



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 27, 2019

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2019-27179

Dear Mr. Miles:

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# 788087 (HHSC# 19012).

The Texas Health and Human Services Commission (the "commission") received a request for comments offered in response to a specified draft request for proposal. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of AETNA, Amerigroup, Center for Public Policy Priorities, Children's Health, DePelchin Children's Center, Disability Rights Texas, Meadows Mental Health Institute, Molina Healthcare of Texas, Superior Health Plan, Texans Care for Children, Texas Council of Community Centers, Texas Pediatric Society, and United Healthcare ("UHC"). 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 and UHC. We have considered the submitted arguments and reviewed the submitted information.

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 not received comments from any remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party has 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 commission may not withhold the submitted information on the basis of any proprietary interest any remaining third party 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). 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 and UHC both state they have competitors. In addition, AETNA and UHC argue release of their information at issue would cause them competitive harm by revealing their strategies in approaching the final request for proposal. After review of the information at issue and consideration of the arguments, we find AETNA and UHC have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude commission may withhold the information we have indicated under section 552.104(a) of the Government Code. While the commission argues release of the remaining information could harm other potential respondents by giving an advantage to their competitors, such an interest in protecting the information belongs to the third party and not the commission. Therefore, we find the commission may not withhold the remaining information under section 552.104(a) of the Government Code. The commission must release the remaining information.

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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KM/eb

Ref: ID# 788087

Enc. Submitted documents

c: Requestor
(w/o enclosures)

13 Third Parties
(w/o enclosures)