



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 7, 2011

Mr. Ryan M. Leach
General Counsel
Pasadena Independent School District
1515 Cherrybrook Lane
Pasadena, Texas 77502

OR2011-18040

Dear Mr. Leach:

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# 438272.

The Pasadena Independent School District (the "district") received a request for information pertaining to the Pharmacy Benefit Management Services component of Request For Competitive Sealed Proposals ("RCSP") CSP #11-031, including all proposals submitted in response to the RCSP, final scoring sheets for all bidders, and the executed contract between the district and the winning bidder. Although you make no arguments 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 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 Aetna, BCBS, Envision, ExpressScripts, HealthTrans,

¹The third parties sent notice pursuant to section 552.305 are the following: Aetna; Alliance Work Partners ("Alliance"); Blue Cross Blue Shield ("BCBS"); Deer Oaks EAP Services ("Deer Oaks"); Delta Dental Insurance Co. ("Delta"); Envision Pharmaceutical Services, Inc. ("Envision"); ExpressScripts, Inc. ("ExpressScripts"); Health Trans; Humana Health Plan, Inc. ("Humana"); Interface EAP ("Interface"); Meritain Health, Inc. ("Meritain"); MHNNet; Save-Rx Scripts ("Save-Rx"); Script Care, Ltd. ("Script Care"); United Concordia Dental ("United Concordia"); United Healthcare Public Sector ("United Healthcare"); WEB-TPA, Inc. ("WEB-TPA"); and WellDyneRX, Inc. ("WellDyne").

Humana, Script Care, and WellDyne.² We have considered the submitted arguments and reviewed the submitted information.³

We note that some of the submitted documents are not responsive to the instant request for information, which the requestor limited to “documents that pertain to the Pharmacy Benefit Management Services component” of the RCSP, as they pertain to medical and dental administrative services. We also note that BCBS seeks to withhold information that it states is not responsive. This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release that information in response to this request.

Next, we note the district has not submitted the requested contract. We assume the district has released the contract to the requestor. If it has not, it must do so at this time to the extent the contract existed on the date the district received the request for information. *See* Gov’t Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

We next 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, Alliance, Deer Oaks, Delta, Interface, Meritain, MHNet, United Concordia, United Healthcare, and WEB-TPA have not submitted to this office reasons explaining why their information should not be released. Therefore, these third parties have provided us with no basis to conclude that they have a protected proprietary interest in any of 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 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 on the basis of any proprietary interest that Alliance, Deer Oaks, Delta, Interface, Meritain, MHNet, United Concordia, United Healthcare, and WEB-TPA may have in this information. We will, however, address the arguments of Aetna, BCBS, Envision, ExpressScripts, HealthTrans, Humana, Script Care, and WellDyne to withhold portions of the submitted information.

Aetna and Script Care seek to withhold certain information that the district has not submitted to this office for our review. Because some of the information that these companies seek to withhold was not submitted by the governmental body, this ruling does not address that

²BCBS also submitted comments on behalf of Prime Therapeutics, L.L.C.

³We note the submitted information includes the requestor’s proposal. As we do not understand the requestor to seek access to its own proposal, we do not address the public availability of that information, and the district need not release it in response to the request.

information 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 arguments of Aetna and Script Care against disclosure of the information that was actually submitted to this office for our review.

HealthTrans asserts that its information may not be disclosed because it was marked confidential or has been made confidential by agreement or assurances. However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Script Care claims its information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. In this instance, Script Care does not present any arguments against disclosure under that section nor has the company directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In addition, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990). Accordingly, none of Script Care's information may be withheld under section 552.101 of the Government Code.

WellDyne claims its information is excepted under 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 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 argue that section 552.104 is applicable in this instance, we conclude that none of WellDyne's information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Aetna, BCBS, ExpressScripts, Envision, HealthTrans, Humana, Script Care, and WellDyne each claim section 552.110 of the Government Code for portions of the submitted

information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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.

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Supreme Court of Texas had 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 [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). 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office will accept

⁴The 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 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 [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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument 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) of the Government Code 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 at 5-6.

