



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 2, 2012

Mr. Ryan M. Leach
General Counsel
Pasadena Independent School District
1515 Cherrybrook Lane
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OR2012-10173

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# 456579.

The Pasadena Independent School District (the "district") received a request for information pertaining to the Request for Competitive Sealed Proposals ("RCSP") number 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.¹ Although you make no arguments as to whether the submitted information is excepted under the Act, you state 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

¹We note the district asked for and received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

the submitted information should not be released.² 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, ExpressScripts, HealthTrans, Humana, Meritain, MHNet, Script Care, United Healthcare, and WellDyne. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information pertaining to the Pharmacy Benefit Management Services component (the "PBMS component") of the RCSP was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2011-18040 (2011). In this prior ruling, we ruled the district must withhold certain portions of Aetna's, BCBS's, Envision's, HealthTrans's, Humana's, Script Care's, and WellDyne's proposals under section 552.110 of the Government Code and certain insurance policy numbers under section 552.136 of the Government Code. We ordered the remaining information released in accordance with copyright law. With respect to Aetna, Alliance, BCBS, Deer Oaks, Delta, Envision, ExpressScripts, HealthTrans, Humana, Interface, MHNet, Script Care, United Concordia, WEB-TPA, and WellDyne, we have no indication the law, facts, and circumstances on which Open Records Letter No. 2011-18040 was based have changed. Accordingly, the district must continue to rely on Open Records Letter No. 2011-18040 as a previous determination and withhold or release the PBMS components of the proposals of Aetna, Alliance, BCBS, Deer Oaks, Delta, Envision, ExpressScripts, HealthTrans, Humana, Interface, MHNet, Script Care, United Concordia, WEB-TPA, and WellDyne in accordance with this ruling.³ See Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). In Open Records Letter No. 2011-18040, the district notified Meritain and United Healthcare pursuant to section 552.305 when the district received the previous request for information, and Meritain and United Healthcare failed to submit any arguments objecting to the release of the PBMS components of their proposals. Accordingly, we

²The 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"); HealthTrans; Humana Health Plan, Inc. ("Humana"); Interface EAP ("Interface"); Medco; Meritain Health, Inc. ("Meritain"); MHNet; 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").

³As we are able to make this determination, we need not address the arguments submitted by Express Script, Script Care, and WellDyne or the arguments of Aetna, Humana, HealthTrans, and MHNet with regard to the portions of their information pertaining to Pharmacy Benefit Management Services.

determined in our previous ruling that, except for information subject to section 552.136 of the Government Code, the district must release, among other things, the PBMS components of Meritain's and United Healthcare's proposals. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. Meritain now claims portions of the PBMS component of its proposal are excepted under section 552.101 of the Government Code, and both Meritain and United Healthcare claim portions of the PBMS components of their proposals are excepted under sections 552.104 and 552.110 of the Government Code.⁴ Section 552.104 is a discretionary exception that protects a governmental body's interests and does not make information confidential by law or prohibit release by law. *See* Gov't Code § 552.104; Open Records Decision 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to section 552.104 could be waived). Thus, the district may not now withhold under section 552.104 any information that was previously released. However, because sections 552.101 and 552.110 make information confidential by law, we will address Meritain's and United Healthcare's respective claims under these exceptions. We will also address the arguments submitted by Aetna, BCBS, HealthTrans, Humana, Meritain, MHNNet, and United Healthcare for the information not subject to Open Records Letter No. 2011-18040.

Next, 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 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, Medco, Save-Rx, United Concordia, 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 remaining 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 remaining information on the basis of any

⁴We note United Healthcare raises section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code. However, section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision No. 676 at 1-3 (2002).

proprietary interest that Alliance, Deer Oaks, Delta, Interface, Medco, Save-Rx, United Concordia, or WEB-TPA may have in this information.

We note BCBS, Meritain, and United Healthcare seek to withhold certain information the district has not submitted to this office for our review. Because this information was not submitted by the district, this ruling does not address that 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 the arguments of BCBS, Meritain, and United Healthcare for the information that was actually submitted to this office for our review.

