



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 18, 2006

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2006-03861

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 246508.

The Texas Health and Human Services Commission (the "commission") received two requests<sup>1</sup> for the winning proposal and contract with First Health Services Corporation ("First Health") for pharmacy benefit management services, and a request for the commission's contract with Northrop Grumman Information Technology, Inc. ("NGIT") for data center services. You state that the commission will release portions of the requested information to the requestors and make portions of First Health's proposal available for public inspection in accordance with federal copyright law. You claim that portions of the submitted information are excepted from disclosure under section 552.139 of the Government Code. Additionally, you contend that the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you represent, and provide documentation showing, that the commission notified interested third parties First Health and NGIT of the request for information and of each company's right to submit comments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990)

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<sup>1</sup> Although the commission states it is unsure that one of the requests received is a valid request under the Act because the requestor is identified by title, not name, we note the identity of the requestor is generally not a factor to be considered when a governmental body receives an open record request. *See* Gov't Code § 552.223 (requiring uniform treatment of all open records requests). *But see id.* § 552.028 (governmental body not required to accept or comply with request for information from an individual who is imprisoned or confined in a correctional facility, or an agent of the individual other than that individual's attorney). You have not explained, nor can we discern from the submitted information, the reason identification by name would be necessary in this instance. We note the second requestor has provided contact information, and the commission does not assert it is unable to comply with this request for information.

(statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to Act in certain circumstances). We have received comments from First Health. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the commission's obligations under the Act. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body must, within fifteen business days of receiving the request, submit to this office 1) 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. *Id.* § 552.301(e)(1)(A)-(D). You state that the commission received the written request for information on January 25, 2006. Although the commission timely requested a decision from our office, the commission did not assert section 552.139 of the Government Code as an exception to disclosure or submit any responsive information for our review until February 16, 2006. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, the commission failed to comply with the requirements of section 552.301 of the Government Code. *Id.* § 552.301(b), (e)(1)(B).

Pursuant to section 552.302, 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, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.139 can provide a compelling reason for non-disclosure; we will therefore consider your claim regarding this exception. Because third party interests are also implicated, we will consider whether any of the requested information must be withheld to protect third party interests.

Next, 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, this office has not received comments from NGIT explaining how the release of the submitted information

will affect its proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of this entity. *See* Open Records Decision Nos. 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, we conclude that none of the submitted information may be withheld based on the proprietary interest of NGIT.

First Health asserts that a portion of its proposal is excepted 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." Gov't Code § 552.101. This section encompasses information protected by other statutes. First Health asserts that a portion of its bid proposal contains information that is governed by the United States Securities and Exchange Commission ("SEC") and is exempt from public disclosure under federal law. However, First Health does not cite to any specific federal provision, nor are we aware of one, that makes the information at issue confidential. Accordingly, no portion of First Health's proposal may be withheld under section 552.101. *See generally* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

Next, First Health contends that portions of its proposal are excepted from disclosure under section 552.110(b) of the Government Code. This section 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." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of the submitted information, we conclude that First Health has made a specific factual showing that release of some of the information at issue, which we have marked, would cause the company substantial competitive harm. Thus, the commission must withhold this information pursuant to section 552.110(b). However, we find that First Health has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive harm and has provided no factual or evidentiary showing to support such allegations. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110(b), business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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 is too speculative). Accordingly, the commission may not withhold any of the remaining information at issue under section 552.110(b).

The commission raises section 552.139 of the Government Code for a portion of Exhibit E. 552.139 provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. You state that public dissemination of portions of Exhibit E would serve as a "road map for hackers seeking to either access confidential client information . . . or disrupt the database served by the computer network." Upon review, we agree that a portion of the information at issue, which we have marked, relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Therefore, the commission must withhold the information we have marked under section 552.139 of the Government Code. However, we find that the commission has not demonstrated that the remaining information relates to computer network security or the design, operation, or defense of a computer network, or consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of the remaining information is excepted from disclosure under section 552.139.

In summary, the commission must withhold: 1) the information we have marked under section 552.110(b) of the Government Code, and 2) the information we have marked under section 552.139 of the Government Code. The remaining submitted information must be released.

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); *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 Office of the Attorney General 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. 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,



Lisa V. Cubriel  
Assistant Attorney General  
Open Records Division

LVC/er

Ref: ID# 246508

Enc. Submitted documents

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