



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 8, 2019

Ms. Sharae N. Reed
First Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2019-28271

Dear Ms. Reed:

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# 790172.

The City of Beaumont (the "city") received a request for information pertaining to a specified request for proposals.¹ The city claims the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code.² Additionally, the city states release of the submitted information may implicate the proprietary interests of the following third parties: BeneCard; Envision Rx; Express Scripts; Magellan Health; ProCare Rx ("ProCare"); Script Care, Ltd. ("Script Care"); and Serve You Rx ("Serve You"). Accordingly, the city 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 BeneCard, Express Scripts, ProCare, Script Care, and Serve You. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the city's procedural obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in

¹ As the city has not submitted a copy of the written request for information, we take our description of the request from its brief.

² Although the city also raises section 552.101 of the Government Code, the city provides no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume the city no longer asserts this exception. *See* Gov't Code §§ 552.301, .302.

asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. 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). The city states it received the request on July 22, 2019. As of the date of this letter, the city has not submitted for our review a copy of the written request for information. Consequently, we conclude the city failed to comply with the procedural requirements mandated by section 552.301(e) 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). The city claims sections 552.104 and 552.110 of the Government Code for the submitted information. We note, because section 552.110 protects the interests of third parties that provide the information, not a governmental body's interest, we do not address the city's section 552.110 assertion. *See* Gov't Code § 552.110 (excepting from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “[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”). Additionally, we find the city failed to establish a compelling reason to address its argument under section 552.104. Therefore, no portion of the submitted information may be withheld under section 552.104 based on the city's own interests. However, 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 submitted information.

Next, we note ProCare seeks to withhold information the city did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the city. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Additionally, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from BeneCard, Express Scripts, ProCare, Script Care, and Serve You 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 city 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. BeneCard, Express Scripts, Script Care, and Serve You state they have competitors. In addition, these third parties explain release of the information they indicated would give their competitors an advantage. After review of the information at issue and consideration of the arguments, we find BeneCard, Express Scripts, Script Care, and Serve You have established the release of the information at issue would give an advantage to a competitor or bidder. Accordingly, we conclude the city may withhold the information BeneCard, Express Scripts, Script Care, and Serve You seek to withhold, which we marked and indicated, under section 552.104(a) of the Government Code.³

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(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[.]” *Id.* § 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. ProCare asserts a portion of its information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find ProCare has established the release of its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury to ProCare. Accordingly, the city must withhold the pricing information pertaining to ProCare, which we marked, under section 552.110(b) of the Government Code.

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

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

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 city may withhold the information we marked and indicated under section 552.104(a) of the Government Code. The city must withhold the pricing information pertaining to ProCare we marked under section 552.110(b) 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 <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# 790172

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 7 Third Parties
(w/o enclosures)