



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 14, 2008

Ms. Lydia L. Perry  
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OR2008-02115

Dear Ms. Perry:

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# 302236.

The Garland Independent School District (the "district"), which you represent, received a request for information pertaining to the district's health care insurance request for proposal. You take no position with respect to the public availability of the requested information. However, you believe that some of the requested information implicates the interests of third parties. You notified the third parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the submitted arguments and have reviewed the information you submitted.

Initially, we note that HAS seeks to withhold information, including its questionnaire responses, cost projections, compensation, and case studies, that was not submitted to this office by the district. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the district. See Gov't Code § 552.301(e)(1)(D) (governmental

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<sup>1</sup>The notified third parties include: Aetna Life Insurance Co. ("Aetna"); Humana Insurance Co. ("Humana"); Group & Pension Administrator Inc.; WEB-TPA, Inc.; Trisurant f/k/a Health Administration Services ("HAS"); JI Companies ("JI"); WMS Prescription Drug Plans; Cigna Health Care; Blue Cross Blue Shield of Texas; IMS Marketing; American Administrative Group ("American"); Fiserv Health; and United Healthcare.

body requesting decision from Attorney General must submit copy of specific information requested).

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 it should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only Aetna, Humana, HAS, JI, and American have submitted arguments to this office explaining why their information should not be released. We thus have no basis for concluding that any portion of the submitted information pertaining to the remaining eight companies constitutes proprietary information, and the district may not withhold any portion of these eight companies' information on that basis. See 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).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by common-law privacy. JI asserts that portions of its proposal, including audits and financial statements, are excepted from disclosure under common-law privacy. We note, however, that JI is a corporate entity. Common-law privacy protects the interests of individuals, not those of corporate and other business entities. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), rev'd on other grounds, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). However, this office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is generally intimate and embarrassing. See Open Records Decision No. 545 (1990). The information we have marked, which reveals the percentages of ownership individuals maintain in JI, constitutes financial information records. Further, in this instance we find that there is not a legitimate public interest in the release of this information. Accordingly, you must withhold only the personal financial information we have marked in JI's proposal under section 552.101 in conjunction with common-law privacy.

Aetna, Humana, HAS, JI, and American assert that portions of their proposals are excepted 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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* ORD 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. ORD 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 Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

Aetna seeks to withhold portions of its proposal, including pricing information, customer lists, discounts, fees, and guarantees, under section 552.110(b). Humana claims that information related to its pricing, management program and methods, client reporting, pharmacy program, SAS 70 audit, and implementation time lines are excepted from disclosure under section 552.110(a) and section 552.110(b). HAS asserts that its pricing information is excepted from disclosure under section 552.110(b). JI claims that its financial statements and a specified SAS 70 audit are excepted from disclosure under section 552.110(a) and section 552.110(b). American argues that specified portions of its bid, including its questionnaire responses and financial information, are excepted from disclosure under sections 552.110(a) and 552.110(b).

Upon review of the submitted arguments and information at issue, we find that Aetna, Humana, and American have established that some of the information they seek to withhold, which we have marked, including pricing, fees, customer lists, and rebate guarantees, constitutes commercial and financial information, the release of which would cause the companies substantial competitive harm. However, we note that Humana has made some of the information it seeks to withhold publicly available on its website. Because Humana published the Savings Center discounts that it now seeks to withhold under section 552.110 of the Government Code, we conclude that the company has failed to demonstrate that it considers this information to be confidential information. Further, we note that the pricing information of a winning bidder, such as HAS in this instance, is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors). Thus, we determine that none of the third party companies have demonstrated that any portion of the remaining information constitutes trade secret information or commercial or financial information that if released 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, the district must withhold only those portions of the submitted information that we have marked under section 552.110.

We note that the submitted information contains insurance policy numbers. Section 552.136 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(b). The district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

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).

In summary, the district must withhold the personal financial information that we have marked under section 552.101 in conjunction with common-law privacy. The district must withhold the information we have marked under section 552.110 of the Government Code. The district must withhold the insurance policy numbers we have marked under section 552.136. The remaining information must be released, however, any information that is subject to 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

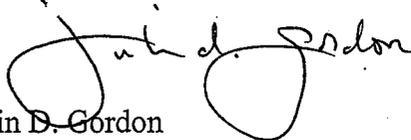
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/jh

Ref: ID# 302236

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