KEN PAXTON
ATTORNEY GENERAL OF TEXAS

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OR2017-20015

Dear Mr. Spurck:

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# 672664 (Texas.gov ID#s 66024934 and 66025706, District PIC ID# 1664.0011).

The Gainesville Hospital District d/b/a North Texas Medical Center (the "district"), which you represent, received a request for: (1) all documents reviewed by two or more district board members during a specified time period; (2) all attorney fee bills during a specified time period; (3) specified payment records; and (4) all documents related to a specified valuation.[1] You state the district will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.111, 552.116, and 552.125 of the Government Code and privileged under Texas Rule of Evidence 503. Additionally, you state release of some of the submitted information may implicate the proprietary interests of multiple third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit

[1]We note the district sought and received clarification of portions of the request for information. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

arguments to this office as to why the submitted information should not be released.[2] *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 Blue Cross, Cardinal, Kinnser, MaxMD, McKesson, Meditech, MidAmerican, SuddenLink, Universal, and Virtual. We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.[3]

Initially, you state portions of Exhibit D were the subject of previous requests for a ruling, as a result of which this office issued Open Records Letter Nos. 2016-26310 (2016) and 2017-10099 (2017). In those rulings, we determined the district may withhold the information at issue under section 552.104 of the Government Code. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, the district may continue to rely on Open Records Letter Nos. 2016-26310 and 2017-10099 as previous determinations and withhold the information at issue in accordance with those rulings.[4] *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against disclosure for the remaining information, which was not subject to the previous rulings.

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[2]The notified third parties consist of: Aetna Health, Inc.; Aldrete Score, Inc.; AmerisourceBergen Corporation; Blue Cross Blue Shield of Texas ("Blue Cross"); Cardinal Health, Inc. ("Cardinal"); Cebridge Acquisition L.P. d/b/a SuddenLink Communications ("SuddenLink"); CIGNA Healthcare of Texas, Inc.; First Databank, Inc.; GDF Suez Energy Resources NA, Inc.; Global Healthcare Exchange, LLC; Greenway Medical Technologies, Inc.; Health Value Management d/b/a ChoiceCare Network; Home Hospice of Grayson County; Howmedica Osteonics Corp.; Indigent Healthcare Solutions, Ltd.; Intelinet Systems; Interbit Data, Inc.; Kinnser Software, Inc. ("Kinnser"); Lexi-Comp, Inc.; Liquid Agents Healthcare, LLC; LTC Group, LLC; McKesson Technologies, LLC ("McKesson"); MedAssets Net Revenue Systems, LLC; Medical Information Technology, Inc. ("Meditech"); Medifax-EDI, LLC; Medisolv, Inc.; MidAmerican Energy Company ("MidAmerican"); Morrison Management Specialists, Inc.; North Texas Indigent Services Inc.; Parallon Business Solutions, LLC; Parallon Workforce Solutions; Park Avenue Capital, LLC d/b/a MaxMD ("MaxMD"); Park Place International, LLC; PeriGen, Inc.; Pharmaceutical Strategies Group, LLC; SNAPS Solutions, LLC d/b/a Holon Solutions; Solaris Healthcare; SourceHOV, LLC; Synthes; T-System, Inc.; United Healthcare of Texas, Inc.; Universal Health Services, Inc. ("Universal"); and Virtual Radiologic Professionals of Texas, P.A. ("Virtual").

[3]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

[4]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Next, we note Blue Cross, Cardinal, Kinnser, MaxMD, MidAmerican, and Universal argue against the release of information that was not submitted by the district. This ruling does not address information that was not submitted by the district and is limited to the information 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 copy of specific information requested).

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). Although we received comments from SuddenLink, SuddenLink does not raise any exceptions to disclosure or assert it had a protected proprietary interest in the submitted information. Furthermore, as of the date of this letter, we have not received comments from any remaining third party explaining why its information should not be released. Therefore, we have no basis to conclude any remaining third party 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 district may not withhold the remaining information on the basis of any proprietary interest SuddenLink or any remaining third party may have in it.

Next, we note Blue Cross argues its information is not responsive to the request for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because you have submitted the information at issue for our review, we find the district has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]
> >
> > . . .

> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
>
> . . .
>
> (16) information that is in a bill for attorney's fees and is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(1), (3), (16). Some of the submitted information is subject to subsections 552.022(a)(1), (3), and (16) and must be released unless it is confidential under the Act or other law. *Id.* You acknowledge the submitted attorney fee bills are subject to section 552.022(a)(16) of the Government Code. You raise rule 503 of the Texas Rules of Evidence for the information at issue. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. Furthermore, we find Exhibit E consists of an executed contract that is subject to section 552.022(a)(3). Although you raise sections 552.103 and 552.111 of the Government Code for Exhibit E, these exceptions are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, Exhibit E may not be withheld under section 552.103 or 552.111 of the Government Code. The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5. The Texas Supreme Court has held "[t]he Texas Rules of Civil Procedure are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d at 336. Thus, we will consider whether Exhibit E is protected by the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Universal claims Exhibit E is excepted form disclosure under section 552.104. Section 552.104(b) provides information encompassed by section 552.022 may be withheld under section 552.104(a). *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required disclosure under section 552.022(a)). Accordingly, we will consider Universal's arguments under section 552.104. Further, we will consider Universal's arguments under section 552.110 of the Government Code, as that exception makes information confidential under the Act for purposes of section 552.022. Finally, we find Exhibit L is a completed report subject to section 552.022(a)(1). Thus, the district must release Exhibit L, unless the information is expressly confidential under other law or is excepted from disclosure by section 552.108. *See id.* § 552.022(a)(1). You do not raise section 552.108 for Exhibit L. You do, however, claim Exhibit L is excepted from disclosure under section 552.125 of the Government Code.

Section 552.125 of the Government Code excepts from disclosure "[a]ny documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act" (the "TEHSAP"). *Id.* § 552.125. The stated purpose of the TEHSAP, article 4447cc of Vernon's Texas Civil Statutes, "is to encourage voluntary compliance with environmental and occupational health and safety laws." V.T.C.S. art. 4447cc, § 2. In furtherance of its stated purpose, the TEHSAP provides that environmental or health and safety audits voluntarily performed by or for the owner or operator of a facility that is regulated under an environmental or health and safety law are privileged. V.T.C.S. art. 4447cc, §§ 3, 5, 6. Section 5 of the TEHSAP provides in part:

> (a) An audit report is privileged as provided in this section.
>
> (b) Except as provided in Sections 6, 7, and 8 of this Act, any part of an audit report is privileged and is not admissible as evidence or subject to discovery[.]

V.T.C.S. art. 4447cc, § 5(a)-(b). As noted above, the Texas Supreme Court has determined that the discovery privileges found in the Texas Rules of Civil Procedure and the Texas Rules of Evidence "are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d at 336. However, article 4447cc of Vernon's Texas Civil Statutes is not such a privilege. Thus, we determine that article 4447cc, as incorporated into the Act by section 552.125, is not "other law" under which information is made confidential, and therefore, Exhibit L may not be withheld from disclosure pursuant to article 4447cc of Vernon's Texas Civil Statutes and section 552.125 of the Government Code. As you raise no further exceptions to disclosure, Exhibit L must be released in its entirety.

Texas Rule of Evidence 503 encompasses the attorney-client privilege. Rule 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
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> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
> >
> > (B) between the client's lawyer and the lawyer's representative;
> >
> > (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
> >
> > (D) between the client's representatives or between the client and the client's representative; or

> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert portions of the information at issue consist of privileged attorney-client communications between district employees, district staff, and outside counsel for the district. You state the communications at issue were made for the purpose of the rendition of legal services to the district. You also state the district has not waived the attorney-client privilege with regard to the communications. Based on your representations and our review of the submitted information, we find you have established some of the information you have marked constitutes privileged attorney-client communications under rule 503. Thus, with the exception of the information we have marked for release, the district may withhold the information you have marked pursuant to rule 503 of the Texas Rules of Evidence. However, we find the remaining information either reveals a communication with a party you have not identified as privileged or is not a communication. We note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find you have failed to demonstrate any portion of the remaining information at issue consists of privileged attorney-client communications. Accordingly, no portion of the remaining information may be withheld under rule 503.

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. Section 552.101 encompasses information protected by other statutes, such as section 1324a of title 8 of the United States Code, which provides an Employment Eligibility Verification Form I-9 and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8

U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude the information we have marked in Exhibit I is confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.[5] However, no portion of the remaining information in Exhibit I consists of an I-9 form or information contained in or appended to an I-9 form. Thus, the district may not withhold the remaining information in Exhibit I under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *See* 26 U.S.C.§ 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, Exhibit K constitutes tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by section 181.006 of the Health and Safety Code. Section 181.006 states "[f]or a covered entity that is a governmental unit, an individual's protected health information . . . is not public information and is not subject to disclosure under [the Act]." Health & Safety Code § 181.006(2). Section 181.001(b)(2)(A) defines "covered entity," in part, as any person who

> 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[.]