Upon review, we find Aetna, BCBS, Envision, Health Trans, Humana, Script Care, and WellDyne have demonstrated that release of portions of the submitted information would cause these companies substantial competitive injury. Therefore, the district must withhold the information we have marked under section 552.110(b) of the Government Code. However, Aetna, Envision, ExpressScripts, Health Trans, Humana, Script Care, and WellDyne have made only conclusory allegations that release of their remaining information would result in substantial damage to their competitive positions. We note Envision has made some of its client information publicly available on its website. Because Envision has published this information, it has failed to demonstrate how release of this information would cause it substantial competitive injury. Furthermore, we note the pricing information of a winning bidder, such as ExpressScripts, is generally not excepted from disclosure under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Thus, Aetna, Envision, ExpressScripts, Health Trans, Humana, Script Care, and WellDyne have not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORD 661 at 5-6, 509 at 5. Accordingly, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Furthermore, we find BCBS, ExpressScripts, Envision, Health Trans, Humana, Script Care, and WellDyne have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Record Decision Nos. 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 was entirely too speculative), 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 are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). As noted above, Envision publishes the identities of some of its clients on its website. In light of Envision's own publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. We also 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, 306 at 3. Accordingly, none of the remaining information may be withheld on the basis of section 552.110(a).

We note the remaining information contains 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."⁵ Gov't Code § 552.136(b); see *id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, we note some of the materials at issue may be 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

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,

⁵The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body. Open Records Decision No. 674 at 3 n.4 (2001).

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/em

Ref: ID# 438272

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Mark Chulick
Counsel
Law & Regulatory Affairs, F730
Aetna
2777 Stemmons Freeway
Dallas, Texas 75207
(w/o enclosures)

Mr. David Bulgerin
COO
Alliance Work Partners
2525 Wallingwood, Building 5
Austin, Texas 78746
(w/o enclosures)

Blue Cross BlueShield of Texas
c/o Ms Brooke A. Spence
Greenberg Traurig
2101 L Street NW, Suite 1000
Washington D.C. 20037
(w/o enclosures)

Paul Alan Boskind, Ph.D.
CEO
Deer Oaks EAP Services
126 East Main Plaza, Suite 8
San Antonio, Texas 78205
(w/o enclosures)

ExpressScripts, Inc.
c/o Ms. Melissa J. Copeland
Schmidt & Copeland, LLC
P.O. Box 11547
Columbia, South Carolina 29211
(w/o enclosures)

Mr. Jerry Mendoza
Sales Account Executive
Delta Dental Insurance Co.
22136 Westheimer Parkway, Suite 107
Katy, Texas 77450
(w/o enclosures)

Marti Hanson
Director of Marketing
Interface EAP
Suite 1100
10370 Richmond Avenue
Houston, Texas 77042
(w/o enclosures)

Mr. David C. Parker
Meritain Health, Inc.
Suite 105
1527 Dale Mabry Highway
Lutz, Florida 33548
(w/o enclosures)

Mr. Sam Friedman
Account Manager
MHNet
9606 North Mopac, Suite 600
Austin, Texas 78759
(w/o enclosures)

Ms. Melanie Sawtelle
Vice President
Sav-Rx Scripts
224 North Park Avenue
Fremont, Nebraska 68025
(w/o enclosures)

Mr. Philip G. Mowry
VP, General Counsel
WellDyneRx
500 Eagles Landing Drive
Lakeland, Florida 33810
(w/o enclosures)

Mr. Michael J. McCabe
President, CEO
WEB-TPA, Inc.
Suite 400
8500 Freeport Parkway South
Irving, Texas 75063
(w/o enclosures)

Ms. Dara G. Katz
Associate Legal Counsel
Envision Pharmaceutical Services, Inc.
1301 East Broward Boulevard, Suite 300
Fort Lauderdale, Florida 33301
(w/o enclosures)

Mr. Gregory J. Mayers
SVP, General Counsel
HealthTrans
8300 E. Maplewood Avenue, Suite 100
Greenwood Village, Colorado 80111
(w/o enclosures)

Humana Health Plan, Inc.
c/o Ms. Rachael K. Padgett
McGinnis, Lochridge & Kilgore, LLP
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(w/o enclosures)

Script Care, Ltd.
c/o Mr. Brian A. Mills
Creighton, Fox, Johnson & Mills, PLLC
P.O. Box 5607
Beaumont, Texas 77726-5607
(w/o enclosures)

Ms. Carol Sweeny
National Director, Business Dev.
United Concordia Dental
159 Express Street
Plainview, New York 11803
(w/o enclosures)

Ms. Carol Voelkel
Senior Strategic Account Executive
Central Region
United Healthcare Public Sector
1333 West Loop South, Suite 1100
Houston, Texas 77027
(w/o enclosures)