



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 20, 2006

Ms. Meredith L. Hayes  
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OR2006-15006

Dear Ms. Hayes:

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# 266237.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for information pertaining to the district's healthcare insurance proposals. Although you raise no exceptions to disclosure on the district's behalf, you state that the requested information may implicate the proprietary interests of the following third parties: Hancock Benefits Consultants, Inc. ("Hancock"); Insurance Management Services ("IMS"); Alt Benefit Consultants ("Alt"); Delta Dental Insurance Company ("Delta Dental"); Walgreens Health Initiatives ("Walgreens"); Great-West Life & Annuity Insurance Company ("Great-West"); Blue Cross Blue Shield of Texas ("Blue Cross"); Aetna ("Aetna"); TML Intergovernmental Employee Benefits Pool ("TML"); Pharma Care Management Services ("Pharma"); Private Healthcare Systems, Inc. ("PHCS"); FBMC Proven Benefit Solutions ("FBMC"); US Script; The JI Companies ("JI"); Express Scripts ("Express"); Fiserv Health ("Fiserv"); HealthSmart; and United Healthcare ("United"). Pursuant to section 552.305 of the Government Code, you were required to notify the interested third parties of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in certain circumstances). We have reviewed the submitted information and considered the submitted arguments.

Initially, we note that you have not submitted for our review United's proposal. We therefore assume you have released such information to the extent that it existed when the district received the request. If you have not released any such records, you must do so at this time. *See Gov't Code* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, 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, the following companies have not submitted comments explaining why their information should be withheld from disclosure: Hancock; IMS; Alt; Delta Dental; Walgreens; Blue Cross; TML; Pharma; FBMC; JI; Fiserv; and HealthSmart. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3 (1990). Accordingly, the district may not withhold any of the submitted information on the basis of any proprietary interests that these companies may have in the information.

We next address the submitted arguments. PHCS argues that its information is confidential pursuant to 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; *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). However, PHCS does not cite to any specific law, and we are not aware of any law, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Accordingly, the district may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Great-West also raises section 552.101 of the Government Code in conjunction with section 1305.503(b) of the Insurance Code. Section 1305.503 of the Insurance Code provides:

b) Confidential information provided to or obtained by the department under this section remains confidential and is not subject to disclosure under Chapter 552, Government Code. The department may not release, and a person may not gain access to, any information that:

- 1) could reasonably be expected to reveal the identity of an injured employee; or
- 2) discloses provider discounts or differentials between payments and billed charges for individual providers or networks.

Ins. Code § 1305.503. We note that section 1305.503 applies only to information “provided to or obtained by the [Texas Department of Insurance].” *See id.* Accordingly, section 1305.503 is not applicable to documents in the hands of other governmental bodies. The information at issue is maintained by the district. Therefore, none of the submitted information is confidential under section 1305.503(b) of the Insurance Code, and it may not be withheld under section 552.101 on that basis.

Next, Express contends that its information is excepted from 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.” *See Gov’t Code* § 552.104. However, we note that section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See Open Records Decision Nos. 592 (1991)* (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the district does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the information at issue, and it may not be withheld on that basis. *See Open Records Decision No. 592.*

Next, Aetna, Great-West, PHCS, US Script, and Express each claim exception to disclosure under section 552.110 of the Government Code. 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(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 id.* § 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. This office must accept a claim that information subject to the Act is exempted 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. 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. *Id.* § 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.

Great-West seeks to withhold portions of its proposal, including pricing information, customer lists, organizational structure, and sample contracts under sections 552.110(a) and 552.110(b). US Script and Express each claim that their pricing information is excepted from disclosure under sections 552.110(a) and 552.110(b). Aetna and PHCS also assert that their pricing information is excepted from disclosure under section 552.110(b). Upon review of the submitted briefs and information at issue, we find that US Script, Express, Aetna, and PHCS have established that some of the information they seek to withhold, which we have marked, constitutes commercial and financial information, the release of which would cause the companies substantial competitive harm. The district must withhold the information we have marked under section 552.110. However, we determine that none of these third party companies has demonstrated that any portion of the remaining information constitutes trade secret information or commercial or financial information, the release of which would cause them substantial competitive harm. *See* Open Records Decision Nos. 552 at 5-6 (1990), 661 (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business”). Accordingly, pursuant to section 552.110, the district must withhold only those portions of the submitted information that we have marked under that section.

Great-West also raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business

prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Great-West has failed to explain how the submitted information relates to economic development negotiations involving it and the district. *See id.* § 552.131. Accordingly, we conclude that the district may not withhold any portion of the submitted information pursuant to section 552.131(a) of the Government Code. Furthermore, we note that section 552.131(b) is designed to protect the interest of governmental bodies, not third parties. As the district does not seek to withhold any information pursuant to section 552.131(b), we find this section does not apply to the information at issue, and it may not be withheld on that basis. Accordingly, no portion of the submitted information is excepted under section 552.131(b) of the Government Code.

Next, we note that portions of the submitted information are excepted from disclosure under section 552.136 of the Government Code. This section states 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. Thus, the district must withhold the insurance policy numbers we have marked under section 552.136.

We further note that section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Accordingly, the district must withhold the social security number we have marked under section 552.147.<sup>1</sup>

Finally, we note that some of the submitted information appears to 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).* Thus, the remaining submitted information must be released to the requestor, but any information protected by copyright must be released in accordance with copyright law.

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<sup>1</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

In summary, the district must withhold the information we have marked under section 552.110 of the Government Code. The district must also withhold the insurance policy numbers we have marked under section 552.136 of the Government Code and the social security number we have marked under section 552.147 of the Government Code. The remaining submitted information must be released to the requestor, but any information protected by copyright must be released in accordance with 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).

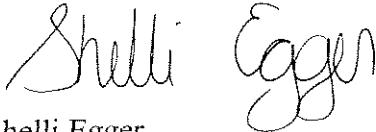
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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,



Shelli Egger  
Assistant Attorney General  
Open Records Division

SE/sdk

Ref: ID# 266237

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