



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2010

Mr. Joel B. Locke
Attorney for Medical Center Hospital
Shafer, Davis, O'Leary & Stoker, P.C.
Post Office Drawer 1552
Odessa, Texas 79760-1552

OR2010-15045

Dear Mr. Locke:

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# 396277.

The Ector County Hospital District d/b/a Medical Center Hospital (the "district"), which you represent, received a request for four specified contracts and the proposals from all bidders who responded to the related requests for proposals. The district takes no position on whether the submitted information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of 3M Company ("3M"); Compliance 360, Inc. ("Compliance 360"); Ethics Point; and McKesson Information Solutions, LLC, (collectively, the "third parties"). Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received correspondence from representatives of 3M and Compliance 360. We have considered the submitted arguments and have reviewed the submitted information.

We note that 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) of the Government Code to

submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Ethics Point or McKesson Information Solutions, LLC. We, thus, have no basis for concluding that any portion of these companies' information constitutes their proprietary 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 district may not withhold any of the submitted information based on the proprietary interests of Ethics Point and McKesson Information Solutions, LLC.

Next, we note that 3M seeks to withhold certain information that the district has not submitted to this office for our review. Because some of the information that 3M seeks to withhold was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the district. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Thus, we will only address 3M's arguments against disclosure of the information that was actually submitted to this office for our review.

3M informs this office that its contract with the district contains a confidentiality provision. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, 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 Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Compliance 360 claims its information is confidential under section 552.101 of the Government Code, but has not directed our attention to any law, nor are we aware of any, under which the information it seeks to withhold is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). We, therefore, conclude that the district may not withhold any of the information at issue under section 552.101 of the Government Code.

Compliance 360 claims that its information is excepted under section 552.110(b) of the Government Code. In addition, 3M claims that the pricing information it has marked in its information is excepted under section 552.110(b). 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* ORD 661 at 5-6 (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).

Upon review of Compliance 360’s and 3M’s arguments, we find these companies have made only conclusory allegations that the release of the submitted information each company seeks to withhold would result in substantial damage to their respective competitive positions. Thus, these third parties have not demonstrated that substantial competitive injury would result from the release of any of their information at issue. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note that the pricing information of winning bidders and governmental contractors, such as 3M and Compliance 360, 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 reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, no portion of the submitted information may be withheld under section 552.110(b).

Finally, we note that some of the submitted information appears to 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. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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. Accordingly, as no further exceptions against its disclosure are raised, the submitted information must 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.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

Ref: ID# 396277

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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