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January 20, 2010

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OR2010-00929

Dear Dr. Janssen:

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# 367504.

The Corpus Christi Independent School District (the "district") received a request for information pertaining to request for proposals FY09-P-0081, FY09-P-0082, FY09-P-0083, FY09-P-0084, and FY09-P-0085. Although you take no position as to whether the submitted information is excepted under the Act, you state that release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the third parties at issue of the request for information

and of their right to submit arguments to this office as to why the submitted information should not be released.¹ *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Aflac stating it does not object to release of its information. We have also received comments from Businessolver, Block, Davis, EyeMed, Humana, Spectera, and Superior objecting to the release of their information. We have considered the submitted arguments and reviewed the submitted information.²

Initially, we note that you have only submitted the bid responses for our review. Thus, to the extent any additional responsive information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released 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 the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has only received comments from Aflac, Businessolver, Block, Davis, EyeMed, Humana, Spectera, and

¹The third parties notified are: Allstate Workplace; American Family Life Assurance Company of Columbus ("Aflac"); American Fidelity Assurance Company; American Financial Insurance Services, Inc. d/b/a; Borden Insurance; American Heritage Life Insurance Company; American Public Life Insurance Company; Ameritas Life Insurance Corporation; ARAG Services, L.L.C.; Assurant Employee Benefits Alternate Distribution; Avesis Third Party Administrators, Inc.; Bay Bridge Administrators, L.L.C.; Block Vision of Texas, Inc. ("Block"); Businessolver, Inc. ("Businessolver"); CIGNA Group Insurance; Colonial Life & Accident Insurance Company; CONEXIS ;Corpus Christi Dental Plan, Inc.; Davis Vision, Inc. ("Davis"); Dental Select; Discovery Benefits; EyeMed Vision Care, L.L.C. ("EyeMed"); Eyetopia Vision Care; Fidelity Life Association; Fidelity Security Life Insurance Company; First Financial Capital/First Financial Administrators; First Financial Group of America; Fort Dearborn Life Insurance Company; Guardian Life Insurance Company of America, Inc.; Hartford Life and Accident Insurance Company; Humana, Inc. ("Humana"); Hyatt Legal Plans, Inc.; Legal Club of America; The LegalEASE Group; Loyal American Life Insurance Company; Metropolitan Life Insurance Company; MGM Benefits Group; Minnesota Life Insurance Company; OptiCare Vision Plan; Pre-Paid Legal Services, Inc.; QCD of America; Spectera, Inc. ("Spectera"); Standard Insurance Company; Superior Vision Services, Inc. ("Superior"); SWBC; Transamerica Worksite Marketing; Texas Life Insurance Company; Union Security Insurance Company; United Dental Care of Texas, Inc.; Unum Life Insurance Company of America; USB Enrollment Services, L.L.C.; and Wortham Insurance and Risk Management.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Superior. None of the remaining third parties have submitted comments explaining why their bid proposals should not be released. Therefore, we have no basis to conclude that these third parties have a protected proprietary interest in the submitted information. *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. Accordingly, the district may not withhold any portion of the submitted information based upon the proprietary interests of the remaining third parties.

Davis seeks to withhold a specified communication to a named individual. However, we note that the district has not submitted this information for our review. Because such information was not submitted by the district, 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 body requesting decision from Attorney General must submit copy of specific information requested).

Businessolver asserts that portions of its information are confidential because the documents were marked as "confidential and proprietary" when they were submitted to the district. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *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 through an 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 section 552.110). Consequently, unless Businessolver's information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

We understand EyeMed to assert that its submitted information is excepted from disclosure 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 exception encompasses information that is considered to be confidential under other law. *See Open Records Decision Nos.* 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). However, EyeMed has failed to direct our attention to any law, nor are we aware of any law, under which any of the information at issue is considered to be confidential for purposes of section 552.101. Therefore, none of EyeMed's submitted information may be withheld under section 552.101 of the Government Code.

Davis raises section 552.102(a) of the Government Code for a portion of its submitted information. Section 552.102(a) 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). Section 552.102(a) protects information relating to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In this instance, the information at issue is related to a private entity, Davis. Therefore, the district may not withhold any of the submitted information under section 552.102(a) of the Government Code.

Businessolver and Davis assert their information is excepted from disclosure pursuant to 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. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general).* As the district does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Businessolver's or Davis's information. *See ORD 592 (governmental body may waive section 552.104).* Accordingly, none of the submitted information may be withheld under section 552.104 of the Government Code.

Businessolver, Block, Davis, EyeMed, Humana, Spectera, and Superior all assert that portions of their submitted information are excepted from 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. 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 the 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 excepted 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 at 2. 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); ORD 661.

Having considered Businessolver's, Block's, Davis's, EyeMed's, and Humana's arguments under section 552.110(a), we find that Block, Davis, EyeMed, and Humana have each made a *prima facie* case that portions of their submitted information, which we have marked, are protected as trade secret information. Thus, the district must withhold the marked information under section 552.110(a). However, we also determine that Businessolver has failed to demonstrate that any of its information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. We also find that Block, Davis, EyeMed, and Humana have failed to demonstrate that any portion of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of business," rather than "a process or device for continuous use in the operation of the business." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, the district may not withhold any of Businessolver's information or any of Block's, Davis's, EyeMed's, or Humana's remaining information on the basis of section 552.110(a) of the Government Code. See Open Records Decision Nos. 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 402.

Block also contends that portions of its information are excepted under section 552.110(b). Among other things, Block argues the release of its information would harm the district's ability to obtain detailed pricing and personnel information with regard to future bids. In advancing its argument, Block appears to rely 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 & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that 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 section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Block's interests in its information.

Upon review of Businessolver's, Block's, Davis's, EyeMed's, Spectera's, and Superior's arguments under section 552.110(b), we find that Businessolver, Block, Davis, EyeMed, Spectera, and Superior have established that some of their information, which we have marked, constitutes commercial or financial information, the release of which would cause the companies substantial competitive injury. Therefore, the district must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find that Businessolver, Block, Davis, EyeMed, Spectera, and Superior have made only conclusory allegations that the release of any of their remaining information would result in substantial damage to the companies' competitive positions. Thus, Businessolver, Block, Davis, EyeMed, Spectera, and Superior have not demonstrated that substantial competitive injury would result from the release of any of their remaining information at issue. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, 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, none of Businessolver's, Block's, Davis's, EyeMed's, Spectera's, or Superior's remaining information may be withheld under section 552.110(b).

Businessolver also claims that some of its information is excepted from disclosure under section 552.139 of the Government Code, which provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], 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, a computer program, network, system, or system interface, 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 containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

Gov't Code § 552.139(a), (b). Upon review, we determine that Businessolver has failed to demonstrate that any of its remaining information relates to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). *See id.* § 2059.055 (defining confidential network information for purposes of section 2059.055). Furthermore, Businessolver has not demonstrated that its information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of Businessolver's remaining information may be withheld under section 552.139 of the Government Code.

We note that a portion of the remaining information is subject to section 552.136 of the Government Code.³ 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." *Id.* § 552.136. Accordingly, we find that the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

Finally, we note that some of the remaining information at issue is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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 information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.⁵

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

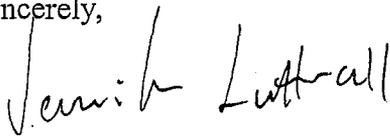
⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁵We note that the information being released contains social security numbers. 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.

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, toll free, at (888) 672-6787.

Sincerely,



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JL/dls

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