



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 28, 2015

Mr. Richard A. McCracken  
Assistant City Attorney  
City of Fort Worth  
Office of the City Attorney  
1000 Throckmorton Street, Third Floor  
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OR2015-20333

Dear Mr. McCracken:

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# 580810 (Fort Worth Reference Nos. W044057, W044368, and W044775).

The City of Fort Worth (the "city") received three requests for information pertaining to a specified request for proposals. You state you have released some information to the first and third requestors. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Aetna Life Insurance Company ("Aetna"); Alliance Work Partners; American Healthways Services, L.L.C. ("Healthways"); Benecard; Blue Cross Blue Shield ("BCBS"); Cigna; Discovery Benefits ("Discovery"); Employee Benefits Corporation; Envision Pharmaceutical Services, L.L.C. ("Envision"); Express Scripts; Group & Pension Administrators, Inc. ("GPA"); Imaging Network Administrators, L.L.C.; Inscope Health, L.L.C. ("Inscope"); MedImpact Healthcare Systems, Inc.; P&A Group; RX Preferred; United Healthcare ("UHC"); Viverae; and Wage Works. Accordingly, you state, and provide documentation showing, you notified these third parties of the requests for information and of the right of each to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Aetna,

BCBS, Cigna, Envision, Express Scripts, Healthways, Inscope, and UHC. We have considered the submitted arguments and reviewed the submitted information.

Initially, you note a portion of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-14275 (2015). In Open Records Letter No. 2015-14275, we determined the city may withhold the information at issue under section 552.104 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the city may continue to rely on Open Records Letter No. 2015-14275 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination).<sup>1</sup> We will address the arguments against release of the submitted information that is not encompassed by Open Records Letter No. 2015-14275.

Next, you acknowledge, and we agree, the city did not comply with its deadlines under section 552.301 of the Government Code in requesting this decision with respect to the first request. Gov't Code § 552.301(b), (e). 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 information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *see also Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). You did not assert any exceptions to withhold the information in response to the first request. You now seek to withhold UHC's information, which was responsive to the first request, from the second and third requestors under section 552.104 of the Government Code. You also seek to withhold GPA's information, which was responsive to the first request, from the third requestor under section 552.104 of the Government Code. However, we note section 552.104 is a discretionary exception and does not make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, in failing to comply with section 552.301 with respect to the first request, the city waived its claims under section 552.104 for UHC's information in regard to the second and third requests, and for GPA's information in regard to the third requestor. Accordingly, the city may not withhold from the second and third requestors the information at issue under section 552.104 of the Government Code based on the city's own interests. Nevertheless, because third-party interests can provide compelling reasons to

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<sup>1</sup>As we are able to make this determination, we need not address the arguments of Aetna, BCBS, Envision, and Express Scripts against disclosure of this information.

overcome the presumption of openness, we will consider the submitted third-party arguments against disclosure of the information at issue.

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, we have not received comments from GPA explaining why the submitted information should not be released. Therefore, we have no basis to conclude GPA has a protected proprietary interest in the submitted information. *See id.* § 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest GPA may have in the information. As no other exceptions to disclosure have been raised, the city must release GPA's information.

UHC seeks to withhold its information under section 552.104 of the Government Code. Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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. UHC states it has competitors. In addition, UHC states release of its information would provide competitors with insider knowledge of UHC's confidential bid information, trade secrets, and methodologies. After review of the information at issue and consideration of the arguments, we find UHC has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold UHC's information under section 552.104(a) of the Government Code.

You seek to withhold the remaining information at issue under section 552.104 of the Government Code. You represent the information pertains to a competitive bidding situation. In addition, you state the city has selected one preferred vendor for each category of service the city offers, but is still negotiating the contracts with the preferred vendors. Thus, you argue release of the information at issue would harm the city's negotiation position with the selected vendors, or a future vendor should the current contract negotiations fail. After review of the information at issue and consideration of the arguments, we find the city has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the remaining information at issue under section 552.104(a).

We note some of the remaining information may 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, the city may continue to rely on Open Records Letter No. 2015-14275 as a previous determination and withhold the identical information in accordance with that ruling. The city must release GPA's information; however, any information subject to copyright may be released only in accordance with copyright law. The city may withhold the remaining information under section 552.104(a) of the Government Code.

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](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,



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CRG/cbz

Ref: ID# 580810

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