



ATTORNEY GENERAL OF TEXAS
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December 30, 2003

Ms. Mindy Ward
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OR2003-9367

Dear Ms. Ward:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193385.

The City of San Angelo (the "city") received a request for "health care insurance vendor proposals and rates from your health care bid process within the last two years." Although the city defers to the interested third parties who may have a proprietary interest in the requested information to raise arguments for withholding the requested information, it indicates that this information may be subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the city notified eighteen interested third parties of the city's receipt of the request and of each company's right to submit arguments to this office as to why any portion of the requested information relating to each company should not be released to the requestor. The third parties which received this notice from the city are Blue Cross Blue Shield of Texas, Inc. ("Blue Cross"), United Healthcare ("United"), Atlas Administrators, Inc. ("Atlas"), Scott & White Prescription Services ("Scott & White"), Employee Benefit Administrators, Inc. ("EAB"), Mutual of Omaha Insurance Co. ("Mutual"), CIGNA Healthcare ("Cigna"), United Provider Services ("UPS"), Health Administration Services, Inc. ("HAS"), USI Administrators, Inc. ("USP"), Aetna Health, Inc. ("Aetna"), EyeMed, Catalyst Rx ("Rx"), Humana, Inc. ("Humana"), Legacy Health Plan ("Legacy"), Maxor Plus ("Maxor"), UniCare, and TML Intergovernmental Employee Benefits Pool ("TML"). *See Gov't Code § 552.305(d); 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 to disclosure under Public Information Act (the "Act") in certain circumstances).*

We have considered arguments submitted by Aetna, Rx, and Humana and have reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, no party notified by the city pursuant to section 552.305, other than Aetna, Rx, and Humana, has submitted comments to this office explaining why any portion of the submitted information relating to that party should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to each of the third parties listed above, other than Aetna, Rx, and Humana, would implicate their proprietary interests. *See, e.g.*, Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the city may not withhold any portion of the submitted information relating to these parties on the basis of any proprietary interest that they may have in the information.

Next, we note that social security numbers that are contained within USI's proposals may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.¹ A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from disclosure under section 552.101 on the basis of that federal provision. We caution the city, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the city should ensure that they were not obtained or are not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

In addition, we note that portions of USI's proposals are excepted from disclosure, and that portions of Atlas' proposals may be excepted from disclosure, pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

information that is protected from disclosure under the common-law right to privacy. Information must be withheld pursuant to the common-law right to privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683.

Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). Based on our review of USI's proposals, we find that the portions, which we have marked, are protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the city must withhold this particular marked information within USI's proposals pursuant to section 552.101 of the Government Code. The city must release the remaining portions of USI's proposals to the requestor. Further, we note based on our review of Atlas' proposals that portions of these particular proposals, which we have marked, are protected from disclosure under the common-law right to privacy, but only if these portions are associated with actual living individuals whose privacy interests would be implicated by the release of the marked information. In that event, we conclude that the city must withhold these marked portions of Atlas' proposals pursuant to section 552.101 of the Government Code. Otherwise, the city must release these marked portions of Atlas' proposals to the requestor.

We now address the arguments presented to us by Aetna, Rx, and Humana regarding each of these companies' requested information. Aetna contends that portions of its information is proprietary and confidential because it submitted this information to the city in confidence. We note, however, that information is not considered to be confidential under the Act simply because the party submitting it to the governmental body anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas 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. *See Attorney General Opinion JM-672* (1987); *see also* Open Records Decision Nos. 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."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, the submitted information is

encompassed by an applicable exception to disclosure under the Act, it must be released, notwithstanding any agreement specifying otherwise.

Aetna, Rx, and Humana claim that portions of the submitted information relating to each company are excepted from disclosure pursuant to section 552.110 of the Government Code. We note that 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a 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 person's trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

² 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 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) 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). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See Open Records Decision No. 639 at 4 (1996)* (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).

Based on our review of Aetna's, Rx's, and Humana's arguments and each of their respective bid proposals, we find that Rx and Humana have adequately demonstrated that portions of each company's respective information constitute trade secret information under section 552.110(a). Accordingly, we conclude that the city must withhold the portions of Rx's and Humana's proposals, which we have marked, pursuant to section 552.110(a) of the Government Code. We also find that Aetna, Rx, and Humana have adequately demonstrated that the release of portions of each company's respective information would cause Aetna, Rx, and Humana substantial competitive harm for purposes of section 552.110(b). Accordingly, we also conclude that the city must withhold the portions of each of these company's proposals, which we have marked, pursuant to section 552.110(b) of the Government Code.

However, we note that although Rx argues that the release of some pricing information contained within its proposal would cause it substantial competitive harm, it appears that this particular pricing information relates solely to this particular procurement process. Consequently, we do not believe that Rx has adequately demonstrated that the release of this particular pricing information will negatively impact Rx in future competitive situations. *See generally Open Records Decision Nos. 514 (1988)* (public has interest in knowing prices charged by government contractors), 509 at 5 (1988) (stating that 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 was entirely too speculative), 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110 and that pricing proposals are entitled to protection only during bid submission process), 184 (1978). Accordingly, we conclude that the city may not withhold any portion of this particular information contained within Rx's proposal under section 552.110 of the Government Code.

We note that a small portion of the proposals submitted by Cigna is excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, "access device" means 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:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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. Accordingly, we conclude that the city must withhold the bank account number that we have marked in Cigna's proposal pursuant to section 552.136 of the Government Code.

Aetna also claims that its proposal contains e-mail addresses that are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 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, 78th 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. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. After careful review of Aetna's representations and its submitted bid proposal, we find that none of the e-mail addresses contained within this proposal are excepted from disclosure under section 552.137(a). Accordingly, we conclude that the city may not withhold any remaining portion of Aetna's bid proposal under section 552.137 of the Government Code.

Finally, we note that portions of some of the submitted proposals are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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 such 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, social security numbers that are contained within USI's proposals may be confidential under federal law. The city must withhold the information within USI's proposals that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The city must also withhold the portions of Atlas' proposals, which we have marked, pursuant to section 552.101 in conjunction with the common-law right to privacy, but only if these portions are associated with actual living individuals whose privacy interests would be implicated by the release of this marked

information. The city must withhold the portions of the proposals of Aetna, Rx, and Humana, which we have marked, pursuant to section 552.110 of the Government Code. The city must withhold the bank account number that we have marked within Cigna's proposals pursuant to section 552.136 of the Government Code. The city must release to the requestor the entirety of the proposals of Scott & White, HAS, Eyemed, Legacy, TML, Blue Cross, United, EAB, Mutual, UPS, Maxor, and UniCare, as well as the remaining portions of the proposals of Atlas, Cigna, USI, Aetna, Rx, and Humana, in compliance with the applicable copyright law.

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,



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RJB/lmt

Ref: ID# 193385

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