

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2009

Ms. Lois A. Wischkaemper
Senior Vice President and General Counsel
UMC Health System
Lubbock County Hospital District
602 Indiana Avenue
Lubbock, Texas 79415

OR2009-07518

Dear Ms. Wischkaemper:

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# 344786.

The Lubbock County Hospital District (the "district") received a request for (1) the contract entered into with the winning vendor for the RFP for Smart Infusion Pumps, including related software and implementation devices, and (2) the proposals and pricing quotes from the other non-winning bidders. Although you take no position on the requested information, you state it may contain proprietary information subject to exception under the Act. Accordingly, you state and provide documentation showing you notified Hospira Worldwide, Inc. ("Hospira"), Sigma International General Medical Apparatus, L.L.C. ("Sigma"), and Cerner Corporation ("Cerner") of the request for information and of each company's right to submit arguments to this office as to why the requested information should not be released. *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 Hospira and Cerner, considered the submitted arguments, and reviewed the submitted information.

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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter Sigma has not submitted any comments to this office explaining how release of the submitted information would affect its proprietary interests. Therefore, Sigma has not provided us with any basis to conclude it has a protected proprietary interest in any of the submitted information. *See id.*

§ 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, it actually faces competition and substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the district may not withhold the information related to Sigma on the basis of any proprietary interest Sigma may have in the information.

Next, Cerner argues its "Schedule Number 26" is not a proposal or pricing quote and therefore is not responsive to the current request for information. Cerner asserts this information is "a contract that was provided to [the district] in hopes that both parties would sign the contract[.]" We note a governmental body must make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at (1990) (construing statutory predecessor). The district has submitted the schedule at issue as information the district deems to be responsive to this request for information. We also note the request seeks proposals from non-winning bidders, and the submitted schedule is a proposed contract between Cerner and the district. Accordingly, we conclude the district has made a good-faith effort to relate this request to responsive information. Therefore, we will determine whether information in Cerner's submitted schedule must be released to the requestor.

Next, Hospira argues its price quote is not responsive to the current request for information because Hospira is the winning vendor, and the request only seeks the contract from the winning vendor and seeks the pricing quotes from the non-winning bidders. We are unable to determine whether Hospira's submitted price quote is part of Hospira's contract with the district. If the price quote is not incorporated into the contract, the price quote is not responsive. To the extent Hospira's price quote is part of Hospira's contract with the district, the price quote is responsive to the current request, and we will address Hospira's arguments with regard to its information.

Cerner asserts portions of its submitted information are excepted under section 552.110(a) of the Government Code. Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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 . . . [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.

Restatements of Torts § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776.

There are six factors to be assessed in determining whether information qualifies as 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. 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). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990).

We find Cerner has not shown its information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional

references, qualifications and experience, and pricing). Thus, the district may not withhold the information under section 552.110(a).

Hospira asserts portions of its submitted information are excepted under section 552.110(b) of the Government Code. 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.* § 552.110(b); *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of the submitted arguments and information, we conclude Hospira has made only conclusory allegations that release of its information would cause substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision No. 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 was entirely too speculative). We also note the pricing information of a winning bidder, in this instance Hospira, is not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

We note the submitted information contains a bank account number and a routing number that are excepted from disclosure under section 552.136 of the Government Code.¹ Section 552.136 states “[n]otwithstanding any other provision of this chapter, 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). Accordingly, the district must withhold these access device numbers, which we have marked, under section 552.136 of the Government Code.

¹The 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).

Finally, we note some of the materials at issue 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the district must withhold the access device numbers we have marked under section 552.136 of the Government Code. To the extent Hospira's price quote is part of Hospira's contract with the district, the price quote is responsive to the request, and it must be released. The remaining information must be released; however, in releasing the information that is copyrighted, the district must comply with applicable 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 344799

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Hospira Worldwide, Inc.
Contract Marketing
275 North Field Drive, Department 361, Building H1
Lake Forest, Illinois 60045
(w/o enclosures)

Sigma
711 Park Avenue
Medina, New York 14103
(w/o enclosures)

Cerner Corporation
2800 Rockcreek Parkway
Kansas City, Missouri 64117
(w/o enclosures)

APR 26 2010 TE

At 9:18 A.M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-09-002163

CERNER CORPORATION,
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS, and UMC HEALTH SYSTEM,
Defendants.

§ IN THE DISTRICT COURT OF
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 98TH JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Cerner Corporation (Cerner), and Defendants Greg Abbott, Attorney General of Texas, and UMC Health System (UMC) appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Shaun West, was sent reasonable notice of this setting and of the parties' agreement that UMC must withhold some of the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

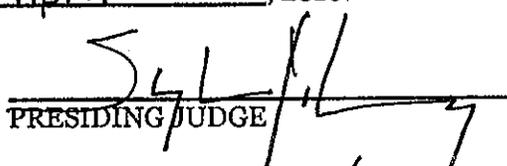
1. The information at issue, specifically, those portions of Cerner's proposal, including its System Schedule No. 26, that are redacted in Exhibit 1 to the letter, dated

NOTICE SENT: FINAL INTERLOCUTORY NONE
DISP PARTIES: _____
DISP CODE: CVD / CLS _____
REDACT PGS: _____
JUDGE _____ CLERK _____

December 11, 2009, from Cerner's counsel to counsel for the Attorney General, is excepted from disclosure by Tex. Gov't Code § 552.110(b).

2. UMC shall withhold from the requestor the redacted information described in Paragraph 1 of this Agreement.
3. All costs of court are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 26 day of April, 2010.


PRESIDING JUDGE

APPROVED:


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