ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2003

Ms. Veronica Ocanas
Assistant City Attorney
City of Corpus Christi
PO Box 9277
Corpus Christi, Texas

OR2003-9233

Dear Ms. Ocanas:

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# 192327.

The City of Corpus Christi (the "city") received a request for the most recent proposals submitted by Comp Care, Saratoga Medical Center ("Saratoga"), and Concentra Medical Centers ("Concentra"). The city has provided most of the information to the requestor. You state that some of the requested information may be confidential under section 552.110 of the Government Code, but make no arguments and take no position as to whether the information is so excepted from disclosure. You have supplied copies of the information at issue in each proposal. This information comprises balance sheets and/or fee schedules that the parties identified as proprietary or copyrighted in their respective bids. You have also submitted correspondence indicating that you have notified the three third parties whose information is at issue in the current request pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 Public Information Act (the "act") in certain circumstances). Two of the third parties, Saratoga and Concentra, have responded to the notice. We have considered all of the submitted arguments and reviewed the submitted information.

Initially, we note that the parties have designated the information at issue in their respective proposals as confidential or proprietary. However, information is not confidential under the act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 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."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

Under section 552.305(d) of the Government Code, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice 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, Comp Care has not submitted to this office its reasons explaining why its information should not be released. Therefore, Comp Care has provided us no basis on which to conclude that its information is excepted from disclosure. *See, e.g.*, Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, the information at issue in Comp Care's proposal must be released.

Saratoga contends the information at issue in its proposal is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104, however, is to protect a governmental body's interests in competitive bidding situations, not the interests of third parties. *See* Open Records Decision No. 592 (1991). As the city does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the information at issue in Saratoga's proposal may not be withheld under section 552.104.

Finally, Concentra claims that the information at issue in its proposal is excepted from disclosure under sections 552.110 and 552.101 of the Government Code. Section 552.110(b) protects the property interests of private persons by excepting from disclosure 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. When raising this exception, the governmental body or interested third party must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from

disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). After reviewing Concentra's arguments and the information at issue, we conclude that the company has made a specific factual showing that substantial competitive injury would likely result from disclosure. Accordingly, the information at issue in Concentra's proposal must be withheld.[1]

In summary, the information at issue in Comp Care's proposal must be released as no grounds have been provided to overcome the presumption of openness for public records under the act. The information at issue in Saratoga's proposal is not excepted from disclosure under section 552.104 and must be released. However, the information at issue in Concentra's proposal is excepted from disclosure under 552.110(b) and must be withheld.

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).

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[1]As our conclusion under section 552.110(b) is dispositive of all the information for which Concentra claims exceptions to disclosure, we need not address its arguments under sections 552.101 and 552.110(a). Moreover, since Concentra was the only party to assert that its materials were protected by copyright and we have determined that all of the material for which a ruling has been requested must be withheld, we dispense with a discussion of compliance issues related to copyright law.

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,

Steven W. Bartels
Assistant Attorney General
Open Records Division

SWB/seg

Ref: ID# 192327

Enc. Submitted documents

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