ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 1, 2005

Mr. M. Gustave Pick
Scott, Hulse, Marshall, Feuille, Finger & Thurmond, P.C.
P.O. Box 99123
El Paso, Texas 79999

OR2005-02803

Dear Mr. Pick:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 220335.

The Ysleta Independent School District (the "district"), which you represent, received a request for "all health care insurance vendor proposals and rates from [the district's] health care bid process within the last two years." Although you assert that the submitted information may be excepted from disclosure under various provisions of the Public Information Act (the "Act"), you take no position and make no arguments regarding these exceptions. Instead, you claim that release of some of the responsive information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305, you state that you have notified the interested third parties of the request and of their opportunity to submit comments to this office.[1] *See* Gov't Code § 552.305 (permitting

[1] The district notified: Aetna, Inc. ("Aetna"); Aetna Life Insurance Company ("Aetna Life"); Access Administrators, Inc. ("Access"); Alpha Omega Wellness WORKS, Inc. ("Wellness WORKS"); American Health Holding, Inc. ("American Health"); APS Healthcare Bethesda, Inc. ("APS"); Beech Street Corporation ("Beech Street"); Blue Cross Blue Shield of Texas ("Blue Cross"); Ceridian Corporation ("Ceridian"); CIGNA Behavioral Health ("CIGNA"); Community First Health Plans ("Community First"); ComPsych Corporation ("ComPsych"); Delta Dental Insurance Company ("Delta"); Deer Oaks EAP Services ("Deer Oaks"); Denver Reserve Corporation ("Denver Reserve"); Educators Mutual Insurance Association ("Educators Mutual"); Great-West Life & Annuity Ins. Company ("Great-West"); Harrington Benefit Services, Inc. ("Harrington"); Health Administration Services, Inc. ("Health Administration"); ICON Benefit Administration II, L.P. ("ICON"); ING Employess Benefits ("ING"); Integrity Employee Association ("Integrity"); Magellan Behavioral Health, Inc. ("Magellan Behavioral"); Magellan Health Services, Inc. ("Magellan"); Matria Healthcare ("Matria"); MERCER Human Resources Consulting ("MERCER"); NCED-MHC, Inc.; United Behavioral Health ("United"); Value Options, Inc. ("Value Options"); WageWorks, Inc. ("WageWorks"); WEB-TPA Employer Services LLC ("WEB-TPA").

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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, you note that some of the information responsive to this request is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2004-7513(2004), we reviewed a request that the district received for information pertaining to RFP 24-322-034CSP. In that ruling, this office concluded that the district could withhold the submitted information pursuant to section 552.104 of the Government Code. Subsequent to that ruling, you inform us that "[c]ontracts were never executed for RFP # 24-322-034CSP." Instead, you state the district sought competitive sealed proposals for the "Employee Benefits Program-REBID" and selected a winning bidder. Therefore, a competitive bidding situation regarding the first RFP no longer exists. Thus, the circumstances existing at the time of the issuance of Open Records Letter No. 2004-7513 have changed. Consequently, the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have not been met in this situation.[2] *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). Thus, you may not rely on that ruling in this instance. We will therefore consider any other arguments against the disclosure of this information.

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, Access, Beech Street, Blue Cross, Ceridian, CIGNA, Community First, ComPysch, Deer Oaks, Delta, Denver Reserve, Educators Mutual, Harrington, ICON, ING, Integrity, MERCER, NCED-MHC, Matria, United, WEB-TPA, WageWorks, and Wellness WORKS have not submitted comments to this office explaining why any portion of the remaining requested information relating to these companies should not be released to the requestor. Therefore, we have no basis to conclude that the release of any of the submitted information would harm the proprietary interests of these interested third parties. *See e.g.*, 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

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[2] The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

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). Accordingly, we conclude that the district may not withhold any portion of the submitted information on the basis of any proprietary interest that Access, Beech Street, Blue Cross, Ceridian, CIGNA, Community First, ComPysch, Deer Oaks, Delta, Denver Reserve, Educators Mutual, Harrington, ICON, ING, Integrity, MERCER, NCED-MHC, Matria, United, WEB-TPA, WageWorks, or Wellness WORKS may have in the information.

Health Administration argues that a portion of the submitted information is protected from disclosure under section 552.101 of the Government Code in conjunction with Rule 507 of the Texas Rules of Evidence.[3] We note that this office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, the Texas Supreme Court has ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information confidential for the purposes of section 552.022. *See* Gov't Code § 552.022 (enumerating several categories of information not excepted from required disclosure unless expressly confidential under other law); *see also In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). In this instance, Health Administration's information does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Civil Procedure are not applicable. We also note that section 552.101 does not encompass civil discovery privileges. *See* Open Records Decision No. 647 at 2 (1996). Accordingly, we conclude that the district may not withhold any portion of Health Administration's information pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence.

Magellan asserts that information pertaining to it is excepted from public disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See id.* at 8-9. The district does not argue that the release of any of the submitted information would harm the district's interests in a particular competitive situation. Therefore, no portion of the submitted information pertaining to Magellan is excepted from disclosure under section 552.104 of the Government Code.

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[3] Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

Value Options, Aetna Life, APS, American Health, Great-West, Health Administration, and Magellan also contend that portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code 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(a), (b).

Section 552.110(a) protects the property 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;
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> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (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. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable 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. 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).

Upon review of the submitted information and arguments, we find that Value Options, Aetna Life, APS, Great-West, Health Administration, and Magellan have made specific factual or evidentiary showings that the release of some of the information each seeks to withhold would cause these companies substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b). However, we find that Value Options, Aetna Life, APS, American Health, Great-West, Health Administration, and Magellan have not shown that any of the remaining information each seeks to withhold meets the definition of a trade secret or that its release would cause that company substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, the remaining submitted information may not be withheld pursuant to section 552.110.

We note that the remaining submitted records contain insurance policy and account numbers that are subject to section 552.136 of the Government Code. This section provides that "[n]otwithstanding 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, the district must withhold these insurance policy and account numbers pursuant to section 552.136 of the Government Code.

Finally, we note that some of the materials at issue may be protected by copyright. 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).

In summary, the district must withhold the information we have marked pursuant to section 552.110. Insurance policy and account numbers must be withheld under section 552.136. The district must release the remaining submitted information in accordance 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).

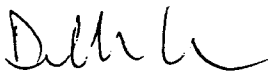
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 220335

Enc. Submitted documents

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