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September 17, 2019

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OR2019-26059

Dear Ms. Brosig:

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# 786059.

The United Independent School District (the "district"), which you represent, received two requests from different requestors for information pertaining to a specified request for proposals. The district claims the submitted information is excepted from disclosure under sections 552.104, 552.110, and 552.111 of the Government Code. Additionally, the district states release of the submitted information may implicate the proprietary interests of the following: ACA GPS, LLC; Benefit Express Services, LLC ("Benefit Express"); BMI Audit Services ("BMI"); Consova Corporation; Health Management Systems, Inc. ("HMS"); and Secova, Inc. Accordingly, the district states, and provides documentation showing, it notified these interested third parties of the request for information and of their right 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 Benefit Express, BMI, and HMS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the district did not fully comply with section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the

governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, the district received the first request for information on June 13, 2019. The district informs us it was closed on June 14, 21, and 28, 2019, and July 1, 2, 3, 4, 5, 12, and 19, 2019. We note this office does not count the date the request was received or holidays for purposes of calculating a governmental body's deadlines under the Act. Thus, the district's ten- and fifteen-business-day deadlines under section 552.301 for the first request were July 9, 2019, and July 17, 2019, respectively. We note the district did not raise section 552.104 of the Government Code with respect to the information responsive to the first request, which is also responsive to the second request, until August 6, 2019. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the district failed to comply with the requirements of section 552.301 of the Government Code with respect to its claim under section 552.104 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1982). Although the district claims section 552.104 of the Government Code for some of the information at issue, we find the district failed to establish a compelling reason to address its argument under this exception. Therefore, the district may not withhold any of the information at issue under section 552.104 based on the district's own interests. However, we will consider the district's timely raised arguments under sections 552.110 and 552.111 of the Government Code. Further, because third-party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider the third parties' submitted arguments against disclosure of the information at issue.

Next, although the district raises section 552.110 of the Government Code, we note section 552.110 protects the interests of third parties that provide information to governmental bodies, not the interests of governmental bodies themselves. *See generally* Open Records Decision No. 592 (1991). Thus, we do not address the district's arguments under section 552.110 of the Government Code on behalf of these third parties.

Next, Benefit Express argues its information is confidential pursuant to an agreement with the district. We note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1

(1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, the district must release it, notwithstanding any expectations or agreement specifying otherwise.

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 only received comments from Benefit Express, BMI, and HMS explaining why the information at issue should not be released. Thus, we have no basis to conclude 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, 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. Therefore, the district may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts 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, 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. HMS states it has competitors. In addition, HMS explains release of the information it indicated would give its competitors an advantage. After review of the information at issue and consideration of the arguments, we find HMS has established the release of the information at issue would give an advantage to a competitor or bidder. Accordingly, we conclude the district may withhold the information HMS indicated under section 552.104(a) of the Government Code.¹

Section 552.110 of the Government Code protects (1) trade secrets obtained from a person 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

¹As our ruling is dispositive, we need not address HMS's remaining arguments against disclosure of this information.

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.² 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 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, 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 5-6.

²The 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).

BMI asserts its information is excepted from disclosure under section 552.110(b). Additionally, Benefit Express asserts portions of its information are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find Benefit Express and BMI have established the release of their pricing information constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the district must withhold the pricing information pertaining to Benefit Express and BMI, which we marked, under section 552.110(b) of the Government Code.³ However, we find Benefit Express and BMI failed to demonstrate the release of any of their remaining information would result in substantial harm to their competitive position. *See* ORD 661, 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 Benefit Express' or BMI's remaining information under section 552.110(b) of the Government Code.

Benefit Express and BMI assert some of their remaining information at issue constitutes trade secrets under section 552.110(a) of the Government Code. However, upon review, we find Benefit Express and BMI failed to establish a *prima facie* case that any portion of their remaining information meets the definition of a trade secret, nor have the companies demonstrated the necessary factors to establish a trade secret claim for the information at issue. *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. Therefore, the district may not withhold any of Benefit Express' or BMI's remaining information under section 552.110(a) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body’s policymaking

³As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, a governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *See Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

The district states Exhibits 9 and I consist of scoring information and evaluation scoring sheets pertaining to the specified request for proposals. The district explains this information consists of advice, opinions, and recommendations of employees of the district regarding policymaking matters of the district. Based upon your representations and our review, we find the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the district. Accordingly, the district may withhold Exhibits 9 and I under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁴ Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found.*, 540 S.W.2d at 685. Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Accordingly, the district must withhold all public citizens' dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the remaining information at issue 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.

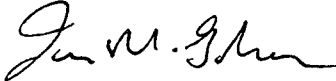
⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the district may withhold the information HMS indicated under section 552.104(a) of the Government Code. The district must withhold the pricing information pertaining to Benefit Express and BMI we marked under section 552.110(b) of the Government Code. The district may withhold Exhibits 9 and I under section 552.111 of the Government Code. The district must withhold all public citizens' dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. The district 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/gw

Ref: ID# 786059

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

c: 6 Third Parties
(w/o enclosures)