



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 13, 2016

Ms. Michelle L. Villarreal
Deputy City Attorney
City of League City
300 West Walker Street
League City, Texas 77573

OR2016-11099

Dear Ms. Villarreal:

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# 610232.

The City of League City (the "city") received a request for "any records relating to bids/proposals/request for bids for insurance brokers," for employee health care, submitted during 2015 and 2016. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Block Vision; Blue Cross Blue Shield ("Blue Cross"); Boon-Chapman Benefit Administrators, Inc.; ReliaStar Life Insurance Co. d/b/a Voya Financial; Unum Group; Davis Vision; Discovery Benefits; Express Scripts Holding Company ("Express Scripts"); EyeMed Vision Care; Group Administrators, Ltd.; HealthSmart; Lincoln Financial Group; Metlife; Minnesota Life Insurance Company; National Vision Administrators, LLC ("National Vision"); Prudential Insurance Company of America; Sterling Administration Health; Superior Vision; Total Administrative Services Corporation; Benecard Services, Inc.; United Medical Resources ("UMR"); United Concordia Dental ("United Concordia"); United Health Care; Gallaher Benefits Services, Inc.; Hay Group; IPS Advisors; Smith & Associates Consulting; Walker and Associates; Avesis; TML Multistate Intergovernmental Employee Benefits Pool; Aetna Life Insurance Company; and Stealth Partner Group. Accordingly, you state you notified these third parties of the request for information and of their rights 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 Blue Cross, Davis Vision, HealthSmart, Express Scripts, National Vision, UMR, and United Concordia. We have considered the submitted arguments and reviewed the submitted information.¹

Initially, we note 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 received comments only from Blue Cross, Davis Vision, HealthSmart, Express Scripts, National Vision, UMR, and United Concordia explaining why their information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have 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, 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 city may not withhold any of the information at issue on the basis of any proprietary interest the remaining third parties may have in it.

We note Express Scripts argues its information is not responsive to the request for information because the request seeks proposals pertaining to employee health care provided by insurance brokers and Express Scripts is not an insurance broker. However, we note the requestor also requests "any records related to bids and proposals . . . for employee health care." Moreover, the Act requires the governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the city has submitted information for our review, we find the city has made a good-faith effort to submit information that is responsive to the request, and we will address the submitted arguments against disclosure of this information.

¹We note Blue Cross contends the city failed to notify certain third parties of the request for information pursuant to section 552.305(d) of the Government Code. *See* Gov't Code § 552.305(d) (providing that "[i]f release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision."). However, the city does not inform us, nor can we discern, these third parties' proprietary interests would be implicated by the public release of the information at issue. Thus, we find this is not an instance where the city is required to notify these third parties pursuant to section 552.305 of the Government Code.

We note Davis Vision seeks to withhold information the city did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 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*, 466 S.W.3d 831 (Tex. 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 841. Davis Vision, Express Scripts, and Blue Cross state they have competitors. Davis Vision states the disclosure of its information would allow competitors to use the information to structure their own services and products to more effectively compete with Davis Vision by copying or undercutting its business model. Express Scripts states the release of its information would interfere with Express Scripts' ability to negotiate cost savings with drug manufacturers and pharmacies and therefore prevent Express Scripts from passing on those savings to its customers. Blue Cross states the release of its information would divulge the blue print for its business model and possible pricing structure in the health insurance market. 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 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 841. After review of the information at issue and consideration of the arguments, we find Davis Vision, Express Scripts, and Blue Cross have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information we have marked under section 552.104(a) of the Government Code.²

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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. *Id.*; *see also* ORD 661 at 5.

HealthSmart, National Vision, and UMR argue portions of their information are excepted under section 552.110(b) of the Government Code.⁴ Upon review, we find HealthSmart, National Vision, and UMR have demonstrated some of their information constitutes commercial or financial information, the release of which would cause them substantial competitive injury. Accordingly, the city must withhold the information we have marked under section 552.110(b) of the Government Code.⁵ However, upon review, we find HealthSmart, National Vision, and UMR have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause either company substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications, are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

HealthSmart, National Vision, UMR, and United Concordia contend some of their information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find United Concordia, National Vision, and UMR have established a *prima facie* case United Concordia’s “Network Accessibility Analysis,” National Vision’s “GEO Access Report” and “Eye Care Professional Directory,” and UMR’s “Geo Access Reports,” and “Medical Summary” constitute trade secret information for purposes of

⁴Although HealthSmart does not raise section 552.110 of the Government Code in its brief, we understand it to raise this exception based on the substance of its arguments.

⁵As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

section 552.110(a). Accordingly, the city must withhold this information, which we have marked, under section 552.110(a) of the Government Code. However, we find HealthSmart, National Vision, and UMR have failed to establish a *prima facie* case their remaining information meets the definition of a trade secret. Moreover, we find these third parties have not demonstrated the necessary factors to establish a trade secret claim for their remaining information at issue. *See* ORD 402. Therefore, none of the remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”⁶ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

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 withhold the information we have marked under section 552.104(a) of the Government Code. The city must withhold the information we have marked under section 552.110(b) of the Government Code. The city must withhold the information we have marked under section 552.110(a) of the Government Code. The city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The city must release the remaining information; however, any information subject to copyright may be released only 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.

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/>

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[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,



Joseph Keeney
Assistant Attorney General
Open Records Division

JDK/dls

Ref: ID# 610232

Enc. Submitted documents

c: Requestor
(w/o enclosures)

32 Third Parties
(w/o enclosures)