



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 18, 2003

Ms. Lisa Aguilar  
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OR2003-8286

Dear Ms. Aguilar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191249.

The City of Corpus Christi (the "city") received a request for several categories of information relating to a contract for health insurance consulting services and bid proposals submitted for the contract, and a specified audit. You advise that you have released some of the requested information. You claim that some of the requested information is excepted from disclosure under section 552.111 of the Government Code. You state that the remaining requested information may be confidential under certain exceptions of the Public Information Act (the "Act"), but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office and provide documentation showing that you have notified Benefit Planners, Boon-Chapman, Entrust, Health First, and Humana of the request for information. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that 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). This office has received responses from Benefit Planners, Boon-Chapman, Entrust, and Humana objecting to the release of portions of their information. We have considered the exceptions claimed and have reviewed the submitted information. We have also considered written comments submitted by the requestor. *See Gov't Code § 552.304* (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that the requestor does not object to Boon-Chapman's position. Boon-Chapman seeks to have the city withhold certain financial information it marked as confidential. Therefore, we find that this information is not responsive to the request, and the city need not release it to the requestor. The remainder of Boon-Chapman's proposal must be released to the requestor. We next note that the city has not submitted information from Health First. Accordingly, this ruling does not address Health First's information, and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

We now turn to the arguments of the responding third parties whose information is at issue. Humana first claims that a small portion of its information is confidential under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d-1320d-8. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You claim that some of the submitted information is subject to HIPAA.<sup>1</sup> At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See id.*, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of title 45 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a). Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider that transmits any health information in electronic form in connection with a transaction covered by subchapter C, subtitle A of title 45. *See* 45 C.F.R. § 160.103.

In this instance, the city has not asserted nor demonstrated how or why it is a covered entity under HIPAA, and although Humana argues that the information at issue is protected health information under HIPAA, Humana has not explained or otherwise established how this information, in the hands of the city, is confidential under HIPAA. Thus, we conclude that HIPAA is not applicable to any of Humana's information, and therefore, none of its information may be withheld on that basis.

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<sup>1</sup> We note that, if applicable, HIPAA generally preempts a contrary provision of state law. *See* 45 C.F.R. §§ 160.202, 160.203.

Next, Benefit Planners claims that its information is excepted from disclosure under section 552.104 because release would give advantage to a competitor or bidder. Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. However, the purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Therefore, we do not consider Benefit Planners' claim under section 552.104, and because the city does not contend that the requested information is excepted under section 552.104, none of it may be withheld on this basis.

Benefit Planners, Entrust, and Humana claim that their proposal information, in part or in whole, is excepted under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “[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[.]” *See* Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has 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 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 a single or ephemeral event 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) (emphasis added); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component 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.<sup>2</sup> *See* Open Records Decision No. 552 at 5 (1990). 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) 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. *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); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). With regard to Benefit Planners' arguments, we note that in construing section 552.110(b), this office has looked to *National Parks*, which established the standard for applying the correlative exception in the federal Freedom of Information Act ("FOIA"). Open Records Decision No. 639 at 3 (1996). Under the *National Parks* test, commercial or financial information is confidential under Exemption Four of FOIA "if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks*, 498 F.2d at 770 (footnote omitted). Seventeen years later, the same court reconsidered the *National Parks* standard in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). While reaffirming the two-pronged test set out in its previous ruling for situations in which information was submitted to the government under compulsion, the Court of Appeals for the District of Columbia established a different test for determining whether commercial or financial information is confidential under Exemption Four when information is provided to the government on a voluntary basis. *Critical Mass*, 975 F.2d 879. The court concluded that "financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.*

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<sup>2</sup> The 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).

However, pursuant to a decision by the Third Court of Appeals and a change made to section 552.110 by the Texas Legislature in 1999, this office no longer applies the federal test in determining whether commercial or financial information is excepted from disclosure under section 552.110. See Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 7, 1999 Tex. Gen. Laws 4500, 4503; *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.--Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied to commercial and financial information and requires that the third party whose information is at issue make a specific factual or evidentiary showing that disclosure of its information would likely result in substantial competitive injury to itself. See Gov't Code § 552.110(b); Open Records Decision No. 661 at 5-6.

Upon review of the submitted arguments and the relevant information, we find that Benefit Planners and Humana have demonstrated that some of the information that each seeks to withhold is excepted from disclosure under section 552.110. We have noted this information within the submitted documents. Neither Benefit Planners, Entrust, nor Humana has demonstrated that any of the remaining information constitutes either trade secret information under section 552.110(a) or commercial or financial information, the release of which would cause substantial competitive harm to either of these parties under section 552.110(b). See, e.g., Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor). Therefore, none of the remaining information may be withheld under section 552.110.

We now turn to the city's argument under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

We note that the information for which the city claims section 552.111 involves Flusche, Van Beveren, and Kilgore, P.C., a private entity. Section 552.111 can encompass communications between a governmental body and a third party acting as a consultant. See

Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (predecessor to section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (predecessor to section 552.111 applies to memoranda prepared by governmental body's consultants). After reviewing your arguments and the information at issue, we find that some of this information constitutes interagency or intraagency communications consisting of advice, recommendations, and opinions that reflect the policymaking processes of the city. Therefore, you may withhold the information we have marked under section 552.111. We find that you have not demonstrated the applicability of section 552.111 to any of the remaining information at issue.

Furthermore, we note that section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. We note, however, that section 552.137 does not apply to the work e-mail addresses provided of officers or employees of a governmental body, a website address or uniform resource locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We have marked e-mail addresses within the submitted information that are confidential under section 552.137(a). Unless the city has received affirmative consent to disclose these e-mail addresses, the city must withhold them under section 552.137 of the Government Code.

Finally, we note that a portion of the submitted information is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the city must withhold the information we have marked pursuant to section 552.110 in Benefit Planners' and Humana's proposals. The city may withhold the information we have marked pursuant to section 552.111, and must withhold the e-mail addresses we have marked pursuant to section 552.137, unless the city has consent to release them. The remaining submitted information that is responsive must be released in accordance with the applicable copyright laws.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

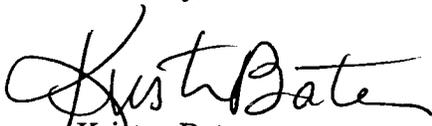
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/lmt

Ref: ID# 191249

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