



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 15, 2006

Ms. Debra G. Rosenberg  
Atlas & Hall, L.L.P.  
Attorney for McAllen Independent School District  
P. O. Box 3725  
McAllen, Texas 78502-3725

OR2006-14801

Dear Ms. Rosenberg:

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# 268042.

The McAllen Independent School District (the "district"), which you represent, received two requests for information pertaining to RFP No. 6643, including the bid proposals and information pertaining to the district's insurance consultant.<sup>1</sup> You state that the submitted information may be excepted from disclosure under sections 552.101 and 552.110 of the Government Code, but take no position as to whether this information is excepted under these sections. Instead, you state that the request may implicate third party proprietary interests. Accordingly, you state, and provide documentation showing, that pursuant to section 552.305(d) of the Government Code, you notified the interested third parties<sup>2</sup> of the

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<sup>1</sup>You inform us and provide documentation showing that the district sought and received clarification from the first requestor. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to narrow his request).

<sup>2</sup>The district sent third-party notice to American Administrative Group, Inc., Boon-Chapman, Blue Cross Blue Shield of Texas, Entrust, Group & Pension Administrators, Group Resources, Inc., Health Administration Services, Humana, Insurance Management Services, Kanawha Healthcare Solutions/KMG, The Loomis Company, Catalyst RX, and The Health Care Partnership.

request for information and of each third party's right to submit arguments explaining why the information concerning it should not be released. *See* Gov't Code § 552.305(d) (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 certain circumstances). We have received correspondence from two third parties: Entrust and Health Administration Services ("HAS"). In addition, we note that the bid proposal submitted by Blue Cross Blue Shield of Texas ("BCBSTX") objects to the release of BCBSTX's information. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that you have only submitted the bid proposals for our review. Therefore, to the extent any additional information existed on the date the district received this request, we assume it has been released. If the district has not released any such records, the district must release them to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code 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, only Entrust, HAS, and BCBSTX have submitted comments to this office explaining how release of the requested information would affect each company's proprietary interests. The remaining third parties failed to submit comments to this office explaining how release of the requested information would affect each company's proprietary interests. Thus, the remaining third parties whose information is responsive have failed to provide us with any basis to conclude that any of their information is proprietary for purposes of the Act. Therefore, the district may not withhold any information relating to the remaining third parties under section 552.110. *See, e.g., id.* § 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).

Entrust raises section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that other statutes make confidential. Gov't Code § 552.101. Entrust contends that some of its bid proposal is protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. 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* HIPAA, 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 (“Privacy Rule”); *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, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, No. 03-04-00743-CV, 2006 WL 1649003 (Tex. App.–Austin, June 16, 2006, no. pet. h.) (disclosures under the Act fall within section 164.512(a)(1) of the Privacy Rule); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Entrust, HAS, and BCBSTX raise section 552.110 of the Government Code. Section 552.110 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) “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.” *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 [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 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). 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 party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.<sup>3</sup> *See* ORD 552 at 5. The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

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.” 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1999).

After reviewing the information at issue, we find that BCBSTX and Entrust have failed to demonstrate that any portion of the information at issue meets the definition of a trade secret, and has failed to demonstrate the necessary factors to establish a trade secret claim for this information. *See* ORD 552 at 5-6; *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for

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<sup>3</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 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).

continuous use in the operation of the business”). We therefore determine that no portion of the information at issue is excepted from disclosure under section 552.110(a).

We find, however, that BCBSTX, Entrust, and HAS, and have made specific factual or evidentiary showings that the release of a portion of the information at issue, which we have marked, would cause each company substantial competitive harm. Thus, this marked information must be withheld pursuant to section 552.110(b). We conclude, however, that BCBSTX, Entrust, and HAS have failed to demonstrate that any other portion of the information at issue constitutes commercial or financial information, the release of which would cause each company substantial competitive harm. *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 (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, pursuant to section 552.110(b), the district must withhold only those portions of the information at issue that we have marked.

Entrust also raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because Entrust has not demonstrated that the remaining information at issue qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor made the specific factual or evidentiary showing required under section 552.110(b) that the release of the remaining information at issue would result in substantial competitive harm, we conclude that the district may not withhold any of the remaining information pursuant to section 552.131(a). Furthermore, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Accordingly, none of the remaining information is excepted under section 552.131(b) of the Government Code.

We note that a portion of the remaining submitted information is subject to section 552.136 of the Government Code. Section 552.136 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 district must withhold the insurance policy numbers that we have marked pursuant to section 552.136.

Finally, we note that some of the materials at issue contain notice of copyright protection. 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 district must withhold the information that we have marked under section 552.110(b) of the Government Code. The district must withhold the insurance policy numbers that we have marked under section 552.136 of the Government Code. The district must release the remaining information. In releasing information protected by copyright, the district must comply with 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).

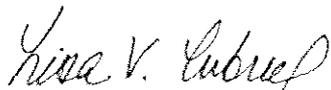
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Lisa V. Cubriel  
Assistant Attorney General  
Open Records Division

LVC/eb

Ref: ID# 268042

Enc. Submitted documents

c: Mr. Scott Koenig  
P.O. Box 38184  
Dallas, Texas 75238-0184  
(w/o enclosures)

Ms. Kaitlin Bell  
The Monitor  
1400 E. Nolana  
McAllen, Texas 78504  
(w/o enclosures)

Ms. Stephanie DeSando  
Assistant Vice President, Client Services  
American Administrative Group, Inc.  
750 Warrenville Road, Suite 200  
Lisle, Illinois 60532  
(w/o enclosures)

Mr. Kevin Chambers  
Director of Marketing  
Boon-Chapman  
12301 Research Blvd., Suite 400  
Austin, Texas 78759  
(w/o enclosures)

Mr. Steve Keevan  
Regional Sales Executive  
Blue Cross Blue Shield of Texas  
P.O. Box 1471  
Harlingen, Texas 78551  
(w/o enclosures)

Karon Gidney  
ENTRUST  
TCPN Activities Coordinator  
14701 St. Mary's, Suite 150  
Houston, Texas 77079  
(w/o enclosures)

Mr. Jeff Mcpeters  
Group & Pension Administrators  
Park Central 8, 12770 Merit Drive 2<sup>nd</sup> Floor  
Dallas, Texas 75251  
(w/o enclosures)

Jo Lester  
Group Resources, Inc.  
2100 Ross Avenue, Suite 830  
Dallas, Texas 75201  
(w/o enclosures)

Ms. Stacey Minton  
Account Executive  
Health Administration Services  
100 Glenborough Drive, #450  
Houston, Texas 77067  
(w/o enclosures)

Mr. Thomas Silliman  
Large Group Sales Executive–S. Texas Division  
Humana  
8431 Fredericksburg, Suite 570  
San Antonio, Texas 78229  
(w/o enclosures)

Ms. Monica Bland  
Insurance Management Fund  
P.O. Box 15688  
Amarillo, Texas 79105  
(w/o enclosures)

Mr. Michael Reagan  
Regional Sales Director  
Kanawha Healthcare Solutions/KMG  
210 S. White Street  
Lancaster, South Carolina 29720  
(w/o enclosures)

Mr. Bill Bixter  
The Loomis Company  
850 N. Park Road  
Wyomissing, Pennsylvania 19610  
(w/o enclosures)

Mr. Mark D. Dickey  
Catalyst RX  
Vice President, Sales  
1490 Woodhaven Drive  
Propser, Texas 75078  
(w/o enclosures)

The Health Care Partnership  
Ben L. Harrison  
14001 North Dallas Parkway, Suite 1200  
Dallas, Texas 75240  
(w/o enclosures)