



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 10, 2017

Ms. Krista Cover
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2017-07448

Dear Ms. Cover:

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# 652592 (File No. W153623).

The City of San Antonio (the "city") received a request for all proposals and scoring material pertaining to a specified request for proposals. 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 Aetna Life Insurance Co. ("Aetna"); Benefit Management Administrators, Inc.; Blue Cross and Blue Shield of Texas ("BCBS"); Caremark PCS Health, LLC ("Caremark"); Envisa Care Rx, LP; Express Scripts, Inc.; Humana Wellness; MaxorPlus, Ltd. ("Maxor"); MedImpact Health Care Systems, Inc. ("Med"); PrismRx, LLC ("Prism"); Total Administrative Services, Corp.; and United Healthcare Services, Inc. ("United"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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, Caremark, Med, Maxor, and United.¹ We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the requested information may have been the subject of a previous ruling from this office. In Open Records Letter No. 2017-03352 (2017), this office ruled the city may withhold some information under section 552.104 of the Government Code, must withhold some information under section 552.136 of the Government Code, and must release the remaining information in accordance with copyright law. We have no indication the law, facts, or circumstances upon which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter No. 2017-03352 as a previous determination, and withhold or release the previously ruled upon information in accordance with it. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the current request is not encompassed by the prior ruling, we will consider the exceptions raised.

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) of the Government Code 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 the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude those parties have protected proprietary interests 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 portion of the submitted information related to the remaining third parties on the basis of any proprietary interest they may have in the information.

Next, we note Maxor and Med seek to withhold information not submitted to this office by the city. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted

¹We note although Caremark has submitted comments, it makes no arguments to withhold the submitted information.

by the city, this ruling does not address this information and is limited to the information submitted as responsive by the city.

Aetna, Maxor, and Med assert portions of their information are protected under section 552.104 of the Government Code. BCBS, Prism, and United assert the entirety of their information is protected under section 552.104. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). 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. Aetna, BCBS, Maxor, Med, Prism, and United state they have competitors. In addition, Aetna, BCBS, Maxor, Med, Prism, and United state the information at issue, if released, would give competitors an advantage in submitting future competitive bids. After review of the information at issue and consideration of the arguments, we find Aetna, Maxor, and Med have established the release of the information we marked would give advantage to a competitor or bidder. Additionally, after review of the information at issue and consideration of the arguments, we find BCBS, Prism, and United have established the release of the entirety of their information would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information at issue under section 552.104(a) of the Government Code.²

We note the submitted information contains insurance policy numbers. Section 552.136(b) of the Government Code states “[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.”³ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Thus, the city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We also 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.

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

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter No. 2017-03352 as a previous determination, and withhold or release the previously ruled upon information in accordance with it. The city may withhold the information marked and the information of BCBS, Prism, and United in its entirety under section 552.104 of the Government Code. The city must withhold 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 only be released 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/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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/bw

Ref: ID# 652592

Enc. Submitted documents

c: Requestor
(w/o enclosures)

12 Third Parties
(w/o enclosures)