



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2005

Ms. Maleshia B. Farmer
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2004-8734A

Dear Ms. Farmer:

This office issued Open Records Letter No. 2004-8734 (2004) on October 14, 2004. In that ruling, we did not rule on information related to CIGNA HealthCare ("CIGNA"). We have determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on October 14, 2004. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210924.

The City of Fort Worth (the "city") received a request for copies of proposals sent to the city "in response to Request for Proposals #04-0025, for prescription drug benefit management services dated March 2004." As for the submitted information, although you make no arguments and take no position as to whether it is excepted from disclosure, pursuant to section 552.305 of the Government Code, you notified the interested third parties of the request and of their opportunity to submit comments to this office.¹ *See* Gov't Code

¹The city provided documentation showing that it notified the following third parties of this request: Systemed, L.L.C. ("Systemed"); RX West; Prime Therapeutic, Inc. ("Prime Therapeutic"); Prescription Solutions; Express Scripts; Eckerd Health Services ("EHS"); CVS Pharmcare – TX ("CVS"); United Health Care ("United"); CIGNA; Walgreen's Pharmacy ("Walgreen's"); Catalyst RX ("Catalyst"), and HealthSCOPE Benefits, Inc. ("HealthSCOPE").

§ 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 to disclosure in certain circumstances). We have received correspondence from EHS, Walgreen's, CIGNA, Prescription Solutions, Catalyst, HealthSCOPE, and United. We have considered all submitted arguments and reviewed the information the city submitted.

Initially, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). Within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D).

In this instance, you inform us that the city received this request on July 8, 2004. However, you did not request a ruling from this office until August 10, 2004 and did not submit the requested information until September 2, 2004. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). We therefore conclude that the city failed to comply with section 552.301 in requesting this ruling.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third party interests can provide a compelling reason to withhold information, we will consider whether any of the requested information must be withheld to protect third party interests.

Next, 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 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, neither Systemed, RX West, Prime Therapeutic, Express Scripts, nor CVS has submitted to this office any reasons explaining why their information should not be released. We thus have no basis for

concluding that any portion of the submitted information relating to Systemed, RX West, Prime Therapeutic, Express Scripts, or CVS constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g., Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990).* Accordingly, we turn to the arguments of the third parties who submitted correspondence to this office.

First, we address United's argument that its information was submitted to the city with the "understanding that the [c]ity would treat it as confidential." However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 676-78 (Tex. 1976).* Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986).* Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

CIGNA, Walgreen's, Prescription Solutions, and United each argue that certain information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general).* As the city does not raise section 552.104, this section does not apply to the requested information. *See Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).* Therefore, the city may not withhold any of the information at issue under section 552.104.

CIGNA, EHS, Walgreen's, Prescription Solutions, Catalyst, and United each argue that portions of their information are excepted from disclosure pursuant to section 552.110 of the Government Code.² This section protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person

²We note that HealthSCOPE's response to the specified RFP contained information belonging to Catalyst. Accordingly, HealthSCOPE informs this office that it adopts the response submitted to this office by Catalyst for the information at issue. We further note that United also asserts their trade secret and commercial financial information is excepted under section 552.101 of the Government, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See Gov't Code § 552.101.* However, section 552.110 of the Government Code is the proper exception to claim for this type of information. *See Gov't Code § 552.110(a), (b).* Therefore, we will address United's trade secret and commercial financial information arguments under section 552.110.

from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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 single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its competitors];
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (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) 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having reviewed the submitted briefs, we conclude that CIGNA, EHS, Walgreen’s, Prescription Solutions, Catalyst, and United have each established that portions of their information are excepted under section 552.110. We have marked the information that the city must withhold. However, we conclude that CIGNA, EHS, Walgreen’s, Prescription Solutions, Catalyst, and United have failed to make a *prima facie* case that the remainder of their information constitutes trade secrets. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Further, we find that CIGNA, EHS, Walgreen’s, Prescription Solutions and Catalyst have made only conclusory allegations and have made no specific factual or evidentiary showing that release of the remainder of their information would likely cause them substantial commercial harm. *See* Open Records Decision Nos. 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). Accordingly, pursuant to section 552.110, the city must withhold only the information we have marked within the proposals of CIGNA, EHS, Walgreen’s, Prescription Solutions, Catalyst, and United.³

Next, we note that the submitted proposals contain insurance policy numbers that are subject to section 552.136 of the Government Code. This section provides that “[n]otwithstanding 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, the city must withhold the policy numbers we have marked pursuant to section 552.136.

³We note that the information the city submitted related to CIGNA is in electronic format. Accordingly, we have marked hard-copies of the information related to CIGNA to indicate which portions must be withheld under section 552.110.

Finally, we note that some of the submitted information appears to 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. 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 under sections 552.110 and 552.136 of the Government Code. The remaining submitted information must be released in accordance with applicable copyright laws for any information protected by copyright.

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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Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 210924

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