



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 28, 2019

Ms. Jessica Marsh
General Counsel
Texas Civil Commitment Office
4616 West Howard Lane, Building 2, Suite 350
Austin, Texas 78728

OR2019-05528

Dear Ms. Marsh:

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# 751872 (PIA 2018-0029).

The Texas Civil Commitment Office (the "TCCO") received a request for thirty-nine categories of information pertaining to various subjects during specified time periods. You state the TCCO does not maintain information responsive to portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, and 552.136 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Cass County CSCD; Counseling & Psychotherapy Center, Inc.; and Wellpath Recovery Solutions, LLC ("Wellpath"). Accordingly, you state, and provide documentation showing, the TCCO notified these third parties 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); *id.* § 552.304 (interested party may submit comments stating why information should or should not be released); *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

¹The 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).

circumstances). We have received comments from Wellpath. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note Wellpath seeks to withhold certain information not submitted to this office by the TCCO. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because the information Wellpath seeks to withhold was not submitted by the TCCO, this ruling does not address such information and is limited to the information submitted as responsive by the TCCO.

Next, you inform us some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-02686 (2016). In that ruling, we determined the TCCO: (1) must withhold the information we marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.181 of the Government Code; (2) must withhold the information we indicated under section 552.110(b) of the Government Code; and (3) must release the remaining information. You state there has been no change in the law, facts, or circumstances upon which the prior ruling was based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon, the TCCO must continue to rely on Open Records Letter No. 2016-02686 as a previous determination and withhold or release the previously ruled upon information 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information at issue in the instant request is not encompassed by the prior ruling, we will address the arguments against its disclosure.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of these third parties 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

²We 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.

is trade secret), 542 at 3. Accordingly, the TCCO may not withhold the submitted information on the basis of any proprietary interest any of the remaining third parties may have in it.

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

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate; [and]

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (3), (5), (15). Upon review, we find the submitted information includes completed reports, budget information used to estimate the need for or expenditure of public funds or taxes, and job descriptions which are generally open to the public as part of a job posting. Thus, the completed reports are subject to section 552.022(a)(1), the budget information is subject to section 552.022(a)(5), and, if the TCCO regards the submitted job descriptions as open to the public, then they are subject to section 552.022(a)(15). Although the TCCO raises section 552.103 of the Government Code for the information at issue, this exception is a discretionary exception 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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the TCCO may not withhold any of the information subject to section 552.022, which we marked, under section 552.103. However, because sections 552.101, 552.104, 552.110, and 552.136 of the Government Code can make information confidential for purposes of section 552.022, we will consider the arguments under these exceptions to the information subject to section 552.022. Further, we will address your argument under section 552.103 for the information not subject to section 552.022.

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, the TCCO was a party to two lawsuits pending in the United States Court of Appeals for the Fifth Circuit when the TCCO received the instant request for information. You state the information at issue is related to the pending lawsuits. Based on your representations, the submitted documentation, and our review of the information, we find litigation was pending when the TCCO received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, with the exception of the information subject to section 552.022 of the Government Code, the TCCO may withhold the submitted information under section 552.103(a) of the Government Code.³

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this 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, 841 (Tex. 2015). You state some of the information subject to section 552.022 of the Government Code pertains to a competitive bidding situation in which a final agreement has not been signed. You assert release of the information at issue “may undercut TCCO’s negotiating position with regard to the current RFP and could disadvantage TCCO’s ability to obtain fair contracts with respect to the current RFP and with respect to future procurements.” After review of the information at issue and consideration of the arguments, we find you have established the release of the information at issue, which we marked, would give advantage to a competitor or bidder. Accordingly, we conclude the TCCO may withhold the information we marked under section 552.104(a) 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. This section encompasses information protected by chapter 611 of the Health and Safety Code. Section 611.002 pertains to mental health records and provides, in pertinent part,

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* Open Records Decision No. 565 (1990). Upon review, we find the information we marked consists of mental health records subject to chapter 611 of the Health and Safety Code. Accordingly, the TCCO must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. However, we find you have not demonstrated any portion of the remaining information consists of mental health records for purposes of chapter 611 of the Health and Safety Code. Accordingly, the TCCO may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also 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. 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).

Upon review, we conclude the information we marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the TCCO must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the TCCO may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.136 of the Government Code 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.” Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we find you have not demonstrated any of the remaining information consists of an access device number for purposes of section 552.136. Accordingly, the TCCO may not withhold any of the remaining information under section 552.136 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret is

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 Huffines*, 314 S.W.2d at 776. 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 private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

Upon review, we find Wellpath has not demonstrated any of the information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov’t Code § 552.110(a). We also find Wellpath has failed to establish release of the information at issue would cause it substantial competitive injury. *See id.* § 552.110(b). Therefore, the TCCO may not withhold any of the remaining information under section 552.110 of the Government Code.

⁴The following are the six factors that the Restatement gives 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 others 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).

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the TCCO must continue to rely on Open Records Letter No. 2016-02686 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. With the exception of the information subject to section 552.022 of the Government Code, the TCCO may withhold the submitted information under section 552.103(a) of the Government Code. The TCCO may withhold the information we marked under section 552.104(a) of the Government Code. The TCCO must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The TCCO must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The TCCO 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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/mo

Ref: ID# 751872

Enc. Submitted documents

c: Requestor
(w/o enclosures)