



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2016

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2016-24795A

Dear Mr. Miles:

This office issued Open Records Letter No. 2016-24795 (2016) on November 7, 2016. We have examined this ruling and determined we will correct the previously issued ruling. *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 (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on November 7, 2016. Your request was assigned ID# 644828.

The Texas Health and Human Services Commission (the "commission") received a request for information related to requests for proposals numbers 529-16-0001 and 529-13-0018. You state the commission is releasing some of the requested information. 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 Cognizant Technology Solutions ("CTS"); Currier, McCabe, and Associates, Inc. ("CMA"); Deloitte Consulting, L.L.P. ("Deloitte"); Ernst & Young ("E&Y"); Optum Government Solutions, Inc. ("Optum"); and Truven Health Analytics, Inc. ("Truven"). Accordingly, you state, and provide documentation showing, you notified CTS, CMA, Deloitte, E&Y, Optum, and Truven 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. *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 CMA, E&Y, Optum, and Truven. We have reviewed the submitted information and the submitted arguments.

Initially, you state Truven's proposal submitted in response to request for proposals number 529-16-0001 was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-20402A (2016). In that ruling, we determined the commission may withhold Truven's information at issue under section 552.104 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the commission may rely on Open Records Letter No. 2016-20402A as a previous determination and withhold Truven's proposal submitted in response to request for proposals number 529-16-0001 in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider the public availability of the remaining information, which was not at issue in the previous ruling.

Next, 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) 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 not received comments from CTS or Deloitte explaining why the submitted information should not be released. Therefore, we have no basis to conclude CTS or Deloitte has 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, 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 commission may not withhold the submitted information on the basis of any proprietary interest CTS or Deloitte may have in the information.

Next, we note Optum argues against the release of information that was not submitted by the commission. This ruling does not address information that was not submitted by the commission and is limited to the information the commission has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 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 advantage.” *Id.* at 841. CMA, E&Y, and Truven state they have competitors. In addition, CMA, E&Y, and Truven state release of their information at issue will cause harm to their competitive advantage and will give advantage to their competitors, who may copy their proposals, underbid them for similar work in the future, or seek to hire their key personnel. After review of the information at issue and consideration of the arguments, we find CMA, E&Y, and Truven have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may withhold the information we marked within CMA’s proposal, the information we noted within E&Y’s proposal, and the entirety of Truven’s proposal submitted in response to request for proposals number 529-13-0018, under section 552.104(a) of the Government Code.¹

Optum states portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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(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

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Restatement's list of six trade secret factors.² 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* 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. 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).

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.

Optum asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Optum has established a *prima facie* case that portions of its information, which we have marked, constitute trade secret information. Accordingly, the commission must withhold the information we marked under section 552.110(a) of the Government Code. Further, to the extent Optum's customer information is not publicly available on Optum's website, the commission must withhold Optum's customer information under section 552.110(a) of the Government Code. However, we conclude Optum has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Optum has not

²The 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).

demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, the commission may not withhold any of Optum's remaining information under section 552.110(a).

Optum further argues portions of its information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Optum has demonstrated portions of the information at issue, which we have marked, constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold the information we marked under section 552.110(b) of the Government Code. However, we find Optum has failed to demonstrate the release of any of its remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, the commission may not withhold any of Optum's remaining information under section 552.110(b).

In summary, the commission may withhold Truven's proposal submitted in response to request for proposals number 529-16-0001 in accordance with Open Records Letter No. 2016-20402A. The commission may withhold the information we marked within CMA's proposal, the information we noted within E&Y's proposal, and the entirety of Truven's proposal submitted in response to request for proposals number 529-13-0018, under section 552.104(a) of the Government Code. The commission must withhold Optum's information we marked, as well as Optum's customer information to the extent Optum's customer information is not publicly available on Optum's website, under section 552.110(a) of the Government Code. The commission must withhold Optum's information we marked under section 552.110(b) of the Government Code. The commission must release the remaining information.

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,

A handwritten signature in black ink that reads "Claire Morris Sloan". The signature is written in a cursive, flowing style.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 644828

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties
(w/o enclosures)