



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 22, 2011

Ms. Amy L. Sims  
Assistant City Attorney  
City of Lubbock  
P.O. Box 2000  
Lubbock, Texas 79457

OR2011-08928

Dear Ms. Sims:

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# 421351.

The City of Lubbock (the "city") received requests from three requestors for a specified audit report.<sup>1</sup> You claim the requested information is excepted from disclosure under section 552.107(2) of the Government Code.<sup>2</sup> You also believe the requested information may implicate the 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

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<sup>1</sup>You inform us the city sought and received clarification of the first and second requests. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

<sup>2</sup>We note you also claim section 552.101 of the Government Code in conjunction with section 552.107(2). 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. Exceptions to disclosure under subchapter C of the Act are not "other law" for purposes of section 552.101.

as to why the requested information should not be released.<sup>3</sup> We received arguments under sections 552.002, 552.107(2), and 552.110 of the Government Code from attorneys for ICON Benefit Administrators II, L.P., American Administrative Group, Inc., and HealthSmart Preferred Care, II, L.P. (collectively "HealthSmart").<sup>4</sup> We have considered all the submitted arguments and reviewed the information you submitted. We also have considered the comments we received from four other interested persons.<sup>5</sup>

Initially, we address HealthSmart's contention that the submitted information does not constitute public information for purposes of section 552.002 of the Government Code. The Act is applicable to "public information," which section 552.002 defines as consisting of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). HealthSmart contends the city is in physical but not legal possession of the submitted information and has no right to "own" or "access" the information. Having considered all of HealthSmart's arguments under section 552.002, we find the city maintains the submitted information in connection with the transaction of official business. We therefore conclude the submitted information constitutes public information for purposes of section 552.002 of the Government Code and, as such, must be released unless it falls within the scope of an exception to disclosure. *See* Gov't Code §§ 552.002, .021.

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<sup>3</sup>*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).

<sup>4</sup>In addition to Greenberg Traurig, LLP, which represents HealthSmart, we note the city also notified Barr, Burt & Associates; Hurley & Guinn; and Weil & Petrocchi, P.C.

<sup>5</sup>*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

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* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, only HealthSmart has submitted arguments against disclosure of the submitted information. Therefore, because none of the other third parties has demonstrated any of the submitted information is proprietary for purposes of the Act, the city may not withhold any of the information at issue on the basis of any interest any of the other third parties may have in the information. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We next note section 552.022(a) of the Government Code provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(1). The city represents to this office, and has provided an affidavit stating, that the submitted information is a completed audit report. HealthSmart contends the information at issue is not a completed report or audit subject to section 552.022. In this instance, whether the report at issue is completed for purposes of section 552.022(a)(1) is a question of fact. This office cannot resolve factual issues in the decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body that is requesting our decision or on those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Based on the city's representations, its affidavit, and our review of the submitted information, we find the submitted information is a completed audit report. Therefore, the information at issue must be released pursuant to section 552.022(a)(1) of the Government Code unless it is expressly confidential under other law.

Both the city and HealthSmart claim section 552.107(a)(2) for some or all of the submitted information. Section 552.107(2) provides that "[i]nformation is excepted from [required public disclosure] if . . . a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). In this instance, the city and HealthSmart rely on protective orders (the "orders") entered by the court in *Icon Benefit Administrators II, L.P. and American Administrative Group v. Joella Mullin et al.*, Cause No. CC-08-01067-B, County Court at Law Number Two, Dallas County, Texas and by an arbitrator in *Icon Benefit Administrators II, L.P. et al. v. City of Lubbock*, Case No. 71 193 Y 00084 08, American Arbitration Association. HealthSmart explains the submitted information is related to litigation in which the orders were entered. The city has submitted copies of the orders. Having considered all of the city's and HealthSmart's arguments and reviewed the orders, we note section 552.022(b) of the Government Code provides as follows:

(b) A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public

information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law.

*Id.* § 552.022(b). Under section 552.022(b), a court may not order a governmental body to withhold from the public information encompassed by section 552.022(a) unless the information is expressly made confidential under other law. That is, the Act does not allow a court to withhold from disclosure information the Legislature has deemed to be expressly public. We find the orders do not determine the submitted information to be confidential under other law. Therefore, because a court cannot order the city to withhold information encompassed by section 552.022(a) unless the information is expressly made confidential under other law, we conclude the city may not withhold any of the submitted information on the basis of the orders under section 552.107(2) of the Government Code.

HealthSmart also claims the submitted information is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) excepts “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(b). A third party claiming section 552.110(b) must provide 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). HealthSmart argues, and has provided affidavits asserting, that both its competitors and the city will use the submitted information to HealthSmart’s detriment. Having considered all of the company’s arguments, we find HealthSmart has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the submitted information would cause HealthSmart substantial competitive harm. We therefore conclude the city may not withhold the submitted information under section 552.110(b) of the Government Code.

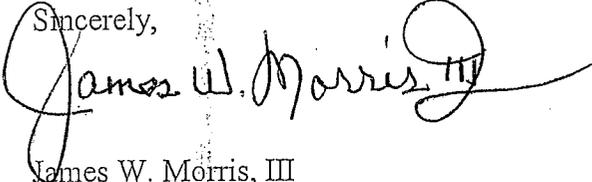
In summary, the submitted information (1) is public information under section 552.002 of the Government Code, (2) is subject to disclosure under section 552.022(a)(1) of the Government Code, and (3) may not be withheld from disclosure under section 552.107(2) or section 552.110(b) of the Government Code. As no other exceptions to disclosure are claimed, the city must release the submitted information in its entirety.

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](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,



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

JWM/em

Ref: ID# 421351

Enc: Submitted documents

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