



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



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ATTORNEY GENERAL OF TEXAS

September 9, 2015

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Maureen Franz
Deputy Chief Counsel
Texas Health and Human Services Commission
P.O. Box 13427
Austin, Texas 78711

OR2015-18804

Dear Ms. Franz:

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# 578451.

The Texas Health and Human Services Commission (the "commission") received nine requests for information concerning the commission's Request for Proposals No. 529-12-0002. Although you take no position with respect to the public availability of the requested information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified Blue Cross and Blue Shield of Texas ("Blue Cross") and Evercare of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining 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 arguments submitted by Blue Cross and Evercare. We have considered these arguments and reviewed the submitted information.

First, we address the information related to Evercare. We note this information is the subject of pending litigation in *Evercare of Tex., LLC v. Greg Abbott, Attorney Gen. of Tex.*, No. D-1-GN-12-000189, in the 126th District Court of Travis County, Texas. Accordingly,

we will not address the public availability of Evercare's information and will allow the trial court to resolve the issue of whether these records must be released to the requestors.

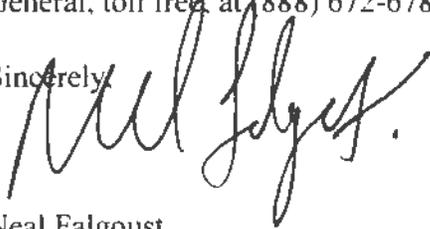
Next, we address Blue Cross's information, submitted as Exhibit E. Blue Cross raises section 552.104 of the Government Code. Section 552.104(a) of the Government Code exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *7 (Tex. June 19, 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at *9. Blue Cross states the information at issue could be used by a competing bidder to tailor its own response to a request for proposals, thereby undercutting Blue Cross's own response. For many years, this office concluded the terms of a contract, and especially the pricing of a winning bidder, are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited only to ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 2015 WL 3854264, at *1, *8. After reviewing the information at issue and considering the arguments, we conclude Blue Cross has established the release of the information submitted in Exhibit E would give an advantage to a competitor or bidder. Accordingly, the commission may withhold Exhibit E under section 552.104(a) of the Government Code. As our ruling is dispositive, we do not address any of the remaining arguments.

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.texasattorneygeneral.gov/open_orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/bhf

Ref: ID# 578451

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Evercare of Texas
d/b/a UnitedHealthcare Community Plan
c/o Mr. John F. Kapacinskas
Fredrickson & Byron
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402-1425
(w/o enclosures)

Blue Cross and Blue Shield of Texas
c/o Mr. Andrew F. MacRae
Levatino Pace
Building K, Suite 125
1101 South Capital of Texas Highway
Austin, Texas 78746
(w/o enclosures)

Coventry Health Care, Capital BlueCross, WellCare, Superior HealthPlan, Bank of America—Merrill Lynch Equity Research, Raymond James & Associates, Blue Cross and Blue Shield of Texas, Health Management Associates, Amerigroup Corporation and Taylor Dunham, LLP have voluntarily withdrawn their requests for information in writing. In addition, the Attorney General represents to the Court that the requestors Molina Healthcare, Bruce Bower, Universal Health Care Group, Magellan Health Services, Debra Maquet, and D. McPhaul have abandoned their requests for information. One final request, from DC Tech, was determined by the parties not to implicate information Plaintiff contends is exempt from disclosure.

Further, Letter Rulings OR2015-18804 and OR2012-00822 will not be considered as a previous determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(a), (f); and, if the precise information is requested again, HHSC may ask for a decision from the Attorney General under Tex. Gov't Code § 552.301(g). Accordingly, HHSC is not required to disclose the requested information subject to release in Letter Rulings OR2015-18804 and OR2012-00822. The parties request that the Court enter this Agreed Order of Dismissal.

The Court is of the opinion that entry of an agreed dismissal order is appropriate.

It is THEREFORE, ORDERED, ADJUDGED and DECREED that this cause is DISMISSED in all respects;

All court costs and attorney fees are taxed to the party incurring same;

All other requested relief not expressly granted herein is denied;

This order disposes of all claims between the parties and is final.

Signed this 31ST day of Jan, 2017.



JUDGE PRESIDING

AGREED:



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UNITEDHEALTHCARE COMMUNITY PLAN



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