



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2011

Mr. Joe R. Tanguma
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OR2011-18494

Dear Mr. Tanguma:

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# 439123.

The New Caney Independent School District (the "district"), which you represent, received a request for proposals related to RFP number A03-11. You do not take a position as to whether the submitted information is excepted from disclosure under the Act; however, you state, and provide documentation showing, you notified the following interested third parties of the district's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: Best Discount Benefits; Block Vision, Inc. ("Block"); Eyetopia Vision Care, Inc.; Humana Inc. ("Humana"); National Vision Administrators, LLC ("NVA"); Superior Vision Services, Inc.; The Guardian Life Insurance Company of America; and United Healthcare Specialty Benefits. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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). In correspondence to this office, Block, Humana, and NVA assert some of the information at issue is excepted from release under the Act. We have reviewed the submitted arguments and information.

Initially, we note Block and Humana have submitted information to this office they assert is excepted from release under section 552.110 of the Government Code. However, the

district did not submit this information for our review. This ruling does not address information beyond what the district has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the district submitted as responsive to the request for information. *See id.*

NVA argues some of its information is excepted from disclosure under section 552.104 of the Government Code. However, section 552.104 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). The district did not assert section 552.104. Therefore, the district may not withhold any of the information at issue pursuant to that section. *See* ORD 592 (governmental body may waive section 552.104).

Block, Humana, and NVA assert some of the information at issue is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). 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.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown 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) excepts from disclosure “[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.” 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 requested information.² *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).

NVA has made some of the information it seeks to withhold publicly available on its website. Because NVA itself published this information, we are unable to conclude such information is proprietary. However, we find Block, Humana, and NVA have established the release of some of the information at issue would cause substantial competitive injury.

¹The 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; (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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

²In its section 552.110 arguments, NVA relies on the test announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), concerning the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal entity. *See Nat'l Parks*, 498 F.2d 765. Although this office applied the *National Parks* test at one time to the statutory predecessor to section 552.110, the Third Court of Appeals overturned that standard in holding *National Parks* was not a judicial decision for purposes of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information at issue would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing Seventy-sixth Legislature's enactment of Gov't Code § 552.110(b)).

Therefore, the district must withhold this information, which we have marked, under section 552.110(b). But Block, Humana, and NVA have made only conclusory allegations that release of the remaining information at issue would cause substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110(b); Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, professional references, and qualifications and experience). In addition, we conclude Block and Humana failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See* Gov't Code § 552.110(a); ORD 319, 402. Thus, the district may not withhold any of the remaining information under section 552.110(a) or (b).

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.

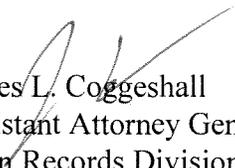
Finally, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Best Discount Benefits, Eyetopia Vision Care, Inc., Superior Vision Services, Inc., The Guardian Life Insurance Company of America, and United Healthcare Speciality Benefits have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of these companies, and the district may not withhold any portion of the submitted information on that basis. *See* ORD 661 at 5-6, 552 at 5, 542 at 3.

To conclude, the district must withhold the information we have marked under section 552.110(b) of the Government Code. The district must release the remaining information, 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 439123

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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