



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 27, 2016

Ms. Elaina Polsen  
Executive Director of Communications  
Clear Creek Independent School District  
P.O. Box 799  
League City, Texas 77574

OR2016-24049

Dear Ms. Polsen:

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# 631935 (CCISD ID# 100913).

The Clear Creek Independent School District (the "district") received a request for the submissions made by MedPerm Placement, Inc. d/b/a Therapy Consultants ("Therapy Consultants") and Top Echelon Contracting, LLC ("Top Echelon") in response to a specified request for qualifications. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of Therapy Consultants and Top Echelon. Accordingly, you state, and provide documentation demonstrating, you notified the third party of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *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 Therapy Consultants and Top Echelon. We have considered the submitted arguments and reviewed the submitted information.

Top Echelon argues its employees' resumes are excepted under section 552.102(a) of the Government Code. Although Top Echelon raises section 552.102(a), this section only applies to information in the personnel files of governmental employees, as opposed to private employees. Gov't Code § 552.102(a). As such, section 552.102(a) is not applicable in this

instance. Consequently, the district may not withhold any portion of the submitted information under section 552.102(a).

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Therapy Consultants and Top Echelon state they have competitors. In addition, Therapy Consultants and Top Echelon state release of the information at issue would give advantage to their competitors. We note Therapy Consultants and Top Echelon were awarded contracts based on the specified request for qualifications. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 839. After review of the information at issue and consideration of the arguments, we find Therapy Consultants and Top Echelon have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information related to Top Echelon we have marked, along with Therapy Consultants’ submission in its entirety, under section 552.104(a).<sup>1</sup>

Top Echelon states portions of its information are excepted from disclosure under section 552.110(b) of the Government Code, which 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* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized

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<sup>1</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

allegations, that release of requested information would cause that party substantial competitive harm).

Top Echelon asserts portions of its information consist of commercial or financial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Top Echelon has established the release of its customer information would cause Top Echelon substantial competitive injury. Accordingly, to the extent Top Echelon's customer information is not publicly available on its website, the district must withhold Top Echelon's customer information under section 552.110(b) of the Government Code. However, we find Top Echelon has failed to demonstrate that the release of any of its remaining information would result in substantial harm to its competitive position. *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 costs, 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 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, none of the remaining information may be withheld under section 552.110(b).

Top Echelon also asserts some of its information is protected from disclosure by section 552.153 of the Government Code. Section 552.153 protects proprietary records and trade secrets involved in certain partnerships under chapter 2267 of the Government Code and provides in part:

(a) In this section, "affected jurisdiction," "comprehensive agreement," "contracting person," "interim agreement," "qualifying project," and "responsible governmental entity" have the meanings assigned those terms by [s]ection 2267.001.

(b) Information in the custody of a responsible government entity that relates to a proposal for a qualifying project authorized under [c]hapter 2267 is excepted from the requirements of [the Act] if:

(1) the information consists of memoranda, staff evaluations, or other records prepared by the responsible governmental entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under [c]hapter 2267 for which:

(A) disclosure to the public before or after the execution of an interim or comprehensive agreement would adversely affect

the financial interest or bargaining position of the responsible governmental entity; and

(B) the basis for the determination under Paragraph (A) is documented in writing by the responsible governmental entity; or

(2) the records are provided by a contracting person to a responsible governmental entity or affected jurisdiction under [c]hapter 2267 and contain:

(A) trade secrets of the contracting person;

(B) financial records of the contracting person, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or other means; or

(C) other information submitted by the contracting person that, if made public before the execution of an interim or comprehensive agreement, would adversely affect the financial interest or bargaining position of the responsible governmental entity or the person.

Gov't Code § 552.153(a)-(b). Section 2267.001(10) of the Government Code provides "qualifying project" means:

(A) any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing care facility, recreational facility, public building, or other similar facility currently available or to be made available to a governmental entity for public use, including any structure, parking area, appurtenance, and other property required to operate the structure or facility and any technology infrastructure installed in the structure or facility that is essential to the project's purpose; or

(B) any improvements necessary or desirable to unimproved real estate owned by a governmental entity.

*Id.* § 2267.001(10). Further, section 2267.001(11) provides that "responsible governmental entity" means "a governmental entity that has the power to develop or operate an applicable qualifying project." *Id.* § 2267.001(11). However, neither the district nor Top Echelon explains how the information relates to a proposal for a qualifying project authorized under

chapter 2267 of the Government Code. Accordingly, we find the district may not withhold any portion of Top Echelon's information under section 552.153 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."<sup>2</sup> *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, the district may withhold the information related to Top Echelon we have marked, along with Therapy Consultants' submission in its entirety, under section 552.104(a). To the extent Top Echelon's customer information is not publicly available on its website, the district must withhold Top Echelon's customer information under section 552.110(b) of the Government Code. The district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The district must release the remaining information.

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](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,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/bhf

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<sup>2</sup>The 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).

Ref: ID# 631935

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Parties  
(w/o enclosures)