



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 31, 2020

Mr. Reggie Hollins
Legal Technology Specialist
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2020-21834

Dear Mr. Hollins:

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# 839807 [File Nos. PUR-R003118, PUR-R003238, and PUR-R003307].

The City of Plano (the "city") received three requests from different requestors for information pertaining to a specified request for proposal. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of several third parties.¹ Accordingly, you state, and provide documentation showing, you notified the interested third parties of the requests for information and of the 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 Allegiance, Allied, BCBS, HPI, Health Smart, S&S, Scott & White, and UHC. We have considered the submitted comments and reviewed the submitted information.

Initially, we note HPI and United argue against the release of some information that was not submitted by the city. This ruling does not address information that was not submitted by the city and is limited to the information the city has submitted for our review. *See*

¹ Aetna Life Insurance; Allegiance Benefit Plan ("Allegiance"); Allied Benefits ("Allied"); Apostrophe Health; Assured Benefits Administrators; Baylor Scott & White ("Scott & White"); Blue Cross Blue Shield of Texas ("BCBS"); Boon Chapman; Cerner Corp.; Cigna Health & Life Insurance; EBMS; Gilsbar LLC; Healthcare Highways; Health Plans, Inc. ("HPI"); Health Smart Benefit Solutions ("Health Smart"); Meritan Health; Quantum Health; Resource One; S & S Health ("S&S"); UMR, Inc.; United Health Care ("UHC"); and Web TPA Employer Services.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have only received comments from Allegiance, Allied, BCBS, Health Smart, HPI, S&S, Scott & White, and United. 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 city 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.

Allied argues its information was supplied with the expectation of confidentiality. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, 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 Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the city must release it, notwithstanding any expectations or agreement specifying otherwise.

We understand UHC to argue its information fits the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the Texas Uniform Trade Secrets Act (the “TUTSA”). Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Section 134A.002(6) provides:

(6) “Trade secret” means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)'s definition of trade secret expressly applies to chapter 134A only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6); *see also id.* § 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act). *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the city may not withhold any of UHC's information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of the Civil Practice and Remedies Code.

UHC also raises section 552.104 of the Government Code for some of the information at issue. Section 552.104 excepts from disclosure information "if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future." Gov't Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov't Code 552.104(a). Therefore, we do not address UHC's arguments under section 552.104.

Section 552.110(b) of the Government Code states, "information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret." *See* Gov't Code § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Section 552.110(c) of the Government Code excepts from disclosure commercial 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(c). Section 552.1101 of the Government Code provides, in relevant part:

(a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

Id. § 552.1101(a). Additionally, we note section 552.0222(b) lists certain types of information to which sections 552.110 and 552.1101(a) do not apply. *See id.* § 552.0222(b). We note some of the information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110 or section 552.1101.

Allegiance, Allied, BCBS, HPI, Health Smart, Scott & White, and UHC argue some of their information consists of commercial or financial information subject to section 552.110(c).² Upon review, we find Allegiance, Allied, BCBS, HPI, Health Smart, Scott & White, and UHC have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the city must withhold the information we have marked and indicated, and, to the extent it has not been published on the companies' websites, Allied's and Health Smart's customer information under section 552.110(c) of the Government Code.³ However, we find Allegiance, Allied, BCBS, HPI, Health Smart, Scott & White, and UHC have failed to provide specific factual evidence demonstrating the

² Although some of the third parties cite to former sections 552.110(a) and 552.110(b) of the Government Code, we understand them to raise current sections 552.110(b) and 552.110(c) of the Government Code based on the substance of their arguments.

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

remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the city may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Allegiance, BCBS, and UHC argue some of their remaining information consists of trade secrets subject to section 552.110(b). Upon review, however, we find Allegiance, BCBS, and UHC have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the city may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Allegiance, Allied, BCBS, HPI, and S&S assert disclosure of some of their remaining information would reveal an individual approach to their work, organizational structure, staffing, internal operations, internal processes and discounts, and pricing and pricing methodology and give advantage to a competitor. Upon review, we find HPI and S&S have demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the city must withhold the information we have marked under section 552.1101 of the Government Code. However, we find Allegiance, Allied, BCBS, and S&S have failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a), and the city may not withhold it on that basis.

HPI also raises section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an 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. Section 552.111 is a discretionary exception to public disclosure that protects a governmental body’s interests, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991), 522 (1989) (discretionary exceptions in general). Therefore, because the city has not raised section 552.111, none of HPI’s remaining information may be withheld under this exception.

Some of the remaining information is subject to section 552.136 of the Government Code.⁴ Section 552.136 provides, “Notwithstanding 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the materials 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

⁴ 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).

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 must withhold the information we have marked and indicated, and, to the extent it has not been published on the companies' websites, Allied's and Health Smart's customer information under section 552.110(c) of the Government Code. The city must withhold the information we have marked under section 552.1101 of the Government Code. The city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The city must release the remaining information; however, any information that is subject to copyright may be released only 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,

Paige Lay
Assistant Attorney General
Open Records Division

PL/jxd

Ref: ID# 839807

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

c: 26 Third Parties
(w/o enclosures)