



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

February 10, 2020

Ms. Kendra Thomas  
General Counsel  
The Harris Center for Mental Health and IDD  
9401 Southwest Freeway, 10th Floor  
Houston, Texas 77074

OR2020-03841

Dear Ms. Thomas:

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# 811005.

The Harris Center for Mental Health and IDD (the "center") received a request for certain information pertaining to the center's request for proposals EHR/RCM Project 19/001. You state you have released the requested award recommendation. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of the following third parties: Cerner Corporation ("Cerner"); Core Solutions, Inc. ("Core"); Credible, Inc. ("Credible"); Harris County Hospital District d/b/a Harris Health System ("Harris Health"); Netsmart Technologies, Inc. ("Netsmart"); Streamline Healthcare Solutions ("Streamline"); and Welligent, Inc. ("Welligent"). Accordingly, you state, and provide documentation showing, you 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 §§ 552.304; 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 Cerner, Core, Credible, Harris Health, Netsmart, and Streamline. We have also received comments from Epic Systems Corporation ("Epic"). *See* Gov't Code § 552.305(d). We have reviewed the submitted information and considered the submitted arguments.

Initially, we note the center has not submitted the requested evaluation summaries. To the extent information responsive to this portion of the request existed on the date the center received the request, we assume you have release it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it

must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, you state and we agree, some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2019-05747 (2019) and 2019-08098 (2019). Additionally, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-18780 (2019). We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the center may continue to rely on Open Records Letter Nos. 2019-05747, 2019-08098, and 2019-18780 as previous determinations and withhold or release the information at issue in accordance with those rulings.<sup>1</sup> *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 note an interested third party has 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 Welligent explaining why the submitted information should not be released. Therefore, we have no basis to conclude Welligent 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 center may not withhold the submitted information on the basis of any proprietary interest Welligent may have in the 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). 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. Core and Credible state they have competitors. In addition, Core and Credible state release of their information at issue would provide their competitors with an unfair advantage and cause Core and Credible competitive harm. After review of the information at issue and consideration of the arguments, we find Core and Credible have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the center may withhold all of Core's and Credible's information under section 552.104(a) of the Government Code.<sup>2</sup>

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<sup>1</sup> As we are able to make this determination, we need not address Cerner's, Epic's, Harris Health's, and Netsmart's arguments against disclosure of this information.

<sup>2</sup> As our ruling is dispositive, we need not address Core's remaining arguments against disclosure of this information.

Streamline claims its information at issue is excepted under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from who the information was obtained. *See* Gov't Code § 552.110. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides that 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.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that

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<sup>3</sup> 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; and
- (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).

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 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. *See* 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]ommerical 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 5-6.

Streamline asserts its information at issue constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Streamline has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find Streamline has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of Streamline’s information may be withheld under section 552.110(a).

Streamline also contends its information at issue is commercial or financial information, the release of which would cause substantial competitive harm to the company. Upon review, we find Streamline has demonstrated some of its information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the center must withhold Streamline’s pricing information, which we marked, under section 552.110(b) of the Government Code. However, we find Streamline has not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. *See* Gov’t Code § 552.110(b). Therefore, the center may not withhold any of Streamline’s remaining information at issue on this basis.

Section 552.136 of the Government Code states “[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.”<sup>4</sup> *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of this exception. Thus, the

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<sup>4</sup> 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).

center must withhold all insurance policy numbers in the remaining information under section 552.136 of the Government Code.

In summary, the center may continue to rely on Open Records Letter Nos. 2019-05747, 2019-08098, and 2019-18780 as previous determinations and withhold or release the information at issue in accordance with those rulings. The center may withhold all of Core's and Credible's information under section 552.104(a) of the Government Code. The center must withhold Streamline's pricing information, which we marked, under section 552.110(b) of the Government Code. The center must withhold all insurance policy numbers in the remaining information under section 552.136 of the Government Code. The center 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Kimbell Kesling  
Attorney  
Open Records Division

KK/be

Ref: ID# 811005

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

8 Third Parties  
(w/o enclosures)