



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 14, 2019

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

OR2019-16147

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# 768751 (Reference Nos. 2019-0008 and 2019-0010).

The Texas Civil Commitment Office (the "TCCO") received two requests from different requestors for several categories of information pertaining to the Texas Civil Commitment Center, including specified invoices and information pertaining to two named entities, a specified contract, a specified program, and a specified report. The TCCO states it does not have information responsive to portions of the requests.¹ The TCCO also states it has provided some of the requested information to the requestors. The TCCO claims portions of the submitted information are excepted from disclosure under sections 552.101 and 552.111 of the Government Code. Additionally, the TCCO states release of the information at issue may implicate the proprietary interests of the following: Management & Training Corporation ("MTC"); Texas Tech University Health Sciences Center ("TTUHSC"); and Wellpath Recovery Solutions, LLC f/k/a Correct Care, LLC ("Wellpath"). Accordingly, the TCCO states, and provides documentation showing, it notified these interested third parties of the request for information and of their right to submit arguments to this office. *See Gov't*

¹The Act does not require a governmental body to create or release information that did not exist when a request for information was received. *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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

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 MTC, TTUHSC, and Wellpath.² We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the first requestor asks the TCCO to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* ORDs 563 at 8, 555 at 1-2. However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision Nos. 561 at 8-9 (1990), 555 at 1-2. We assume the TCCO has made a good faith effort to do so.

Next, we understand Wellpath to assert some of the submitted information was supplied with the expectation of confidentiality under the TCCO's procurement policies. We note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, the TCCO must release it, notwithstanding any expectations or agreement specifying otherwise.

Next, the TCCO informs us some of the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2017-28543 (2017). In that ruling, we determined the TCCO must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the TCCO must continue to rely on Open Records Letter No. 2017-28543 as a previous determination

²Although MTC raises section 552.101 of the Government Code in conjunction with the Privacy Act of 1947, section 552a of title 5 of the United States Code (“Federal Privacy Act”), for the submitted social security number, we note section 552.147 of the Government Code is the proper exception to raise when this information is held by a Texas governmental body. *See* Attorney General Opinion MW-95 (1979) (neither Freedom of Information Act (“FOIA”) nor Federal Privacy Act applies to records held by state or local governmental bodies in Texas). Therefore, we will consider MTC's claim for the information at issue under section 552.147 of the Government Code.

and withhold the information at issue in accordance with that ruling.³ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). We will address the arguments against disclosure of the remaining information.

TTUHSC and Wellpath assert some of the submitted information is excepted from public disclosure under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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. TTUHSC and Wellpath state they have competitors. In addition, TTUHSC and Wellpath explain release of the information they indicated would give their competitors an advantage. We note TTUHSC and Wellpath were winning bidders with respect to the information at issue and each seeks to withhold the terms of a contract. 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 (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 839. After review of the information at issue and consideration of the arguments, we find TTUHSC and Wellpath established the release of the information at issue would give an advantage to a competitor or bidder. Accordingly, we

³As we are able to make this determination, we need not address the remaining arguments against its disclosure.

conclude the TCCO may withhold all of TTUHSC's information and Wellpath's pricing information under section 552.104(a) of the Government Code.⁴

Section 552.101 of the Government Code excepts from public 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 chapter 418 of the Government Code. As part of the Texas Homeland Security Act (the "HSA"), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.176(a) of the Government Code provides the following:

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a). Section 418.181 of the Government Code provides the following:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181; *see also id.* § 421.001(2) (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). Section 418.182 of the Government Code provides the following:

- (a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security

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

system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under [the Act].

(c) Information in the possession of a governmental entity that relates to the location of a security camera in a private office at a state agency, including an institution of higher education, as defined by Section 61.003, Education Code, is public information and is not excepted from required disclosure under [the Act] unless the security camera:

(1) is located in an individual personal residence for which the state provides security; or

(2) is in use for surveillance in an active criminal investigation.