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[5]As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Id. § 181.001(b)(2)(A). You 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. Section 181.001 states "[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 ["HIPAA"]." *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. You state the information you have marked in Exhibit F was created by the district as a health care provider and relates to the provision of health care to identifiable individuals. Upon review, we find the information you have marked consists of protected health information for purposes of section 181.006 of the Health and Safety Code. You state the district collects and stores this information for the purpose of providing health care-related services. Therefore, with respect to this information, the district is a health care entity that is in the practice of collecting, using, and storing protected health information, and is a covered entity for purposes of section 181.006 of the Health and Safety Code. Accordingly, the district must withhold the information you have marked in Exhibit F under section 552.101 in conjunction with section 181.006.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial*

Foundation. *Id.* at 683. Further, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (personal financial information includes choice of a particular insurance carrier), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, we note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984). Upon review, we find you have failed to demonstrate the remaining information in Exhibit I is highly intimate or embarrassing and of no legitimate public interest. Thus, the district may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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 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. You state Exhibit H relates to a proposed transaction between Universal and the district. You assert release of Exhibit H "could impact the current transaction as well as provide knowledge of the details of this transaction to the [d]istrict's competitors." Furthermore, Blue Cross, Cardinal, Kinnser, MaxMD, McKesson, Universal, and Virtual all state they have competitors. In addition, these third parties state release of their information would cause harm by giving their competitors an unfair competitive 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 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (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 831, 839. After review of the information at issue and consideration of the arguments, we find these third parties have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we

conclude the district may withhold the remaining information in Exhibit D, along with Exhibits E and H in full under section 552.104(a) of the Government Code.[6] Additionally, the district may withhold Blue Cross's, Cardinal's, Kinnser's, MaxMD's, and Virtual's information in Exhibit G in full, along with McKesson's information in Exhibit G, which we have marked, under section 552.104(a) of the Government Code.[7]

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibits B and J consist of communications between attorneys and representatives for the district, district employees and officials, and the district's insurer. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications. Thus, the district may withhold Exhibits B and J under section 552.107(1) of the Government Code.[8]

Meditech and MidAmerican state portions of their information in Exhibit G 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

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[6]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

[7]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

[8]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

> 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.[9] 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).

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 (to prevent disclosure of commercial or financial information, party must show by specific factual

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[9]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).

evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Meditech and MidAmerican assert their information at issue constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Meditech and MidAmerican have failed to establish a *prima facie* case that any portion of their information at issue meets the definition of a trade secret. We further find Meditech and MidAmerican have not demonstrated the necessary factors to establish a trade secret claim for their information at issue. *See* ORD 402. Therefore, the district may not withhold any of Meditech's or MidAmerican's information at issue under section 552.110(a) of the Government Code.

Meditech and MidAmerican argue their information at issue consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. We note the information at issue relates to contracts awarded to Meditech and MidAmerican. 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 (public has interest in knowing prices charged by government contractors). *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). Upon review, we find Meditech and MidAmerican have failed to demonstrate the release of any of their information at issue would result in substantial harm to their competitive positions. *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). Accordingly, the district may not withhold any of Meditech's or MidAmerican's information at issue under section 552.110(b) of the Government Code.

Section 552.116 of the Government Code provides as follows:

> (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper

> is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.
>
> (b) In this section:
>
> > (1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.
> >
> > (2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:
> >
> > > (A) intra-agency and interagency communications; and
> > >
> > > (B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state Exhibit C consists of audit working papers that were prepared or maintained by the district's financial auditor, as authorized by section 1077.154 of the Special District Local Laws Code. *See* Spec. Dist. Local Laws Code § 1077.154 (district shall have audit made of its financial condition). Based on your representations and our review, we agree Exhibit C consists of audit working papers for purposes of section 552.116. Therefore, the district may withhold Exhibit C under section 552.116 of the Government Code.

Section 552.136 provides, "[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."[10] Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the district must withhold the information we have marked under section 552.136 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

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[10]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).

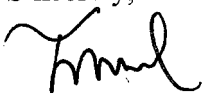
information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the district: (1) may continue to rely on Open Records Letter Nos. 2016-26310 and 2017-10099 as previous determinations and withhold the information at issue in accordance with those rulings; (2) may withhold the information your have marked, with the exception of the information we have marked for release, pursuant to rule 503 of the Texas Rules of Evidence; (3) must withhold the information we have marked in Exhibit I under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (4) must withhold Exhibit K under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (5) must withhold the information you have marked in Exhibit F under section 552.101 in conjunction with section 181.006; (6) may withhold the remaining information in Exhibit D, Exhibits E and H in full, Blue Cross's, Cardinal's, Kinnser's, MaxMD's, and Virtual's information in Exhibit G in full, and the info pertaining to McKesson that we have marked, under section 552.104(a) of the Government Code; (7) may withhold Exhibits B and J under section 552.107(1) of the Government Code; (8) may withhold Exhibit C under section 552.116 of the Government Code; and (9) must withhold the information we have marked under section 552.136 of the Government Code. The district 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, 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/tdw

Ref: ID# 672664

Enc. Submitted documents

c: Requestor
(w/o enclosures)

43 Third Parties
(w/o enclosures)