



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 5, 2020

Ms. Debra L. Goetz
Counsel for McAllen Independent School District
Atlas, Hall, & Rodriguez, LLP
P.O. Box 3725
McAllen, Texas 78502-3725

OR2019-32056A

Dear Ms. Goetz:

This office issued Open Records Letter No. 2019-32056 (2019) on November 13, 2019. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on November 13, 2019. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 815662.

The McAllen Independent School District (the "district"), which you represent, received a request for information pertaining to a specified request for proposals. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Aetna Life Insurance Company; Ameritas Life Insurance Corp. ("Ameritas"); Assured Benefits Administrators ("ABA"); Benefit Management Administrators, Inc.; Continental Benefits, LLC; Deer Oaks EAP Services; Encore Wellness, LLC ("Encore"); Frates Benefit Administrators; Harris, Rothenberg International, Inc. d/b/a Humana Wellness ("Humana"); Blue Cross Blue Shield, a division of Health Care Service Corporation ("BCBS"); Independent Medical Systems ("IMS"); Medwatch, LLC ("Medwatch"); Metropolitan Life Insurance Company; National Benefit Services, LLC; Revolv, Inc. ("Revolv"); United Health Group ("United"); Wage Works, Inc.; and Workers Assistance Program. Accordingly, you state, and provide documentation showing, you notified these interested 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.¹ *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 ABA, Ameritas, BCBS, Encore, Humana, IMS, Medwatch, Revolv, and United.² We have considered the submitted arguments and reviewed the submitted information.

Initially, we note ABA, Ameritas, IMS, and Revolv object to disclosure of information the district has not submitted to this office for review. This ruling does not address information that was not submitted by the district and is limited to the information the district has submitted for our review.³ *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this ruling, we have only received comments from ABA, Ameritas, BCBS, Encore, Humana, IMS, and Medwatch. Thus, we have no basis to conclude any of the remaining interested third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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 district may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining interested 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). 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

¹ We note the district did not comply with section 552.301 of the Government Code in submitting some of the information for this decision. *See* Gov't Code § 552.301. Nevertheless, because the interests of third parties can provide a compelling reason to overcome the presumption of openness, we will consider the submitted arguments for the submitted information. *See id.* §§ 552.007, .302, .352.

² Although Medwatch submitted comments, it did not raise any arguments against disclosure of the submitted information.

³ As we are able to make this determination, we need not address the arguments against disclosure of this information.

advantage.” *Id.* at 841. BCBS, Encore, Humana, and United state they have competitors. In addition, BCBS, Encore, Humana, and United state release of the information at issue would give competitors an advantage. After review of the information at issue and consideration of the arguments, we find BCBS, Encore, Humana, and United have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold United’s information and the information we have marked under section 552.104(a) of the Government Code.⁴

ABA, Ameritas, and IMS claim portions of their information are excepted under section 552.110 of the Government Code, which 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.⁵ *See* Gov’t Code § 552.110. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides that a trade secret is:

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 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 Huffines*, 314 S.W.2d at 776. 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.⁶ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that

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

⁵ Although Ameritas does not raise section 552.110 of the Government Code in its brief, we understand Ameritas to assert this exception based on the substance of its argument.

⁶ 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];

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. *See* 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 Record 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.

ABA, Ameritas, and IMS assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude ABA, Ameritas, and IMS have failed to establish a *prima facie* case that any portion of their information at issue meets the definition of a trade secret. We further find ABA, Ameritas, and IMS have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of ABA’s, Ameritas’s, or IMS’s information may be withheld under section 552.110(a).

ABA, Ameritas, and IMS contend some of their information is commercial or financial information, the release of which would cause substantial competitive harm to the companies. Upon review, we find ABA and IMS have demonstrated some of their information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the district must withhold this information, which we have marked and indicated, under section 552.110(b) of the

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- (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).

Government Code. However, we find ABA, Ameritas, and IMS have not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the district may not withhold any of the remaining information at issue on this basis.

Section 552.136 of the Government Code states “[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 governmental body is confidential.”⁷ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of this exception. Thus, the district must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may be subject to copyright law. 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 United's information and the information we have marked under section 552.104(a) of the Government Code. The district must withhold the information we have marked and indicated under section 552.110(b) of the Government Code. The district must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The district 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 <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

⁷ 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).

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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/mo

Ref: ID# 815662

Enc. Submitted documents

c: Requestor
(w/o enclosures)

18 Third Parties
(w/o enclosures)