



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2014

Ms. Katheryne Ellison
Assistant General Counsel
Public Information Office - Legal Services
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2014-15951

Dear Ms. Ellison:

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# 535632 (Houston ISD ID# B06714).

The Houston Independent School District (the "district") received a request for information pertaining to the medical portion of RFP 12-0401, including a copy of (1) the winning proposal, (2) the current ASO agreement or group contract, (3) the most recent utilization report, and (4) the current wellness plan and results. Although you take no position with respect to the public availability of the requested information, you state its release may implicate the proprietary interests of Aetna Life Insurance Company ("Aetna"). Accordingly, you state, and provide documentation showing, you notified Aetna of the request and of its 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 Aetna. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the district did not submit information responsive to categories two and four of the request. Thus, to the extent the information at issue exists, we assume the district

has released it. If the district has not released this information, it must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We note most of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-13781A (2013). In that ruling, we found, in relevant part, the district must withhold the portions of Aetna's information we marked under sections 552.110(b) of the Government Code, and release the remaining information in accordance with copyright law. Aetna now makes arguments to withhold portions of the released information. 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. Aetna now claims portions of the information we ordered released are excepted from disclosure under section 552.110(b) of the Government Code, which makes information confidential under the Act. Thus, with respect to the information Aetna sought to withhold previously, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the district must continue to rely on Open Records Letter No. 2013-13781A as a previous determination and withhold or release the identical information at issue in accordance with the prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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). However, because circumstances have changed with respect to the additional information Aetna seeks to withhold under section 552.110(b), the district may not rely upon the prior ruling as a previous determination for this information, and we will address Aetna's arguments against the release of this information under section 552.110(b) of the Government Code. Additionally, we will address Aetna's arguments under section 552.110(b) for the information not at issue in the previous ruling.

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 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).

As mentioned above, Aetna's information was the subject of Open Records Letter No. 2013-13781A. Since the issuance of the previous ruling, Aetna has not disputed this office's conclusions regarding the release of its information, and we presume the district has released the information in accordance with that ruling. In this regard, we find Aetna has not taken any measures to protect its information in order for this office to conclude the information now qualifies as commercial or financial information, the release of which would cause Aetna substantial harm. *See* Gov't Code § 552.110(b); *see also* Open Records Decision Nos. 661, 319 at 2 (1982). Accordingly, we conclude the district may not withhold the additional information Aetna now seeks to withhold under section 552.110 of the Government Code.

Aetna contends portions of its information not at issue in Open Records Letter No. 2013-13781A are 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, Aetna 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). *See* 5 U.S.C. § 552(b)(4) (exempting from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."). 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 Aetna's interest in its information at issue.

Aetna also claims portions of its information not at issue⁴ in Open Records Letter No. 2013-13781A constitute commercial information that, if released, would cause Aetna substantial competitive harm. Upon review, we find Aetna must withhold the information we have marked under section 552.110(b) of the Government Code. However, we conclude

Aetna has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause Aetna substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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 is too speculative), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience), 175 at 4 (1977) (resumes cannot be said to fall within any exception to Act). Furthermore, we note the pricing information of a winning bidder is generally not excepted from disclosure under section 552.110(b). Aetna was the winning bidder for the medical portion of the RFP at issue. 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). Consequently, the district may not withhold any of the information at issue under section 552.110(b) of the Government Code.

We note some of the remaining information 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, with respect to the information Aetna previously sought to withhold, the district must rely on Open Records Letter No. 2013-13781A as a previous determination and withhold or release the information at issue in that ruling in accordance with it. 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; however, the district may release information protected by copyright only 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID#535632

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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