



ATTORNEY GENERAL OF TEXAS
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January 27, 2011

Mr. Humberto F. Aguilera
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OR2011-01480

Dear Mr. Aguilera:

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# 407177.

You ask this office to reconsider Open Records Letter No. 2010-15340 (2010). We note a governmental body is prohibited from asking this office to reconsider a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Furthermore, you have not demonstrated this office made an error in issuing the prior ruling. Nevertheless, we have determined the prior ruling should be corrected for purposes of due process. *See id.* §§ 552.306, 352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2010-15340 and serves as the correct ruling.

The Eagle Pass Independent School District (the "district"), which you represent, received requests from two requestors for information relating to Request for Proposals ("RFP") No. 100632TPARSLP, including the original RFP, a contract with a named individual, all proposals received, consultants' findings and recommendations, and other specified records. You state that some of the requested information either has been or will be released. You take no position on the public availability of the submitted information. You believe, however, the submitted information may implicate the proprietary interests of third parties. You inform us the third parties concerned were notified of these requests for information and of their right to submit arguments to this office as to why the submitted information should

not be released.¹ We received correspondence from Aetna, BlueCross BlueShield of Texas ("BlueCross"), and Envision Pharmaceutical Services, Inc. ("Envision"). We have considered the parties' arguments and reviewed the information you submitted.

We note 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 id.* § 552.305(d)(2)(B). As of the date of this decision, only Aetna, BlueCross, and Envision have submitted arguments against disclosure of the information at issue. Thus, because the other third parties concerned have not demonstrated any of the information at issue is proprietary for purposes of the Act, none of the submitted information may be withheld on the basis of any proprietary interest any of the other third parties may have in the information.² *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the arguments submitted by Aetna, BlueCross, and Envision. Envision contends some of its information is protected by Exemption Four of the federal Freedom of Information Act ("FOIA"), section 552 of title 5 of the United States Code. We note FOIA is applicable to information held by an agency of the federal government. *See* 5 U.S.C. § 551(1). The submitted information is maintained by the district, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also* Open Records Decision No. 561 at 7 n.3 (1990) (federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA). Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.*, Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); ORD124 (fact that information held by federal agency is exempted by FOIA does not necessarily mean that same

¹*See* 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).

²You inform us the other third parties concerned are Entrust, Inc.; FMH Core Source; Global Benefit Services; Group & Pension Administrators, Inc.; Group Resources of Texas, LLC; HealthFirst TPA; HealthSmart Benefit Solutions, Inc.; Humana Insurance Company and Humana Dental Insurance; Meritain Health, Inc. ("Meritain"); Mutual Assurance Administrators, Inc.; Principal Life Insurance Company; Stop Loss Insurance Services, Inc.; UMR; and WEB-TPA Employer Services, LLC. We note Meritain acknowledged receipt of the district's notice under section 552.305 but has submitted no arguments against disclosure.

information is excepted under the Act when held by Texas governmental body). Therefore, the district may not withhold any of Envision's information on the basis of FOIA.

Envision also claims 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(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Therefore, because it does not claim an exception to disclosure under section 552.104(a), the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Aetna, BlueCross, and Envision all claim section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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 Supreme Court of Texas 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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.³ See ORD 552 at 5. We cannot conclude that section 552.110(a) is applicable, however, 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).

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).

Aetna claims section 552.110(b) for a portion of its proposal. BlueCross and Envision claim both aspects of section 552.110 for portions of their proposals. Having considered the parties' arguments and reviewed the information at issue, we conclude the district must withhold all of the information at issue in Aetna's and BlueCross's proposals and some of the information at issue in Envision's proposal under section 552.110(b). We have marked the information the district must withhold. We note some or all of the information we have marked in BlueCross's proposal also appears in the CD included in BlueCross's proposal. To the extent the information we have marked in BlueCross's proposal also appears in the CD, the district also must withhold that information under section 552.110(b). We note that in addition to the customer information we have marked in Envision's proposal, the company seeks to withhold the name of a customer identified on its internet website. We are unable to find that information published on Envision's website constitutes a trade secret of the company or that release of such information would cause the Envision any competitive harm. We also find Envision has neither demonstrated that any of the remaining information at issue in its proposal constitutes a trade secret under section 552.110(a) nor made the specific factual or evidentiary showing required by section 552.110(b) that release of the information would cause Envision substantial competitive harm. We therefore conclude the district may not withhold any of the remaining information relating to Envision under section 552.110. See Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 509 at 5 (1988) (because

³The 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 Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 the remaining information at issue includes account, insurance group, and insurance policy numbers. Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of [the Act], 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.”⁴ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of section 552.136. Therefore, the district must withhold the account, insurance group and insurance policy numbers we have marked under section 552.136 of the Government Code.⁵

We also note some of the remaining information at issue appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1977); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials 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.

In summary: (1) the district must withhold the information we have marked in Aetna's, BlueCross's, and Envision's proposals under section 552.110(b) of the Government Code; (2) to the extent the information we have marked in BlueCross's proposal also appears in the CD submitted with the company's proposal, the district also must withhold that information under section 552.110(b); and (3) the district must withhold the account, insurance group and insurance policy numbers we have marked under section 552.136 of the Government Code. The rest of the submitted information must be released, but any copyrighted information may only be released in compliance with copyright law.

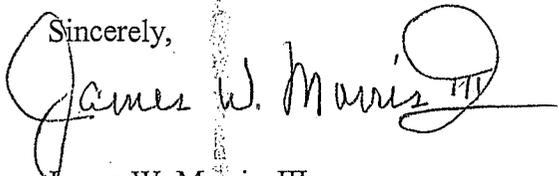
⁴This office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including an insurance policy number under section 552.136, without the necessity of requesting an attorney general decision.

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_or1.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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JWM/em

Ref: ID# 407177

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