



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2009

Mr. Dale Caffey
Public Information Officer
Waco Independent School District
501 Franklin
Waco, Texas 76701

OR2009-05524

Dear Mr. Caffey:

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# 340193.

The Waco Independent School District (the "district") received a request for information relating to a request for proposals for a group health/prescription drug plan, including the best and final offers of companies that submitted proposals and those companies' communications with a named employee of the district. You indicate that some of the requested information has been released. You take no position on the public availability of the rest of the requested information. You believe, however, that the remaining information implicates the proprietary interests of BlueCross BlueShield of Texas ("BlueCross"); Humana Insurance Company, Humana Health Plan of Texas, Inc., and Humana, Inc. (collectively "Humana"); FirstCare Health Plans ("FirstCare"); and Valley Baptist Health Plans ("VBHP"). You notified those parties of the request for information and of their right to submit arguments to this office as to why the information should not be released.¹ We received correspondence from attorneys for Humana, FirstCare, and VBHP.² We have considered all of the submitted arguments and reviewed the submitted information.

We note that some of the submitted information was created after the date of the district's receipt of this request for information. The Act does not require a governmental body to

¹See 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).

²We note that Humana, FirstCare, and VBHP have submitted information that they claim is excepted from disclosure. This decision is applicable only to the information that the district submitted to this office in requesting this decision. See Gov't Code § 552.301(e)(1)(D).

release information that did not exist when it received a request or create responsive information.³ Thus, the information that did not exist when the district received this request is not responsive to the request. This decision does not address the public availability of that information, which we have marked, and it need not be released in response to this request.

~~We also note that the submitted information includes the agenda and related information from a meeting of the district's board of trustees. The agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. See Gov't Code §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the agenda and related information that we have marked must be released to the requestor.~~

~~We next note that the district did not submit most of the information at issue to this office within the fifteen-business-day period prescribed by section 552.301 of the Government Code. See Gov't Code § 552.301(a), (e). That information is therefore presumed to be public under section 552.302 of the Government Code and must be released, unless there is a compelling reason to withhold any of the information. See *id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Accordingly, we will determine whether the district must withhold any of the submitted information, including the information that was not timely submitted, on either of those grounds.~~

~~An interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from BlueCross. Therefore, because BlueCross has not demonstrated that any of its information is proprietary for the purposes of the Act, the district may not withhold any of BlueCross's information on that basis. See *id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).~~

Next, we address the arguments that we received from Humana, FirstCare, and VBHP. Humana states that some of its information was provided to the district with the expectation that the information would be kept confidential. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests

³See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

confidentiality. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, the submitted information relating to Humana must be released unless it falls within an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

VBHP raises section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. We understand VBHP to claim that some of its information is confidential under section 843.156 of the Insurance Code, which provides in part:

(d) On request of the commissioner, a health maintenance organization shall provide to the commissioner a copy of any contract, agreement, or other arrangement between the health maintenance organization and a physician or provider. Documentation provided to the commissioner under this subsection is confidential and is not subject to the public information law, Chapter 552, Government Code.

Ins. Code § 843.156(d). We note that section 843.156 is applicable to information provided to the commissioner of the Texas Department of Insurance under the statute. The information at issue here was provided to and is maintained by the district. We therefore conclude that the district may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of section 843.156 of the Insurance Code. See Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

Humana, FirstCare, and VBHP claim exceptions to disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (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.” Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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, *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 [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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the applicability of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima-facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁴ *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information at issue 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).

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 information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

⁴The Restatement of Torts lists the following six factors 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 other 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).

Humana, FirstCare, and VBHP contend that portions of their proposals constitute trade secrets under section 552.110(a). All three companies also argue that section 552.110(b) is applicable to portions of their proposals. Having considered the companies' arguments and reviewed the information at issue, we have marked information relating to the companies' customers that the district must withhold under section 552.110(a). We have marked other information relating to Humana, FirstCare, and VBHP that must be withheld under section 552.110(b). We find that Humana, FirstCare, and VBHP have not demonstrated that any of the remaining information at issue constitutes a trade secret under section 552.110(a). We also find that Humana, FirstCare, and VBHP have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause any of the companies substantial competitive harm. We therefore conclude that the district may not withhold any of the remaining information under section 552.110. *See* Gov't Code § 552.110(a)-(b); *see also* 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 Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

We note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

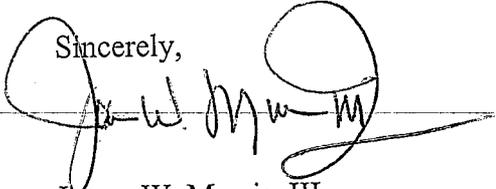
In summary, the district must withhold the information that we have marked under section 552.110 of the Government Code. The rest of the submitted information must be released. Any information that is protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'James W. Morris, III'. The signature is written in a cursive style with a large, looping initial 'J' and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/eb

Ref: ID# 340193

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Ms. Randi Harms
BlueCross BlueShield of Texas
1205 North Loop 340
Lacy Lakeview, Texas 76705
(w/o enclosures)

Ms. Marguerita Brunson Sims
FirstCare Health Plans
12940 North Highway 183
Austin, Texas 78750
(w/o enclosures)

Ms. Joy Hall
Ms. Judy Cheatham
Humana Health Plans
1221 South Mopac Expressway
Austin, Texas 78746
(w/o enclosures)

Mr. Robert Rodriguez
Valley Baptist Health Plans
2005 Ed Carey Drive
Harlingen, Texas 78550
(w/o enclosures)

Ms. Janet Farrer
Greenberg Traurig, LLP
600 Congress Avenue Suite 300
Austin, Texas 78701
(w/o enclosures)

Ms. Rachael K. Padgett
McGinnis, Lochridge & Kilgore, L.L.P.
600 Congress Avenue Suite 2100
Austin, Texas 78701
(w/o enclosures)