



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 16, 2015

Ms. Katheryne Ellison
Assistant General Counsel
Houston Independent School District
Public Information Office - Box 99
4400 West 18th Street
Houston, Texas 77092-8501

OR2015-24113

Dear Ms. Ellison:

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# 588980.

The Houston Independent School District (the "district") received a request for information pertaining to district health care insurance contracts.¹ The district does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the district states, and provides documentation showing, it notified Aetna Behavioral Health, LLC ("Aetna"); CaremarkPCS Health, L.L.C. ("Caremark"); National Pacific Dental, Inc.; and UnitedHealthcare Vision of the district's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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). In correspondence to this office, Aetna and Caremark assert some of the information at issue is excepted from release under the Act. We have considered the submitted arguments and reviewed the submitted information.

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

¹The district informs us it sent an estimate of charges to the requestor, which required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See* Gov't Code § 552.263(a). The district states it received the deposit on September 8, 2015. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, National Pacific Dental, Inc. and UnitedHealthcare Vision have not submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of these third parties, and the district may not withhold any portion of it on that basis. *See* 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 that information is trade secret), 542 at 3.

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, the court concluded a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder's districtor competitor's information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Caremark states it has competitors. In addition, Caremark states release of “the confidential pricing and confidential financial and commercial information” within its contract with the district would give advantage to a competitor or bidder. 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 the *Boeing* decision, section 552.104 is not limited to only 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*, 466 S.W.3d, at 833, 841. After review of the information at issue and consideration of the arguments, we find Caremark has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information Caremark has marked under section 552.104(a) of the Government Code.²

²As our ruling is dispositive, we do not address Caremark's other argument to withhold this information.

Aetna asserts some of its information is excepted from disclosure under section 552.110(b) of the Government Code, which 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[.]” Gov’t Code § 552.110(b). 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). However, as discussed in part above, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Gov’t Code § 552.022(a)(3); ORD Nos. 541, 514, 494.

Having considered Aetna’s arguments and reviewed the information at issue, we find Aetna has failed to establish release of the information at issue would cause it substantial competitive injury. *See* Gov’t Code § 552.110(b). Therefore, the district may not withhold any of Aetna’s information pursuant to section 552.110(b).

To conclude, the district may withhold the information Caremark has marked under section 552.104(a) of the Government Code. The district must release the remaining information.

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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/sb

Ref: ID# 588980

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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