



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2011

Ms. Laura Garza Jimenez
County Attorney
Nueces County
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2011-04350

Dear Ms. Jiminez:

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# 412995.

Nueces County (the "county") received two requests for specified proposals, scoring evaluation documentation, and the executed contract related to the county's request for proposals for inmate medical services. You state you are releasing some of the requested information to the requestors. You state the county is redacting insurance policy numbers subject to section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ Although you take no position with respect to the public availability of the submitted information, you indicate its release may implicate the proprietary interests of several third parties. Accordingly, you have notified NaphCare, Inc. ("NaphCare"); Correctional Healthcare Management, Inc. ("CHM"); Correct Care Solutions, LLC ("CCS"); NextGen Healthcare Information Systems, Inc. ("NextGen"); and PHS Correctional Health Care ("PHS") of the request 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) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We

¹We note this office issued Open Records Decision No. 684, 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.

have received comments from NaphCare, CHM, CCS, and NextGen. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the county's procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). In this instance, you state the county received the first request for information on January 6, 2011. However, you did not submit some of the information responsive to that request until March 4, 2011. Thus, the county has failed to comply with the requirements of section 552.301(e) for the information that was not timely submitted.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third-party interests are at stake, we will consider whether the information at issue must be withheld on those grounds.

Next, 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 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 arguments from PHS explaining why its submitted information should not be released. Thus, we have no basis for concluding any portion of the submitted information constitutes proprietary information of this company, and the county may not withhold any portion of the submitted information based on the proprietary interests of PHS. *See* 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.

NextGen asserts its proposal is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the system, not the proprietary interests of private

parties such as NextGen. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the county does not raise section 552.104 as an exception to disclosure. Therefore, the county may not withhold any of the submitted information under section 552.104 of the Government Code.

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the disclosure of which 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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a

²The 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;
- (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).

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). We note that 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 (1939).

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 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

NaphCare, CHM, and CCS contend portions of their submitted information consist of trade secrets excepted from disclosure under section 552.110(a). Upon review, we find that NaphCare and CHM have shown that portions of their proprietary software information are protected trade secrets under section 552.110(a). We also find CCS has established a *prima facie* case that some of its customer information constitutes trade secrets. Accordingly, the county must withhold the information we have marked under section 552.110(a). We note, however, that CCS has made some of the customer information it seeks to withhold publicly available on its website. Because CCS has published this information, it has failed to demonstrate this information is a trade secret, and none of it may be withheld under section 552.110(a). Additionally, we find that NaphCare, CHM, and CCS have failed to demonstrate how any of their remaining information meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. *See* ORD 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). Thus, the county may not withhold any of the remaining information at issue under section 552.110(a).

NaphCare and CHM claim portions of their remaining information are excepted from disclosure under section 552.110(b). NextGen also claims its methodologies and pricing information is excepted from disclosure under section 552.110(b). Further, we understand NextGen to raise section 552.110(b) for its customer information. Upon review, we find NextGen has established its pricing information, customer information, and a portion of its methodologies constitute commercial or financial information, the release of which would cause the company substantial competitive harm. We also conclude CHM has established that release of some of its customer information would cause it substantial competitive injury. Therefore, the county must withhold the information we have marked under section 552.110(b) of the Government Code. 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. Therefore, CHM and NaphCare have failed to demonstrate that release of this information would cause the companies substantial competitive harm. NaphCare, CHM, and NextGen 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. Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Finally, we note, and the county acknowledges, that some of the remaining information 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 (1977). 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 county must withhold the information we have marked under section 552.110 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.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tf

Ref: ID# 412995

Enc. Submitted documents

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(w/o enclosures)

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