



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



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ATTORNEY GENERAL OF TEXAS

May 16, 2019

Ms. Alice McAfee
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2019-13157

Dear Ms. McAfee:

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# 765573 (Ref. No. GovWin 19-1).

The Teacher Retirement System of Texas (the "system") received a request for current contract information pertaining to health benefit plans.¹ You state you will release some information to the requestor. You also state you are relying on Open Records Letter No. 2017-16661 (2017) with respect to some of the requested information and withholding the requested information that was also at issue in Open Records Letter Nos. 2017-28511 (2017), 2018-16116 (2018), 2019-02623 (2019) pending the outcome of litigation against our office as a result of these rulings.² *See* Open Records Decision No. 673 (2001) (so long as law,

¹The system states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²With regard to the requested information at issue in these lawsuits, we will allow the trial courts to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public.

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). You claim some of the submitted information may be protected by copyright. Additionally, you state release of the submitted information may implicate the proprietary interests of Aetna Life Insurance Company (“Aetna”), CaremarkPCS Health, L.L.C. (“Caremark”), Humana Insurance Company (“Humana”), SilverScript Insurance Company (“SilverScript”), and UnitedHealthcare Retiree Solutions (“United”). Accordingly, you state, and provide documentation showing, you notified these third parties of the request and their rights to submit arguments to this office. *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, United, Humana, Caremark, and SilverScript. We have considered the submitted arguments and have reviewed the submitted information.

Aetna, Caremark, and SilverScript argue against the release of information that was not submitted by the system. This ruling does not address information that was not submitted by the system and is limited to the information the system has submitted for our review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

The submitted information includes amendments to Aetna contract number K201700005 and Humana contract number K201700154 and its amendments. We note these contracts are subject to section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

(b) A state agency monthly may post contracts described by Subsection (a) that are valued less than \$15,000.

Id. § 2261.253(a)(1), (b). The contracts, valued at more than \$15,000, are between the system, which is a state agency, and private vendors for the purchase of services, and the contracts are not expired or completed. *See id.* § 2261.002(2) (“State agency” has meaning assigned by Gov’t Code § 2151.002). Aetna and Humana seek to withhold the information at issue under sections 552.104 and 552.110 of the Government Code. In addition, the

system states it will redact information pursuant to section 552.136 of the Government from the information at issue. However, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the system may not withhold any portion of the information at issue under sections 552.104, 552.110, or 552.136 of the Government Code.

United raises section 552.104 of the Government Code for its information. 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. United states it has competitors. In addition, United states release of the information at issue would reveal confidential bid information, trade secrets, and competitively sensitive methodologies. United argues disclosure would give their competitors an unfair advantage by allowing these companies to underbid United in future bids for government contracts. 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 839. After review of the information at issue and consideration of the arguments, we find United has established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the system may withhold the submitted information pertaining to United under section 552.104(a) of the Government Code.³

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

³As our ruling is dispositive, we need not address United’s remaining argument against disclosure of this information.

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 system may withhold the information pertaining to United under section 552.104(a) of the Government Code. The system must release the remaining 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, 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,



Michelle Garza
Assistant Attorney General
Open Records Division

MG/gw

Ref: ID# 765573

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 5 Third Parties
(w/o enclosures)

Cause No. D-1-GN-19-002990

HUMANA INSURANCE COMPANY,	§	IN THE DISTRICT COURT OF
HUMANA HEALTH INSURANCE	§	
COMPANY OF FLORIDA, INC.,	§	
HUMANA INSURANCE COMPANY	§	
OF NEW YORK, AND HUMANA	§	
BENEFIT PLAN OF ILLINOIS, INC.,	§	
<i>Plaintiffs,</i>	§	TRAVIS COUNTY, TEXAS
	§	
v.	§	
	§	
KEN PAXTON, ATTORNEY GENERAL	§	
OF THE STATE OF TEXAS,	§	
<i>Defendant.</i>	§	261st JUDICIAL DISTRICT

AGREED FINAL ORDER OF DISMISSAL

This is a cause of action under the Public Information Act (“PIA”), Texas Government Code chapter 552. Plaintiff Humana Insurance Company, Humana Health Insurance Company of Florida, Inc., Humana Insurance Company of New York, and Humana Benefit Plan of Illinois, Inc. (collectively “Humana”) and Defendant Ken Paxton, Attorney General of Texas (“Attorney General”), agree to dismiss this suit pursuant to PIA section 552.327 on the ground that the requestor has abandoned the request for information. *See* Tex. Gov’t Code § 552.327. A court may dismiss a PIA suit under section 552.327 when all parties agree to dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request for information in writing or has abandoned the request. *Id.* The Attorney General represents to the Court that the requestor, Alexandra

Ellison, has abandoned her request for information. Accordingly, the Teacher Retirement System of Texas, the governmental body that received Ellison's request, is not required to release the requested information subject to disclosure in Letter Ruling OR2019-13157. The Court is of the opinion that entry of an agreed final order of dismissal is appropriate.

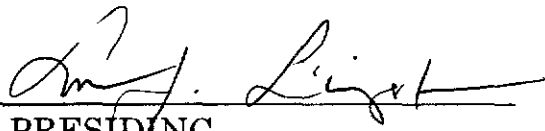
It is THEREFORE, ORDERED, ADJUDGED and DECREED that this cause is DISMISSED in all respects;

All costs of the court and attorney fees are taxed against the parties incurring the same;

All relief not expressly granted is denied; and

This order disposes of all claims between the parties and is final.

Signed this 10th day of JUNE, 2020.



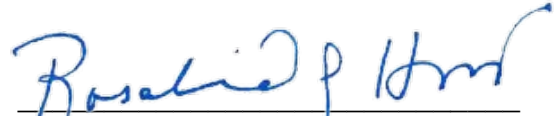
JUDGE PRESIDING

AGREED AS TO FORM AND SUBSTANCE:



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