



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2013

Mr. Miles J. LeBlanc
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2013-00341

Dear Mr. LeBlanc:

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# 475191.

The Houston Independent School District (the "district") received a request for the proposals submitted by ten named companies in response to RFP 12-04-01. Although you take no position on whether the responsive information is excepted from disclosure, you state release of the responsive proposals submitted by Cigna Healthcare ("Cigna"); Concentra Health Services, Inc. ("Concentra"); and QuadMed may implicate these companies' proprietary interests. Accordingly, you notified Cigna, Concentra, and QuadMed of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Cigna, Concentra, and QuadMed. We have reviewed the submitted arguments and the submitted information.

Initially, you acknowledge, and we agree, the district failed to meet the statutory deadline imposed by section 552.301(b) of the Government Code with respect to this request. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a

governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—FortWorth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). In this instance, third-party interests are at stake, and we note some of the information at issue is subject to section 552.136 of the Government Code, which can also provide a compelling reason to withhold information.¹ Accordingly, we will consider whether the submitted information must be released under the Act.

We next note Concentra seeks to withhold information the district has not submitted 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.*

Cigna asserts some of the submitted information is excepted from public disclosure under section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). This exception protects the competitive interests of governmental bodies such as the district, not the proprietary interests of private parties such as Cigna. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the district does not raise section 552.104 as an exception to disclosure. Therefore, the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Cigna and Concentra raise section 552.110 of the Government Code for portions of their respective proposals. QuadMed raises section 552.110 for its entire proposal, and alternatively for its pricing and staffing information. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* 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 Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides 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.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable 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) of the Government Code 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

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

information was obtained.” Gov’t Code § 552.110(b). 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. *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).

We also understand QuadMed to contend its proposal is excepted under section 552.110(b) of the Government Code because release of the information at issue would harm the district’s ability and the ability of other governmental entities to obtain qualified candidates in response to future searches. In advancing this argument, QuadMed appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (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 in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only QuadMed’s interest in its information.

Upon review, we find Cigna, Concentra, and QuadMed have established some of their information at issue constitutes commercial or financial information, the release of which would cause each company substantial competitive injury. Therefore, the district must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Cigna, Concentra, and QuadMed have made only conclusory allegations that release of any of the remaining information would result in substantial damage to each company’s competitive position. ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note Concentra has published the identity of one of its customers on its website, making this information publicly available. Thus, Concentra has failed to demonstrate that release of the information it has published on its website would cause it substantial competitive injury. We further note that although Concentra seeks to withhold its pricing information, it was the winning bidder with respect to the proposal at issue, and the pricing information of a winning bidder 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, Cigna, Concentra, and QuadMed have not demonstrated substantial competitive injury would result from the release of any of the remaining information. *See id.* Consequently, the district may not withhold any of the remaining information under section 552.110(b).

Additionally, we find Cigna, Concentra, and QuadMed have failed to demonstrate any of the remaining information at issue meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. As noted above, Concentra has published the identity of one of its customers on its website. Thus, we are unable to find that the information Concentra has published on its website constitutes a trade secret under section 552.110(a). Additionally, some of QuadMed's information reflects it was tailored for this particular bid proposal. We note 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; *Huffines*, 314 S.W.2d at 776. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Section 552.136 of the Government Code provides, "[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." Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Upon review, we find the district must withhold the information we have marked under section 552.136 of the Government Code.

We note some of the remaining information appears to 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(b) and 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright 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,



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Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 475191

Enc. Submitted documents

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