KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 16, 2016

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OR2016-06053

Dear Ms. Madrid and Mr. Skyles:

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# 601664.

The Midland County Hospital District d/b/a Midland Memorial Hospital (the "district"), which you represent, received one request for the (1) purchase order or check number; (2) date; (3) description; (4) quantity; (5) price; and (6) vendor identification number, name, and address for all district purchase orders or expenditures from January 1, 2012 to the date of the request.[1] The district received a second request from a different requestor for information regarding public spending by the district during the 2015

[1]We note, and you acknowledge, the district did not comply with section 552.301 of the Government Code in requesting a ruling from this office with respect to this request. *See* Gov't Code § 552.301(b),(e). Nonetheless, because third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider whether the district may withhold the information responsive to this request on that basis.

fiscal year. Although you take no position with respect to the public availability of the requested information, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state and provide documentation showing, you have notified these third parties of the request for information and of their rights 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 note West-Ward Pharmaceuticals, the Texas Commission on Environmental Quality, and Biotronik, Inc. do not object to the release of the information at issue. We have received comments from several third parties.[2] We have considered the submitted arguments and reviewed the submitted information.

Initially, we note several third parties argue against disclosure of information not submitted by the district to this office. This ruling does not address information beyond what the district has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the district has submitted as responsive to the requests for information.

Ulrich asserts its information is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

> (1) by a governmental body;

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[2]CareFusion; Lantheus Holdings, Inc. ("Lantheus"); W.W. Grainger, Inc. ("Grainger"); Blood Systems, Inc. ("Blood Systems"); Skeletal Dynamics, L.L.C. ("Skeletal Dynamics"); Kaufman, Hall & Associates, L.L.C. ("Kaufman"); Evologics, L.L.C. ("Evologics"); Exactech US, Inc. ("Exactech"); Brainlab, Inc. ("Brainlab"); AMN HealthCare, Inc. ("AMN"); AlliedBarton Security Services, L.L.C. ("AlliedBarton"); Draeger Medical, Inc. ("Draeger"); Standard Textile, Inc. ("Standard Textile"); Landauer, Inc. ("Laundauer"); Sirtex Medica, Inc. ("Sirtex"); Grifols Diagnostic Solutions, Inc. ("Grifols"); West Texas Surgical Services, L.L.C. ("West Texas"); E-Scan Data Systems, Inc. (E-Scan Data"); MCG Health, L.L.C. ("MCG"); NAVEX Global, Inc. ("NAVEX"); Biocompatibles, Inc. ("Biocompatibles"); Black Box Corporation ("Black Box"); FFF Enterprises, Inc. ("FFF"); iMedConsent, L.L.C. ("iMedConsent"); ThermoFisher Scientific, L.L.C. ("ThermoFisher"); Ulrich Medical USA, Inc. ("Ulrich"); Aesynt Incorporated ("Aesynt"); Cartus Corporation ("Cartus"); Otis Elevator Company ("Otis"); BKM Total Office of Texas ("BKM"); Certified Laboratories; Chem-Aqua, Inc. ("Chem-Aqua"); Houston Series of Lockton Companies, L.L.C. ("Lockton"); ChemSearch; ARUP Laboratories, Inc. ("ARUP"); Halyard Sales, L.L.C. ("Halyard"); QuadraMed Affinity Corporation ("QuadraMed"); Follett Corporations ("Follett"); Aesculap, Inc. ("Aesculap"); Bayer Corporation ("Bayer"); B. Braun Medical Inc. ("B. Braun"); Boston Scientific Neuromodulation ("Boston Scientific"); and Advisory Board Company ("ABC").

> (2) for a governmental body and the governmental body:
>
> > (A) owns the information;
> >
> > (B) has a right of access to the information; or
> >
> > (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
>
> (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002. Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Ulrich argues its information does not constitute public information under the Act because it is a private company. Upon review, however, we find Ulrich's information was collected and is maintained in connection with the transaction of official business by the district. Thus, the submitted information is subject to the Act and the district must release it unless it falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

FFF, iMedConsent, ThermoFisher, and Draeger assert their information is confidential pursuant to confidentiality agreements. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it will 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.

