



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 9, 2018

Ms. Ann-Marie Sheely
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2018-00691

Dear Ms. Sheely:

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# 688922 (ID Nos. 537983-1 and 537432-1).

The Travis County Healthcare District d/b/a Central Health ("Central Health") received two requests from the same requestor for nineteen categories of information pertaining to Central Health's involvement with Community Care Collaborative ("CCC"). You state you released some information to the requestor. You state Central Health does not have information responsive to some categories of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, and 552.107 of the Government Code. In addition, you also state the requested information may implicate the proprietary interests of sixty-two third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request and their right to submit arguments to this office. *See* Gov't Code §§ 552.304, .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

interested third party to raise and explain applicability of exception in the Act in certain circumstances). We received comments from Aegis.net, Inc. (“Aegis”); Ascension Texas d/b/a Seton (“Seton”); Austin Regional Clinic (“ARC”); Capital Anesthesiology Association (“CAA”); Clinical Pathology Associates (“CPA”); Clinical Pathology Laboratories (“CPL”); Austin Retina Associates (“Austin Retina”); Central Texas Community and Health Centers d/b/a CommUnity Care (“CommUnity”); CCC; Health Management Associates (“HMA”); Infomedia Group d/b/a Carenet Healthcare Services (“Carenet”); Integrated Care Collaboration (“ICC”); K & C Systems d/b/a Management Information Analysis (“K&C”); Lone Star Circle of Care (“LSCC”); Lone Star Oral and Maxillofacial Surgery (“Lone Star”); People’s Community Clinic (“People’s”); Sendero Health Plan, Inc. (“Sendero”); St. David’s Healthcare (“St. David’s”); and Wakely Consulting Group (“Wakely”). We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the submitted information, which you indicated, is not responsive to the present request. This ruling does not address the public availability of the non-responsive information, and Central Health need not release it in response to this request.

Next, we note the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov’t Code § 552.022(a)(3). The responsive information consists of information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3). Central Health must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act or other law. *See id.* Although Central Health raises sections 552.103 and 552.107 of the Government Code for this information, sections 552.103 and 552.107 are discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, Central Health may not withhold any of the submitted information under section 552.103 or section 552.107. However, information encompassed by section 552.022 may be withheld under section 552.104 of the Government

Code. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). Accordingly, we will consider Central Health's argument under section 552.104 of the Government Code.

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 ruling, we have not received comments from any of the remaining third parties. Thus, we have no basis to conclude these third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, Central Health may not withhold any of the submitted information on the basis of any proprietary interest these remaining third parties may have in the information.

Section 552.104(a) of the Government Code exempts 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. Aegis, ARC, Austin Retina, Carenet, CAA, CCC, CPA, CPL, CommUnity, ICC, K&C, Lone Star, LSCC, HMA, People's, Seton, and St. David's state they have competitors. In addition, they state release of the information at issue would provide their competitors with an advantage. You state the information you indicated pertains to "costs of purchasing services . . . that are closely held by Central Health" and that release of this information would allow Central Health's competitors to "unfairly leverage this information to their financial benefit and Central Health's detriment[.]" After review of the information at issue and consideration of the arguments, we find Aegis, ARC, Austin Retina, Carenet, CAA, Central Health, CPA, CPL, CommUnity, ICC, K&C, Lone Star, LSCC, HMA, People's, Seton, and St. David's established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude Central Health may withhold the information we marked and indicated under section 552.104(a) of the Government Code.² However, upon review, we find CCC failed to establish the applicability of section 552.104(a) of the Government Code to the remaining information and Central Health may not withhold CCC's information on that basis.

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

CCC states its information is 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 Restatement's list of six trade secret factors.³ 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

³The 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(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, 232 (1979), 217 (1978).

Section 552.110(b) of the Government Code 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.

CCC asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude CCC failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find CCC failed to demonstrate the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, Central Health may not withhold any of CCC’s remaining information under section 552.110(a) of the Government Code.

CCC 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 CCC failed to demonstrate the release of any portion of the remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 and 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, Central Health may not withhold any of CCC’s remaining information under section 552.110(b) of the Government Code.

In summary, Central Health may withhold the information we marked and indicated under section 552.104(a) of the Government Code. Central Health must release the remaining responsive 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, appearing to read "Patrick P. Mehaffy", written in a cursive style.

Patrick P. Mehaffy
Attorney
Open Records Division

PPM/som

Ref: ID# 688922

Enc. Submitted documents

c: Requestor
(w/o enclosures)

19 Third Parties
(w/o enclosures)