consequently, we also conclude that the city may not withhold any other portion of the submitted information 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, experience, and pricing not excepted under section 552.110), 184 (1978).

We note that portions of the submitted information relating to HealthSpring, BCBS, Eckerd's, Cigna, Humana, CareMark, Walgreens, and Texan Plus are excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we conclude that the city must withhold the insurance policy numbers that we have marked pursuant to section 552.136 of the Government Code.

You claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
- (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
- (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
- (4) provided to a governmental body on a letterhead, cover sheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. After carefully reviewing the remaining submitted information, we find that no portion of this information is excepted from disclosure under section 552.137 and, thus, no portion of it may be withheld from the requestor on that basis.

Finally, we note that portions of the remaining submitted information relating to Humana, HealthSpring, Aetna, Eckerd's, United, Cigna, CareMark, Walgreens, and Texan Plus 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 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, 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 city must withhold the information that we have marked pursuant to sections 552.110 and 552.136 of the Government Code. The city must release the remaining submitted information to the requestor; however, in releasing that information, the city must comply with the applicable copyright law for those portions of that information that are copyrighted.

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).

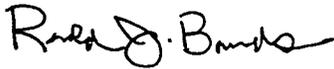
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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/krl

Ref: ID# 214797

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