



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2010

Ms. Lois A. Wischkaemper
Senior Vice President and General Counsel
University Medical Center Health System
602 Indiana Avenue
Lubbock, Texas 79415

OR2010-16190

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# 397981.

The Lubbock County Hospital District (the "district") received a request for the electronic health records contract the district has with Cerner Corporation ("Cerner") as well as the proposals, responses, and pricing quotes submitted in response to electronic health records solicitations. Although you take no position as to the public availability of the submitted information, you state release of this information may implicate the proprietary interests of Cerner. Thus, pursuant to section 552.305 of the Government Code, you notified Cerner of the request and of the company's right to submit arguments to this office as to why its information should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have considered the comments submitted by Cerner and reviewed the submitted information.

Initially, we note you have only submitted district contracts with Cerner. We assume that, to the extent proposals, responses, and pricing quotes submitted in response to electronic health records solicitations existed at the time the request was received, they have been released to the requestor. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664

(2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, Cerner argues that, because the requestor may not be a Texas resident, she is not entitled to request information under the Act. We disagree. Under the Act, any member of the public has a right of access to information that a governmental body collects, assembles, or maintains in connection with the transaction of official business. *See* Gov't Code §§ 552.002(a), .021. In this instance, the requestor seeks information held by the district, which is a governmental body in Texas. Therefore, the Act is plainly applicable to this request for information. Furthermore, the Act expressly provides that the district "shall treat all requests for information uniformly without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media." *Id.* § 552.223; *see also id.* §§ 552.007(b), .221(a), .222(a). Accordingly, the Act clearly entitles this individual to make this request for information.

Cerner raises section 552.222 of the Government Code and argues the district should seek clarification because some of the submitted contracts are not responsive to the request for information. Section 552.222 permits a government body to communicate with a requestor for purpose of clarifying or narrowing request for information. *Id.* § 552.222. In this instance, the district has not sought clarification from the requestor. Thus, we assume the district has made a good-faith effort to relate this request to information it holds. *See* Open Records Decision No. 561 at (1990). Therefore, we will consider Cerner's arguments for all the submitted information.

Cerner raises section 552.110 of the Government Code, which protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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." *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 a "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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that 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). 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.¹ Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* 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).

Cerner seeks to withhold the pricing information in the submitted contracts as trade secrets under section 552.110(a). Cerner states this pricing information relates to particular contracts between Cerner and the district and was tailored to meet the district's particular goals. Information that pertains to "a single or ephemeral event in the conduct of a business" is specifically excluded from the definition of "trade secret" because it is not "a process or device for continuous use in the operation of the business." *See* Restatement of Torts § 757 cmt. b (1939); *c.f. Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Cerner nonetheless argues this information relates to its business "as a whole," claiming this information could be used to determine the company's overall pricing strategy. However, Cerner does not

¹The 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 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).

explain how the release of a pricing structure and service package that have been tailored for a particular customer and contract could be used to determine more general information about the company and its strategies. Therefore, because Cerner has not demonstrated the information it seeks to withhold meets the definition of a trade secret, the submitted information may not be withheld under subsection (a) of section 552.110.

Cerner also seeks to withhold its pricing information under section 552.110(b) of the Government Code. However, this office considers the prices charged in 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* 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). Upon review, we find Cerner has made only conclusory allegations that release of the submitted information would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing how release of information pertaining to particular contracts will likely result in competitive injury to the company. *Cf.* Open Records Decision Nos. 661 at 5-6 (1999), 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). Therefore, no information may be withheld under section 552.110(b).

Section 552.136 states 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.”² Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we conclude the bank account and routing numbers we have marked must be withheld under section 552.136.³

²The 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).

³We 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 bank account numbers and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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. 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.

In summary, the district must withhold the bank account and routing numbers we marked under section 552.136 of the Government Code. As no further exceptions to disclosure are raised, the district must release the submitted information to the requestor, but any information protected by copyright 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tp

Ref: ID# 397981

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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