MHNet argues its information is not responsive to the request because it is outside the scope of the request. The present request for information, in pertinent part, seeks information pertaining to RCSP number 11-031, including all proposals submitted in response to the RCSP. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the district has reviewed its records and determined the submitted information is responsive to the request. Thus, we find the district has made a good-faith effort to relate the request to information within its possession or control. Accordingly, MHNet's submitted information is responsive to the request for information, and we will determine whether any of this information must be withheld under the Act.

HealthTrans asserts 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.

Next, Meritain asserts portions of its proposal are excepted from disclosure under section 552.101 of the Government in conjunction with section 252.049 of the Local Government Code. 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. Section 552.101 encompasses section 252.049, which provides as follows:

(a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

(b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This statutory provision merely duplicates the protection that section 552.110 of the Government Code provides to trade secret and commercial or financial information. Therefore, we will address Meritain's arguments with respect to section 252.049 of the Local Government Code under section 552.110 of the Government Code.

Meritain and United Healthcare claim portions of the information not previously released in Open Records Letter No. 2011-18040 are 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 (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 section 552.104 is applicable in this instance, we conclude that none of Meritain's or United Healthcare's information at issue may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Aetna, BCBS, HealthTrans, Humana, Meritain, and United Healthcare each claim 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: (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.⁵ RESTATEMENT OF TORTS § 757 cmt. b. This office will accept 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[.]”

⁵The 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).

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.

As mentioned above, the PBMS components of Meritain's and United Healthcare's proposals were subject to a previous request for a ruling, in response to which this office issued Open Records Letter No. 2011-18040. In that prior ruling, the district notified Meritain and United Healthcare pursuant to section 552.305, and these companies failed to submit any arguments their information was excepted from disclosure under the Act. Since the issuance of the previous ruling on December 7, 2011, Meritain and United Healthcare have not disputed this office's conclusion regarding the release of the information at issue in Open Records Letter No. 2011-18040 and we understand the district has released it. In this regard, we find Meritain and United Healthcare have not taken the necessary measures to protect the PBMS components of their proposals in order for this office to conclude that any portion of that information now qualifies as a trade secret or contains commercial or financial information, the release of which would cause them substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661 at 5-6, 552 at 5, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the district may not withhold any of Meritain's or United Healthcare's information that was previously released in Open Records Letter No. 2011-18040 under section 552.110 of the Government Code. However, we will address Meritain's and United Healthcare's arguments for the information not previously released in Open Records Letter No. 2011-18040.

Upon review, we find Humana has established that some of its submitted information constitutes a trade secret. Therefore, the district must withhold the information we have marked under section 552.110(a) of the Government Code. However, we find Aetna, BCBS, HealthTrans, Humana, Meritain, and United Healthcare have failed to demonstrate any portion of the remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. We note 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); *Huffines*, 314 S.W.2d at 776; ORD 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). Accordingly, none of the remaining information may be withheld on the basis of section 552.110(a).

Upon review, we find BCBS, Humana, and HealthTrans have demonstrated release of portions of their remaining information would cause them substantial competitive injury. Further, we find Meritain and United Healthcare have demonstrated release of some of the information that is not subject to Open Records Letter No. 2011-18040 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, BCBS, HealthTrans, Humana, Meritain, and United Healthcare have made only conclusory allegations release of their remaining information would result in substantial damage to their competitive positions. Furthermore, we note the pricing information of a winning bidder, such as Aetna, 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, BCBS, HealthTrans, Humana, Meritain, and United Healthcare 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.

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.”⁶ 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 continue to rely on Open Records Letter No. 2011-18040 as a previous determination and withhold or release the PBMS components of the proposals of Aetna, Alliance, BCBS, Deer Oaks, Delta, Envision, ExpressScripts, HealthTrans, Humana,

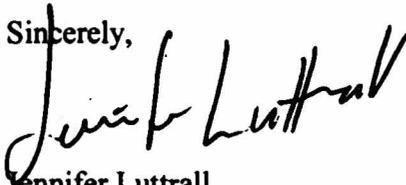
⁶The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body. Open Records Decision No. 674 at 3 n.4 (2001).

Interface, MHNet, Script Care, United Concordia, WEB-TPA, and WellDyne in accordance with this ruling. 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,



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JL/som

Ref: ID# 456579

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