



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2010

Ms. Myrna Reingold
Galveston County
Legal Department
722 Moody, 5th Floor
Galveston, Texas 77550-2317

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2010-01316

Dear Ms. Reingold:

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# 368224.

The Galveston County Purchasing Agent (the "county") received four requests for information pertaining to Request for Proposal number B092027. You state that the county has released some of the requested information. Although you take no position with respect to the public availability of the submitted information, you state that the submitted documents may contain proprietary information of third parties subject to exception under the Act. Accordingly, you provide documentation showing that the county notified Conmed Healthcare Management, Inc. ("Conmed"); Correctional Healthcare Management ("CHM"); Correctional Medical Services, Inc. ("CMS"); NaphCare; Prison Health Services, Inc. ("PHS"); and Wexford Health Sources, Inc. ("Wexford") of the requests 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); *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). ~~CHM, CMS, and NaphCare have responded to this notice. We have considered the submitted arguments and reviewed the submitted information.~~

Initially, we note, and you acknowledge, that the county failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting an open records decision from this office. See Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. See *id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); see also Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Accordingly, we will consider whether the interests of the notified third parties provide a compelling reason to withhold any portion of the submitted information from disclosure.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code 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, Conmed, PHS, and Wexford have not submitted comments to this office explaining why any portion of the submitted information relating to them should not be released to the requestors. Because we have not received comments from Conmed, PHS, or Wexford, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of Conmed, PHS, or Wexford. Accordingly, none of the information pertaining to these parties may be withheld on that basis. See *id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

We now address the arguments submitted by CHM, CMS, and NaphCare. Section 552.110(a) protects trade secrets 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. 1957); see also Open Records Decision No. 552 at 2. 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

The 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.

Id.; *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 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 that section 552.110(a) is applicable unless it has been shown that 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).

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 *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

CMS and NaphCare claim that portions of their information at issue are excepted from disclosure under section 552.110(a) of the Government Code. Upon review, we find that NaphCare has shown that its proprietary software user manual is a protected trade secret under section 552.110(a). Accordingly, the county must withhold the information we have marked under section 552.110(a). However, we conclude that CMS has failed to establish that any of its information at issue is a trade secret protected by section 552.110(a). See ORD Nos. 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 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the county may not withhold any of the remaining information at issue under section 552.110(a).

CMS, CHM, and NaphCare claim that portions of the remaining information are excepted under section 552.110(b) of the Government Code. Upon review, we conclude CHM has established that release of some of its customer information would cause it substantial competitive injury. However, we note that CHM published the identities of some of its customers on its website and NaphCare published the identities of all of its customers on its website. CHM and NaphCare have failed to demonstrate that release of this information would cause the companies substantial competitive harm. Further, we note that some of the customers CHM seeks to withhold are acting as references for the company. We find that CHM has not established that this customer information is excepted from disclosure under section 552.110(b). See ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to professional references). However, CHM has established that release of information pertaining to its canceled contracts and employee benefits would cause the company substantial competitive harm. Therefore, the county must withhold the information we have marked under section 552.110(b). However, CHM, CMS, and NaphCare have made only conclusory allegations that release of their remaining information at issue would cause the companies substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. We note that the pricing information of a winning bidder, such as CMS in this instance, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. 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, 219 (2000) (federal cases applying analogous Freedom of Information Act reason that disclosure of prices charged government is a cost of doing business with government). Accordingly, we determine none of the remaining submitted information may be withheld under section 552.110(b) of the Government Code.

Next, section 552.136 of the Government Code provides that “[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.”¹ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded that insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the county must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.²

We note that portions of the remaining submitted information are 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 county must withhold the information we have marked under sections 552.110(a), 552.110(b), and 552.136 of the Government Code. The county must release the remaining information, but any information that is protected by copyright may only be released in accordance with 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.

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).

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 368224

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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JAN 13 2015

8:47A

Cause No. D-1-GN-10-000477

At
Velva L. Falco, District Clerk

CORRECTIONAL MEDICAL SERVICES, INC., <i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
	§	
	§	
	§	
v.	§	
	§	
HONORABLE GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, JAMES D. YARBROUGH, COUNTY JUDGE OF GALVESTON COUNTY, AND BRUCE HUGHES, GALVESTON COUNTY PURCHASING AGENT, <i>Defendants.</i>	§	419th JUDICIAL DISTRICT
	§	
	§	
	§	
	§	
	§	TRAVIS COUNTY, TEXAS

AGREED ORDER OF DISMISSAL

This cause is an action under the Public Information Act (PIA), Texas Government Code Chapter 552. Plaintiff Corizon Health f/k/a Correctional Medical Services, Inc., ("CMS"), Defendant Ken Paxton, Attorney General of Texas (formerly Greg Abbott) ("Attorney General"), and Defendants the Galveston County Judge (formerly James Yarbrough and currently Mark Henry) and the Galveston County Purchasing Agent (formerly Bruce Hughes and now Rufus Crowder) (collectively "Galveston County"), agree that this matter should be dismissed pursuant to PIA section 552.327 on the grounds that the requestors have abandoned their requests for information. See Tex. Gov't Code § 552.327. A court may dismiss a PIA suit under section 552.327 when all parties agree to dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request for information in writing or has abandoned the request. *Id.* The Attorney General represents to the Court that the requestors, Cornmed Healthcare

Management, Inc., Correctional Healthcare Management, NaphCare, Inc., Prison Health Services, Inc., Wexford Health Source, Inc., and Advanced Correctional Healthcare have abandoned their requests for information.

Further, Letter Ruling OR2010-01316 will not be considered a “previous determination” by the Office of the Attorney General under Tex. Gov’t Code § 552.301(a), (f); and, if the precise information is requested again, Galveston County may ask for a decision from the Attorney General under Tex. Gov’t Code § 552.301(g). Accordingly, Galveston County is not required to disclose the requested information subject to release in Letter Ruling OR2010-01316. The parties request that the Court enter this Agreed Order of Dismissal.

The Court is of the opinion that entry of an agreed dismissal order is appropriate.

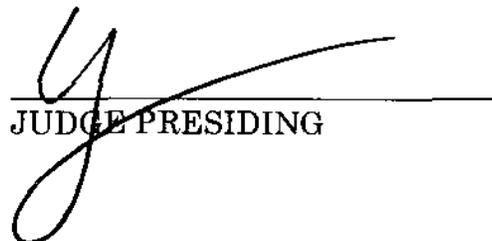
It is THEREFORE, ORDERED, ADJUDGED and DECREED that this cause is DISMISSED in all respects;

All court costs and attorney fees are taxed to the party incurring same;

All other requested relief not expressly granted herein is denied;

This order disposes of all claims between the parties and is final.

Signed this 13TH day of JANUARY, 2016.



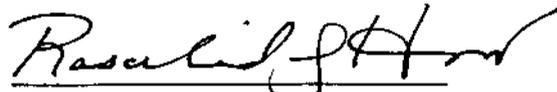
JUDGE PRESIDING

AGREED:



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