Id. § 418.182. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

MTC and the TCCO raise sections 418.176, 418.181, and 418.182 of the Government Code for portions of the remaining information. The TCCO states the information at issue consists of the staffing plans and emergency operations plan for the Texas Civil Commitment Center facility (the "facility") for the treatment and monitoring of sexually violent clients. The TCCO explains review of the submitted staffing plans can provide information regarding areas of the facility or types of activities that do not have direct staff oversight or can reveal shifts during which there are fewer staff members present. The TCCO further explains this information could be used to determine hours in which an attempted breach or other attack may be met with less resistance from staff due to variances in the staffing plan or scheduling of fewer staff members during certain hours. Upon review, we find the information we marked relates to staffing requirements of a law enforcement agency or a tactical plan of the provider and is maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Accordingly, the TCCO must withhold the information we marked under section 552.101

of the Government Code in conjunction with section 418.176 of the Government Code.⁵ However, we find MTC and the TCCO failed to establish the remaining information at issue is confidential under section 418.176, section 418.181, or section 418.182. Therefore, the TCCO may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.176, section 418.181, or section 418.182 of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by section 841.0833 of the Health and Safety Code, which provides the following:

- (a) The office shall develop procedures for the security and monitoring of committed persons in each programming tier.
- (b) Information regarding the security and monitoring procedures developed under Subsection (a) is confidential and not subject to disclosure under [the Act].

Health & Safety Code § 841.0833. The TCCO states the remaining information contains policies and procedures related to the security and monitoring of sexually violent predators. Upon review, we agree the information we marked consists of policies and procedures related to the security and monitoring of committed persons, which is made confidential under section 841.0833(b) 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 841.0833(b) of the Health and Safety Code. Although MTC raises section 841.0833 for some of the remaining information at issue, we find MTC failed to demonstrate the information at issue is confidential pursuant to section 841.0833. Therefore, the TCCO may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 841.0833 of the Health and Safety Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*,

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, a governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *See Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* ORD 561 at 9 (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

The TCCO states the information at issue consists of advice, opinions, and recommendations regarding policymaking matters of the facility. The TCCO explains the information at issue consists of a draft document that will be released in its final form. Based upon these

representations and our review, we find the TCCO may withhold the information we marked under section 552.111 of the Government Code.⁶

Section 552.110 of the Government Code 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.⁷ RESTATEMENT OF TORTS § 757 cmt. b. This

⁶As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

⁷The 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

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, 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* Open Records Decision No. 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).

MTC and Wellpath argue some of the remaining 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. Upon review, we find MTC has demonstrated the information we marked constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the TCCO must withhold the information we marked under section 552.110(b) of the Government Code. However, we find MTC and Wellpath failed to demonstrate the release the remaining information at issue would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). We note MTC and Wellpath were winning bidders in this instance. This office considers the prices charged in

(1982), 255 at 2 (1980).

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 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3); ORD 541 at 8. Therefore, the TCCO may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Wellpath claims some of the remaining information is excepted from disclosure under section 552.110(a) of the Government Code. However, upon review, we find Wellpath failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret, nor has the company demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, the TCCO may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. *See* Gov't Code § 552.147. Upon review, we find the TCCO may withhold the submitted social security number under section 552.147 of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by judicial decision and the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm. *Id.* In applying this standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned, "vague assertions of risk will not carry the day." *Id.* at 119. Upon review, we conclude the TCCO failed to demonstrate the applicability of the common-law physical safety exception to any of the remaining information. Accordingly, the TCCO may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

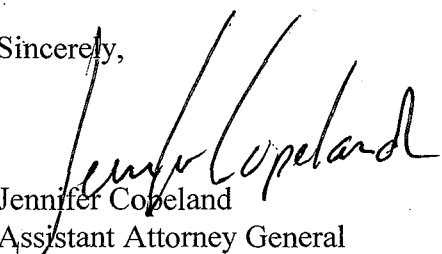
In summary, the TCCO must continue to rely on Open Records Letter No. 2017-28543 as a previous determination and withhold the information at issue in accordance with that ruling. The TCCO may withhold all of TTUHSC's information and Wellpath's pricing information

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 418.176 of the Government Code. The TCCO must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 841.0833(b) of the Health and Safety Code. The TCCO may withhold the information we marked under section 552.111 of the Government Code. The TCCO must withhold the information we marked under section 552.110(b) of the Government Code. The TCCO may withhold the submitted social security number under section 552.147 of the Government Code. 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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/mo

Ref: ID# 768751

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)