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. CareFusion, Lantheus, Grainger, Blood Systems, Skeletal Dynamics, Kaufman, Evologics, Exactech, Brainlab, AMN, AlliedBarton, Draeger, Standard Textile, Landauer, Sirtex, Grifols, West Texas, E-Scan Data, MCG, NAVEX, Biocompatibles, Bayer, Black Box, BKM, and ABC state they have competitors. In addition, these third parties state release of portions of their information would give their competitors an advantage. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (public has interest in knowing terms of contract with state agency), 514 (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 839. After review of the information at issue and consideration of the arguments, we find these third parties have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information we have indicated under section 552.104(a) of the Government Code.[3]

ThermoFisher, FFF, Ulrich, Aesynt, Cartus, Otis, Certified Laboratories, Chem-Aqua, Lockton, ChemSearch, iMedConsent, ARUP, Halyard, QuadraMed, Follett, Aesculap, Boston Scientific, and B. Braun argue section 552.110 of the Government Code for portions of their information. 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:

[3]As our ruling is dispositive, we need not address the remaining arguments for this information.

> 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.[4] RESTATEMENT OF TORTS § 757 cmt. b. 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* Open Records Decision No. 552 at 5 (1990). 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. 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 Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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[4]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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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* Open Records Decision No. 661 at 5 (1999).

Upon review, we find Ulrich, Aesynt, Cartus, Otis, Certified Laboratories, Chem-Aqua, ChemSearch, iMedConsent, ARUP, Halyard, QuadraMed, Follett, Aesculap, and B. Braun have failed to demonstrate any portion of their information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* Open Records Decision Nos. 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, experience, and pricing not excepted under section 552.110). Therefore, the district may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Further, we find ThermoFisher, FFF, Ulrich, Aesynt, Cartus, Otis, Certified Laboratories, Chem-Aqua, Lockton, ChemSearch, iMedConsent, ARUP, Halyard, QuadraMed, Follett, Aesculap, B. Braun, and Boston Scientific have made only conclusory allegations that release of their information at issue would result in substantial damage to their competitive positions. Thus, these third parties have not demonstrated that substantial competitive injury would result from the release of any of the remaining information. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). We note the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* ORD 514; *see also* ORD 319 at 3. *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the district may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. ARUP, West Texas, and E-Scan Data also argue section 552.101 in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for some of the remaining information. At the direction of Congress, the

Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. §§ 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See id.* § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We therefore held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

West Texas also argues some of its remaining information should be protected under section 181.006 of the Health and Safety Code. Section 552.101 of the Government Code also encompasses section 181.006 of the Health and Safety Code, which provides:

> [F]or a covered entity that is a governmental unit, an individual's protected health information:
>
> > (1) includes any information that reflects that an individual received health care from the covered entity; and
> >
> > (2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Section 181.001(b)(2)(A) defines "covered entity," in part, as any person who:

> (A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). We understand West Texas to assert the district is a covered entity for purposes of section 181.006 of the Health and Safety Code. However, in order to determine whether the district is a covered entity, we must address whether the district engages in the practice of "assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information." *Id.* Section 181.001 states that "[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards." *Id.* § 181.001(a). Accordingly, as chapter 181 does not define "protected health information," we turn to HIPAA's definition of the term. HIPAA defines "protected health information" as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines "individually identifiable health information" as information that is a subset of health information, including demographic information collected from an individual, and:

> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> > (i) That identifies the individual; or
> >
> > (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. The information at issue consists of purchase order information. Although West Texas asserts the district is a protected entity, neither you nor West Texas has explained how the information at issue consists of protected health information. Thus, West Texas has not demonstrated the applicability of section 181.006 of the Health and Safety Code. Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

West Texas also argues some of its remaining information is confidential pursuant to the Medical Practice Act ("MPA"). Section 552.101 of the Government Code also encompasses information made confidential by the MPA, subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part, the following:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 at 3-4 (1987), 370 at 2 (1983), 343 at 1 (1982). Section 159.001 of the Occupations Code defines a "patient" as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001. Upon review, we find none of the remaining information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the MPA.

Lockton and NAVEX also argue section 552.136 of the Government Code. Section 552.136 states that "[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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). However, upon review, we find no portion of the remaining information contains access device numbers. Accordingly, no portion of the remaining information may be withheld under section 552.136 of the Government Code.

Finally, we note 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 letter, no other interested third party has submitted to this office reasons explaining why any of the remaining information should not be released. Thus, we have no basis for concluding the remaining information constitutes proprietary information of any other interested third party, and the district may not withhold any portion of it on that basis. *See id.* § 552.110(a)-(b); ORDs 661 at 5-6 (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 (party must establish *prima facie* case that information is trade secret), 542 at 3.

In summary, the district may withhold the information we have indicated under section 552.104(a) of the Government Code. The remaining information must be released.

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, 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,

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TH/som

Ref: ID# 601664

Enc. Submitted documents

c: 2 Requestors
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