



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 23, 2017

Mr. Darren Skyles  
Counsel for the Midland Memorial Hospital  
Jackson Walker, LLP  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701

OR2017-01493

Dear 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# 642971.

The Midland County Hospital District d/b/a Midland Memorial Hospital (the "district"), which you represent, received a request for contracts and bid proposals involving named entities. You state you do not possess some of the requested information.<sup>1</sup> You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code.<sup>2</sup> You also state release of the submitted information may implicate the proprietary interests of Critical Alert Systems, Cerner, CareFusion, IBM, and GE. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2(1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you raise section 552.110 of the Government Code, we note that exception is designed to protect the interests of third parties, not the interests of a governmental body. *See Gov't Code* § 552.110 (excepts from disclosure trade secret or commercial or financial information obtained from another person). Thus, we do not address the district's assertion of section 552.110, but we will consider a third party's assertion of that exception.

their rights 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 CareFusion. We have considered the arguments and reviewed the submitted information.

Initially, CareFusion argues its submitted information is not responsive to the request for information. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the district has reviewed its records and determined the documents it has submitted are responsive to the request. Thus, we find the district has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we find the information at issue is responsive to the request and will determine whether the district must release the information at issue to the requestor under the Act.

Next, we note CareFusion seeks to withhold some of its information, which the district has previously released, under section 552.104 of the Government Code. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although CareFusion raises section 552.104 of the Government Code for the information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the district may not now withhold any of the previously released information under section 552.104 of the Government Code on behalf of CareFusion. We also note CareFusion seeks to withhold the previously released information under section 552.110 of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address CareFusion's claim under section 552.110 for the previously released information.

We must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments

stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The district received the request for information on October 25, 2016. The district informs us it was closed on November 11, 2016. This office does not count the date the request was received or the date the governmental body was closed as business days for the purpose of calculating a governmental body's deadlines under the Act. You do not inform us the district was closed for business on any of the remaining business days at issue. Accordingly, you were required to provide the information required by section 552.301(e) by November 16, 2016. However, the district submitted CareFusion's remaining information required under section 552.301(e) by electronic submission on November 23, 2016. Consequently, we find the district failed to comply with section 552.301 of the Government Code with respect to this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third-party interests. *See* ORD 630. The district claims section 552.104 of the Government Code for CareFusion's remaining information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision No. 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Accordingly, no portion of CareFusion's remaining information may be withheld under section 552.104 of the Government Code based on the district's own interests. However, as third-party interests can provide a compelling reason to withhold information from disclosure, we will address the arguments submitted by CareFusion against disclosure of its remaining 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). 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The district explains it is a not-for-profit hospital that "has an obligation to provide low-cost quality health-care services" and contracts with outside vendors to provide the district and its patients with certain goods and services. The district argues that release of the information at issue would harm the district

by causing it to accept less favorable terms in the future.” Based on these representations, we find the district has demonstrated release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the district may withhold the information it has indicated that does not pertain to CareFusion under section 552.104(a) of the Government Code.

We now turn to CareFusion’s interest in withholding its information not previously released. As noted above, 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 also invoke this exception, which is subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. CareFusion states it has competitors. CareFusion argues release of the information at issue would cause harm to CareFusion because such release would give advantage to its competitors. After review of the information at issue and consideration of the arguments, we find CareFusion has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold CareFusion’s information not previously released under section 552.104(a) of the Government Code.<sup>3</sup>

Section 552.110(b) of the Government Code protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (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). CareFusion argues its pricing information is commercial or financial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find CareFusion has demonstrated its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury to CareFusion. Therefore, the district must withhold CareFusion’s pricing information under section 552.110(b) of the Government Code.

In summary, the district may withhold the information it has indicated and CareFusion’s information that was not previously released by the district under section 552.104(a) of the Government Code. The district must withhold CareFusion’s pricing information under section 552.110(b) of the Government Code.

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this 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](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,



Kavid Singh  
Assistant Attorney General  
Open Records Division

KVS/som

Ref: ID# 642971

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

5 Third Parties  
(w/o enclosures)