



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2008

Ms. Marney Collins Sims
General Counsel
Cypress-Fairbanks Independent School District
P.O. Box 692003
Houston, Texas 77269

OR2008-08053

Dear Ms. Sims:

~~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# 312486.~~

The Cypress-Fairbanks Independent School District (the "district") received a request for information pertaining to a specified Request for Proposals to provide the district with an audit of its medical and prescription plan claims, including documentation supporting its decision process. The district states that it is releasing its Claims Audit RFP Evaluation (the "evaluation") to the requestor, with information obtained from third parties redacted. The district takes no position on whether the submitted proposals or the information redacted from the evaluation are excepted from disclosure, but it states that release of this information may implicate the proprietary interests of the following companies: Prudent Rx ("Prudent"), Benefit Plan Audit Services, LLC ("Benefit"), Healthcare Data Management ("Healthcare"), Fairfield Associates, Limited, LLC ("Fairfield"), Claim Technologies Incorporated ("CTI"), and BMI Audit Services ("BMI"). Accordingly, the district informs us, and provides documentation showing, that the district notified these companies of the request and of each company's right to submit arguments to this office as to why its 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 received comments from

Prudent, Benefit, Healthcare, Fairfield, and BMI. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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, CTI has not submitted to this office any reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of CTI's information constitutes proprietary information. *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). As the district makes no arguments regarding CTI's proposal, it must generally be released to the requestor.

We note, however, that CTI's proposal 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).

We will now address the arguments we have received from Prudent, Benefit, Healthcare, Fairfield, and BMI. Prudent raises sections 552.101 and 552.102 for portions of its proposal. 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. Prudent raises section 552.101 in conjunction with both common-law and constitutional privacy. The doctrine of common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. *See Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ *ref'd n.r.e.*). Section 552.102 protects private information in a

personnel file of a governmental body, as opposed to the information in the personnel files of a third party.

Although Prudent asserts common-law privacy for portions of its proposal, it has not explained how any portion of its proposal is highly intimate or embarrassing. Therefore, none of Prudent's information may be withheld under section 552.101 in conjunction with common-law privacy. Furthermore, none of Prudent's personnel information is maintained in the personnel files of a governmental body. Accordingly, none of Prudent's information may be withheld pursuant to section 552.102 of the Government Code.

Constitutional privacy is also encompassed by section 552.101 of the Government Code and consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Prudent has failed to submit any arguments that explain how release of any portion of its information would impair an individual's right to make certain kinds of decisions independently or would implicate an individual's interest in avoiding disclosure of personal matters. Accordingly, none of Prudent's information may be withheld under section 552.101 in conjunction with constitutional privacy.

It appears that Benefit raises section 552.101 of the Government Code for contact information within its proposal. However, Benefit has not identified any law, and this office is not aware of any law, under which any of Benefit's information would be considered confidential for the purposes of section 552.101. Therefore, none of Benefit's information may be withheld under section 552.101.

Prudent raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Although Prudent raises section 552.104 for its entire proposal, this section protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 (1991). As the district does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the district may not withhold Prudent's proposal based on section 552.104.

Prudent, Benefit, Healthcare, Fairfield, and BMI all assert that portions of their information are excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information the release of which would cause a third party substantial competitive harm. *See* Gov't Code § 552.110. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.1958); *see also* ORD 552 at 2. Section 757 provides that a trade secret is

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 single or ephemeral events 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 Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

¹The following are the six factors that the Restatement gives 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 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 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).

Section 552.110(b) 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. *Id.* § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

Among other things, Fairfield argues that the release of its information could deter vendors such as Fairfield from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. This argument relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks*. *See also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of Gov’t Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain proposals from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will only consider each third party’s own interests in the information at issue.

Prudent, Benefit, Healthcare, and Fairfield assert that their proposals contain trade secrets subject to exception under section 552.110(a). We find that Benefit, Healthcare, and Fairfield have only made generalized arguments that fail to demonstrate the applicability of section 552.110(a) to any portion of each company’s proposal. Although Prudent has made more specific arguments regarding its proposal, the company failed to establish that any portion of its proposal meets the definition of a trade secret. Thus, none of the information at issue may be withheld pursuant to section 552.110(a).

Prudent, Benefit, Healthcare, Fairfield, and BMI also assert that their proposals contain information subject to section 552.110(b). Upon review, we agree that release of portions of these companies’ proposals would cause those companies substantial competitive harm. Accordingly, we have marked customer information of Prudent, Benefit, Healthcare, Fairfield, and BMI to be withheld under section 552.110(b). We note that Healthcare and Benefit have published the identities of several of their customers on their websites. Thus,

Healthcare and Benefit have failed to demonstrate that release of these particular customer names would cause them substantial competitive injury. We have also marked under section 552.110(b) the pricing information of Prudent, Benefit, Healthcare, and Fairfield within each company's proposal and the submitted evaluation. We find, however, that none of these companies has demonstrated that any remaining portion of the information at issue is excepted under section 552.110(b) of the Government Code. *See* Open Record Decision Nos. 661 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm), 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), 319 at 3 (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

In summary, the district must withhold the information we have marked within the submitted proposals and evaluation under section 552.110(b). The remaining information must be released to the requestor, but CTT's proposal may only 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 312486

Enc. Submitted documents

c: Mr. Tony M. Schy
Chapman Kelly
100 West Court Avenue, Suite 106
Jeffersonville, Indiana 47130
(w/o enclosures)

Mr. Will Baker
BMI Audit Services
130 S. Main Street, Suite 420
South Bend, Indiana 46601
(w/o enclosures)

Mr. Russell Dates
Prudent Rx
100 Corporate Pointe, Suite 395
Culver City, California 90230
(w/o enclosures)

Mr. Robert Frcek
CEO, Benefit Plan Audit Services, LLC
961 Amherst Avenue
Los Angeles, California 90049
(w/o enclosures)

Mr. Richard Goode
Fairfield Associates, Limited LLC
5312 Fairfield Circle
Castle Rock, Colorado 80104
(w/o enclosures)

Mr. Russell W. Calkins, III
Claim Technologies, Incorporated
The Palmolive Building
159 E. Walton Place, Suite 15F
Chicago, Illinois 60611
(w/o enclosures)

Mr. James Herrington
Chief Marketing Officer
Healthcare Data Management
555 Croton Road, Suite 350
King of Prussia, Pennsylvania 19406
(w/o enclosures)

Mr. Steven Marcus
CEO, Benefit Plan Audit Services
431 West 22nd Street, Suite 2R
New York, New York 10011
(w/o enclosures)