



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2010

Mr. Robert L. Blumenfeld
Mendel Blumenfeld, LLP
5809 Acacia Circle
El Paso, Texas 79912

OR2010-04631

Dear Mr. Blumenfeld:

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# 374562.

El Paso Mental Health and Retardation ("MHMR"), which you represent, received a request for all responses to the request for proposals for prescription management services and details on which company received the subsequent award. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also indicate that release of the submitted information may implicate the proprietary interests of NEC Health Networks, LLC and WWB Healthcare Associates, Inc. Accordingly, you have notified these interested third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 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 reviewed the submitted information.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records

Decision No. 541 (1990). However, in some situations, section 552.104 will operate to protect from disclosure bid information that is submitted by successful bidders. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).

You acknowledge the responsive information relates to an executed contract. You have made a general assertion that portions of the submitted information "continue to be exempt from disclosure under [section 552.104]" after the procurement process is complete. However, we conclude the information at issue does not reflect MHMR is engaging in any particular competitive bidding situation and you have not sufficiently explained the applicability of section 552.104 to the information you seek to withhold under this exception. *See Open Records Decision No. 509 at 5 (1998)* (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 to withhold information under predecessor statute). Consequently, MHMR may not withhold any of the responsive information under section 552.104 of the Government Code.

Although MHMR raises section 552.110 of the Government Code for the submitted information, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. We note 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 that party should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, none of the third parties have submitted comments to this office explaining how release of the information at issue would affect their proprietary interests. Therefore, these companies have failed to provide us with any basis to conclude they have a protected proprietary interest in the submitted 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 or evidentiary material, not conclusory or generalized allegations, it actually faces competition and substantial competitive injury would likely result from disclosure); 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Therefore, MHMR may not withhold the submitted information on the basis of any proprietary interest any of the third parties may have in the information.

We note the submitted information includes insurance policy numbers. Section 552.136 of the Government Code provides 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."¹ *Gov't Code § 552.136*. This

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, MHMR must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.²

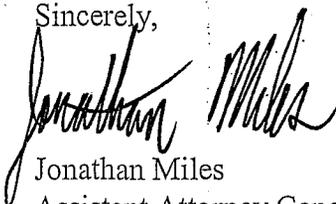
Finally, we note some of the materials at issue are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted 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, MHMR must withhold the insurance policy numbers we have marked in the submitted information under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only 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, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

²We 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.

Ref: ID# 374562

Enc. Submitted documents

c: Requestor
(w/o enclosures)

NEC Health Networks
c/o El Paso MHMR
Cynthia Juarez
8730 Boeing
El Paso, Texas 79925
(w/o enclosures)

WWB Healthcare Associates
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