



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 17, 2010

Mr. Eric G. Rodriguez  
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OR2010-02364

Dear Mr. Rodriguez:

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# 371163.

The Harlingen Consolidated Independent School District (the "district"), which you represent, received a request for the average fee discounts submitted by all bidders in response to question number sixty-six of a specified request for proposal. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also state the release of the submitted information may implicate the proprietary interests of BlueCross BlueShield of Texas ("BCBSTX"); Valley Baptist Insurance Company d/b/a Valley Baptist Health Plans ("VBHP"); and UnitedHealthcare Choice ("UnitedHealthcare"). Accordingly, you have notified these third parties of the request and of their right to submit arguments stating why their information should not be released. *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 the Act in certain circumstances). We have received comments from BCBSTX and VBHP. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have submitted information that is not responsive to the instant request. The request only seeks the average fee discounts submitted by the bidders to a request for proposal. Thus, the remaining submitted information, which we have marked, is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release that information in response to the request.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code

§ 552.104. The purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, in some situations, section 552.104 will operate to protect from disclosure bid information that is submitted by successful bidders. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).

You acknowledge the responsive information relates to an executed contract. However, you state the district will solicit bids for the same services "on a regular basis" and you inform us that "[t]his type of contract is not a one-time contract which the district would be unlikely to enter into again with an insurance provider." Upon review, however, we find you have failed to establish that release of the responsive information would cause potential harm to the district's interests in upcoming competitive bidding situations. Accordingly, the district may not withhold the responsive information under section 552.104.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You raise section 552.101 in conjunction with confidentiality statements BCBSTX, VBHP, and UnitedHealthcare attached to their proposals and argue that due to these confidentiality statements, the district "cannot comply with [the] request because the records requested are considered confidential under [s]ection 552.101[.]" However, information is not confidential under the Act simply because the party that submitted the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 ("[T]he obligations of a governmental body under [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). Therefore, unless the responsive information at issue falls within an exception to disclosure, the district must release it, notwithstanding any expectation or agreement to the contrary.

You also contend the responsive information is excepted from disclosure under section 552.101 of the Government Code as information protected by copyright law. However, copyright law does not make information confidential for the purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). 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). Nevertheless, an officer for public information must comply with copyright law 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).

Next, we note 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 not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received any correspondence from UnitedHealthcare. Thus, UnitedHealthcare has not demonstrated that it has a protected proprietary interest in any of the responsive information. *See id.* § 552.110(a)-(b); 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. Accordingly, the district may not withhold any portion of the responsive information on the basis of any proprietary interest UnitedHealthcare may have in it.

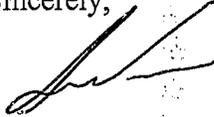
BCBSTX and VBHP raise section 552.110(b) of the Government Code for their information. Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

BCBSTX states release of its average fee discounts would cause it substantial competitive harm because "[w]ith knowledge of the [average fee discounts], competitors will be able to 'meet or beat' any future proposal BCBSTX might submit." Similarly, VBHP states release of its average fee discounts would allow its competitors to use it "to develop and negotiate their own provider fee discounts to undercut VBHP's position in the marketplace," causing it substantial competitive harm. Having considered both companies' arguments and reviewed the information at issue, we find BCBSTX and VBHP have made a specific factual or evidentiary showing that release of their average fee discounts would cause them substantial competitive harm. Accordingly, the district must withhold BCBSTX's and VBHP's average fee discounts under section 552.110(b). The remaining responsive information must be released.

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.

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](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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 371163

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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