ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2010

Mr. James K. Lowry, Jr.
Counsel to Northside Independent School District
Langley & Banack
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San Antonio, Texas 78212-3166

OR2010-08642

Dear Mr. Lowry:

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# 382505.

The Northside Independent School District (the "district"), which you represent, received a request for information pertaining to the solicitation for vision benefits, including proposals, correspondence with vendors, and evaluation notes and documents. You state the district has released some of the requested information. The district takes no position on whether the submitted proposals are excepted from disclosure, but states that release of this information may implicate the proprietary interests of Avesis; Block Vision; EyeMed Vision Care ("EyeMed"); Eyetopia Vision Care ("Eyetopia"); Davis Vision, Inc. ("Davis Vision"); Humana, Inc. ("Humana"), MetLife; and United Healthcare Insurance Company ("United Healthcare"). Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their 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); 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 received correspondence from some of the third parties. We have considered the submitted arguments and have reviewed the submitted information.[1]

[1]Block Vision states it has presumed the district is a governmental body as defined in the Act, but requests that if our office determines that the district is not a governmental body subject to the Act that no part of its proposal be released to the requestor. We note that the district does not assert it is not subject to the Act.

Initially, we note Davis Vision seeks to withhold information that was not submitted to this office by the district. This ruling does not address information that was not submitted by the governmental body, and is limited to the information submitted 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). Thus, we will only address Davis Vision's arguments against disclosure of the information that was actually submitted by the district to this office for our review.

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 that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, EyeMed, Eyetopia, MetLife, and Humana have not submitted comments to this office explaining why any portion of their submitted information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to EyeMed, Eyetopia, MetLife, and Humana would implicate their proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the district may not withhold any portion of EyeMed, Eyetopia, MetLife, and Humana's information on the basis of any proprietary interests that they may have in the information.

Block Vision argues that its network provider information, including details about access to providers by zip code and accessibility data, is excepted from disclosure under section 843.156(d) of the Insurance Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, including section 843.156(d) which provides:

> (d) On request of the commissioner [of the Texas Department of Insurance (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 [Act].

Ins. Code § 843.156(d). We note that section 843.156(d) is applicable to a contract, agreement, or other arrangement between a health maintenance organization and a physician or other health care provider that is requested by and provided to the commissioner. *Id.*

Accordingly, we address the submitted arguments against disclosure of the information at issue.

§ 843.156(d). 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 information at issue under section 552.101 of the Government Code on the basis of section 843.156(d) of the Insurance Code. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

Block Vision also claims its network provider information is excepted under section 843.078(l) of the Insurance Code in conjunction with section 552.101. Section 843.078(l) provides:

> (l) An application for a certificate of authority must include a written description of the types of compensation arrangements, such as compensation based on fee-for-service arrangements, risk-sharing arrangements, or capitated risk arrangements, made or to be made with physicians and providers in exchange for the provision of or an arrangement to provide health care services to enrollees, including any financial incentives for physicians and providers. The compensation arrangements are confidential and are not subject to [the Act].

Ins. Code § 843.078(l). Section 843.076(a) of the Insurance Code provides that a person may apply to the commissioner in order to obtain a certificate of authority to organize and operate a health maintenance organization. *Id.* § 843.076(a). Under section 843.078(l), an application for a certificate of authority must include a written description of certain types of compensation agreement information. *Id.* § 843.078(l). We note that section 843.078(l) is applicable to compensation information provided to the commissioner as part of an application for a certificate of authority. The information at issue was provided to and is maintained by the district. We therefore conclude that the district may not withhold any of the information at issue under section 552.101 of the Government Code on the basis of section 843.078(l) of the Insurance Code. *See* ORD 649 at 3.

Davis Vision raises section 552.102(a) of the Government Code for a portion of its proposal. 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 Vision. Therefore, the district may not withhold any portion of Davis Vision's proposal under section 552.102(a) of the Government Code.

Davis Vision and United Health raise section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions

which 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 a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the district does not seek to withhold any information pursuant to this exception, no portion of Davis Vision or United Health's information may be withheld on this basis.

Avesis, Block Vision, Davis Vision, and United Health claim portions of their proposals are excepted from disclosure under section 552.110 of the Government Code.[2] Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

The 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;

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[2]Although Avesis cites to section 552.101 of the Government Code, we understand Avesis to raise section 552.110 as this is the proper exception for the substance of Avevsis's argument.

> (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.

Id.; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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.*; *see also* ORD 661.

Upon review of the submitted arguments and the information at issue, we agree Block Vision and Davis Vision's customer information constitutes trade secret information under section 552.110(a); therefore, the district must withhold this information, which we have marked, under section 552.110(a). The district must also withhold also withhold the additional information we have marked in Davis Vision's proposal. However, Block Vision and Davis Vision have failed to demonstrate that any portion of their remaining information constitutes a trade secret. Furthermore, Avesis has failed to establish that any of its information at issue is a trade secret protected by section 552.110(a). *See* ORD Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the district may not withhold any of the remaining information at issue under section 552.110(a).

Block Vision and Davis Vision also contend, in part, that portions of their remaining information at issue are excepted under section 552.110(b) because release of the information at issue would harm the district's ability and the ability of other governmental entities to

obtain information in response to future requests for proposals: In advancing their arguments, these companies appear 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 each company's interests in its own information. We also will consider Avesis and United Healthcare's claims under section 552.110(b).

Upon review of Avesis, Block Vision, Davis Vision, and United Healthcare's arguments under section 552.110(b) and the information at issue, we conclude Avesis, Block Vision, Davis Vision, and United Healthcare have established that release of their pricing information would cause these companies substantial competitive injury; therefore, the district must withhold this information, which we have marked, under section 552.110(b). The district also must withhold United Healthcare's customer information, which we have marked, on this basis. However, Avesis, Block Vision, Davis Vision, and United Healthcare have made only conclusory allegations that release of the remaining information at issue would cause each company substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. Accordingly, we determine none of the remaining submitted information may be withheld under section 552.110(b) of the Government Code. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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).

We note a portion of the remaining information is subject to section 552.136 of the Government.[3] Section 552.136 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." Gov't Code § 552.136. This office has concluded that insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the district must withhold the

[3]The 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).

insurance policy numbers we have marked in Avesis, EyeMed, MetLife, and Davis Vision's proposals under section 552.136 of the Government Code.[4]

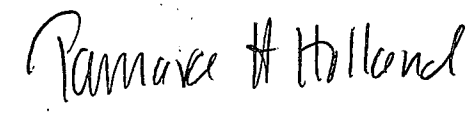
We also note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted 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 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.

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

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[4]We 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# 382505

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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