



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

October 8, 2015

Ms. Melanie J. Rodney  
Assistant County Attorney  
County of Harris  
2525 Holly Hall, Suite 190  
Houston, Texas 77054

OR2015-21120

Dear Ms. Rodney:

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# 582402 (CA File Nos. 15HSP0503, 15HSP0540, and 15HSP0546).

The Harris County Hospital District d/b/a Harris Health System (the "system") received three requests from different requestors for all bids submitted in response to Job No. 14/029 and the awarded contract. You state you have released the awarded contract. Although you take no position with respect to the public availability of the remaining requested information, you state release of this information may implicate the proprietary interests of Cardinal Health ("Cardinal"), Morris & Dickson Co., L.L.C. ("Morris"), AmerisourceBergen Drug Corporation ("Amerisource"), and McKesson Corporation ("McKesson"). Accordingly, you state and provide documentation showing, you have notified these third parties of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments from Amerisource and Cardinal. 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 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 letter, we have not received arguments from Morris or McKesson. Thus, these companies have not demonstrated they have a protected proprietary interest in any of 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 system may not withhold the submitted information on the basis of any proprietary interests these companies may have in the information.

Cardinal asserts portions of the submitted information are marked confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See 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. *See* 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 falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Amerisource argues section 552.104 of the Government Code for its proposal. Section 552.104(a) 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*, No. 12-1007, 2015 WL 3854264, at \*7 (Tex. June 19, 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 \*9. Amerisource states it has competitors. In addition, Amerisource states release of its information would give advantage to a competitor or bidder. After review of the information at issue and consideration of the arguments, we find Amerisource has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold Amerisource's information under section 552.104(a) of the Government Code.<sup>1</sup>

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<sup>1</sup>As our ruling is dispositive, we need not address Amerisource's remaining argument against disclosure of its information.

Cardinal argues portions of its submitted proposal are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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. *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 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.<sup>2</sup> 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* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary

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<sup>2</sup>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];
- (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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

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. *See id.*; *see also* ORD 661 at 5.

Upon review, we find Cardinal has established a *prima facie* case its customer information constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information at issue is not publicly available on Cardinal’s website, the system must withhold the customer information we have marked under section 552.110(a) of the Government Code. However, we find Cardinal has failed to establish a *prima facie* case the remaining information meets the definition of a trade secret, nor has Cardinal demonstrated the necessary factors to establish a trade secret claim for its information. *See* RESTATEMENT OF TORTS § 757 cmt. b; 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 (information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted under section 552.110). Therefore, we find none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Upon review, we find Cardinal has established the release of its pricing information would cause the company substantial competitive injury. Therefore, we find the system must withhold the pricing information we have marked under section 552.110(b) of the Government Code. However, we find Cardinal has made only conclusory allegations that the release of its remaining information would result in substantial damage to its competitive position. Therefore, we find Cardinal has failed to demonstrate that the release of its remaining information would cause it substantial competitive harm. Accordingly, we find none of the remaining information may be withheld under section 552.110(b) of the Government Code.

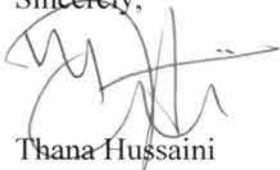
We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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.

In summary, the system may withhold Amerisource's information under section 552.104(a) of the Government Code. To the extent Cardinal's customer information is not publicly available on its website, the system must withhold the information we have marked under section 552.110(a) of the Government Code. The system must withhold the information we have marked under section 552.110(b) of the Government Code. The system 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 [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Thana Hussaini  
Assistant Attorney General  
Open Records Division

TSH/cbz

Ref: ID# 582402

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Deborah E. Wolin  
Vice President & Associate General Counsel  
Cardinal Health  
1330 Enclave Parkway  
Houston, Texas 77077  
(w/o enclosures)

Mr. Chad Runeberg  
Morris & Dickson Co, LLC  
1776 Woodstead Court, 125  
The Woodlands, Texas 77380  
(w/o enclosures)

Ms. Elizabeth S. Campbell  
Associate General Counsel  
Amerisource Bergen Drug Corporation  
227 Washington Street  
Conshohocken, Pennsylvania 19428  
(w/o enclosures)

McKesson US Pharmaceutical  
One Post Street  
San Francisco, California 94104  
(w/o enclosures)