



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2009

Mr. Matthew C.G. Boyle
Assistant City Attorney
Boyle & Lowry, L.L.P.
4201 Wingren Suite 108
Irving, Texas 75062-2763

OR2009-03570

Dear Mr. Boyle:

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# 338210.

The City of Hurst (the "city"), which you represent, received a request for the following information related to RFP #08-016: (1) complete vendor selection criteria documentation; (2) completed vendor pricing submission forms; (3) completed pricing tabulations/worksheets; and (4) pricing materials submitted by top ten candidates. You believe that this request for information implicates the interests of third parties under sections 552.101 and 552.110 of the Government Code. You have submitted arguments under section 552.110. You also state that you notified the interested third parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Express. We have considered the claimed exceptions and have reviewed the information you submitted.

Initially, we note that you have not submitted information responsive to categories one, two, or three of the request for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore,

¹You have submitted information pertaining to the following third parties: Aetna, Inc.; BlueCross BlueShield of Texas; CIGNA; Delta Dental Insurance Company; Express Scripts, Inc. ("Express"); JI Specialty Services, Inc.; Principal Financial Group; and UMR.

to the extent information responsive to these aspects of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; 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).

We note that portions of the submitted documents are not responsive to the instant request because they do not reflect pricing materials. The city need not release non-responsive information in response to this request and this ruling will not address that information.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from any third party other than Express. On behalf of these third parties, however, you assert that release of the submitted information "would be very damaging to the submitting vendors and would harm their position in the competitive marketplace." Although you assert that the submitted information is excepted under section 552.110 of the Government Code, we note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, because we have received no arguments from any third party other than Express, none of the remaining third parties has demonstrated that any of the submitted information is confidential or proprietary for the purposes of the Act, and the city may not withhold any of their information under section 552.110. *See id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

The city raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). You have not directed our attention to any law, nor are we aware of any law, under which any of the submitted information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code.

Express asserts that its pricing information is excepted under section 552.110 of the Government Code.² Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. 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. *See id.*; ORD 661; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Upon review, we find that Express has established that the release of the pricing information at issue would cause substantial competitive injury; therefore, the city must withhold this information, which we have marked, under section 552.110(b). As we are able to make this determination, we do not address the company’s arguments for this information under section 552.110(a).

Finally, we note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the city must withhold the information we have marked under section 552.110 of the Government Code. The remaining submitted information must be released to the requestor, but any information protected by copyright must be released in accordance with copyright law.

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

²We note that the city did not submit most of the pricing information that Express seeks to withhold. This ruling does not address information that was not submitted by the city 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).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jb

Ref: ID# 338210

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Principal Financial Group
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Addison, Texas 75001
(w/o enclosures)

Mr. Kevin McCormick
JI Specialty Services, Inc.
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Austin, Texas 78758
(w/o enclosures)

Ms. Kelly Millender
UMR
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Plano, Texas 75093
(w/o enclosures)

Ms. Melissa J. Copeland
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Raleigh, North Carolina 27619-9764
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Mr. Chris Hinds
Delta Dental Insurance Company
700 Parker Square, Suite 150
Flower Mound, Texas 75028
(w/o enclosures)

Express Scripts, Inc.
Attn: President
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Maryland Heights, Missouri 63043
(w/o enclosures)

Aetna, Inc.
c/o Mr. Matthew C.G. Boyle
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