



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 19, 2019

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OR2019-04583

Dear Mr. Garcia:

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# 751008.

The Lubbock Independent School District (the "district"), which you represent, received a request for information pertaining to a request for proposals for pharmacy benefits, including the submitted proposals, evaluative documents, internal district communications regarding the request for proposals, and the final executed contract.<sup>1</sup> Although the district takes no position as to whether the submitted information is excepted from disclosure under the Act, you state release of the information at issue may implicate the proprietary interests of the following third parties: Aetna ("Aetna"); Blue Cross Blue Shield of Texas ("Blue Cross"); Cerpess RX ("Cerpess"); Employers Health/CVS ("CVS"); Express Scripts ("Express");

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<sup>1</sup>We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

FirstCare Health Plans (“FirstCare”); and United Healthcare (“United”).<sup>2</sup> Accordingly, you state, and provide documentation demonstrating, you notified these third parties of the request for information and of their right 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). You have provided us with comments from Aetna, CVS, and Express. We have also received comments from Blue Cross, FirstCare, and United. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the submitted information is not responsive to the present request for information because it does not pertain to the request for proposals for pharmacy benefits specified in the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release this information in response to the present request.

Next, we note the district has not submitted any evaluative documents, internal communications, or the final contract pertaining to the specified request for proposals in response to the present request. To the extent any additional information responsive to the request existed on the date the district received the request, we assume the district has already released it. If the district has not released any such information, it must do so at this time. *See* Gov’t Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, 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 Cerpas explaining why the information at issue should not be released. Therefore, we have no basis to conclude Cerpas has a protected proprietary interest in any portion of the submitted responsive 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

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<sup>2</sup>We note Blue Cross contends the district 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 district 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 district is required to notify these third parties pursuant to section 552.305 of the Government Code.

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 district may not withhold any portion of the submitted responsive information on the basis of any proprietary interest Cerpass may have in it.

Blue Cross, CVS, FirstCare, and United assert portions of their information at issue are excepted from disclosure under section 552.104(a) of the Government Code.<sup>3</sup> Section 552.104(a) 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*, 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. Blue Cross, CVS, FirstCare, and United state they have competitors. In addition, the third parties state the release of the information at issue would provide an unfair advantage to their competitors. After review of the information at issue and consideration of the arguments, we find the third parties have established the release of the information at issue would give advantage to a competitor or bidder. Accordingly, we conclude the district may withhold the information we marked and indicated under section 552.104(a) of the Government Code.<sup>4</sup>

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

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<sup>3</sup>Although CVS does not cite section 552.104 of the Government Code in its brief, we understand CVS to assert this exception based on the substance of its arguments.

<sup>4</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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.<sup>5</sup> 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* ORD 552 at 5. 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).

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 5-6.

Aetna asserts section 552.110(b) of the Government Code for portions of their information at issue. Upon review, we find Aetna has demonstrated its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury to the company. Accordingly, the district must withhold Aetna’s pricing information, which we have marked, under section 552.110(b) of the Government Code.<sup>6</sup> However, we find Aetna has failed to demonstrate the release of any of its remaining

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<sup>5</sup>The 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).

<sup>6</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

responsive information would result in substantial harm to its competitive position. *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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Therefore, the district may not withhold any of Aetna's remaining responsive information under section 552.110(b) of the Government Code.

Express asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Express has established a *prima facie* case that its client reference information, which we marked, constitutes trade secret information. Accordingly, to the extent Express' client reference information is not publicly available on Express' website, the district must withhold Express' client reference information we marked under section 552.110(a) of the Government Code. However, we conclude Express has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Express has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). As previously noted, pricing 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. Therefore, the district may not withhold any of Express' remaining responsive information under section 552.110(a).

Section 552.136(b) of the Government Code provides, "[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 government body is confidential."<sup>7</sup> 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 district must withhold all insurance policy numbers within the remaining responsive information under section 552.136 of the Government Code.

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<sup>7</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We note some of the remaining responsive information appears to 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 district may withhold the information we marked and indicated under section 552.104(a) of the Government Code. The district must withhold Aetna's pricing information we marked under section 552.110(b) of the Government Code. To the extent Express' client reference information is not publicly available on its website, the district must withhold Express' client reference information we marked under section 552.110(a) of the Government Code. The district must withhold all insurance policy numbers within the remaining responsive information under section 552.136 of the Government Code. The district must release the remaining responsive information; however, any information protected by 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](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,



Blake Brennan  
Attorney  
Open Records Division

BB/eb

Ref: ID# 751008

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

7 Third Parties  
(w/o enclosures)