



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

March 19, 2012

Ms. Zeena Angadicheril
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

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

OR2012-04021

Dear Ms. Angadicheril:

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# 448056 (OGC# 141211).

The University of Texas System (the "system") received a request for the contract for a medical code billing system and proposals submitted pursuant to a specified request for proposals.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Kiwi-Tek ("Kiwi"); A-Life Medical ("A-Life"); CodeRyte, Inc. ("CodeRyte"); Plato Health Systems, Ltd. ("Plato"), and PLATOCODE, Ltd ("PlatoCode"). Accordingly, you state, and provide documentation showing, you notified Kiwi, A-Life, CodeRyte, Plato, and PlatoCode of the request for information and of their rights 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). We have received comments from CodeRyte, Plato, and PlatoCode. We have reviewed the submitted information and the submitted arguments.

¹You state the system sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Initially, 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 comments from Kiwi or A-Life explaining why the submitted information should not be released. Therefore, we have no basis to conclude either Kiwi or A-Life has a protected proprietary interest in any of the submitted 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 system may not withhold any of the submitted information on the basis of any proprietary interest Kiwi or A-Life may have in the information.

CodeRyte, Plato, and PlatoCode each argue portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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, 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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).

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

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 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). We note 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); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.

CodeRyte, Plato, and PlatoCode assert portions of the submitted information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude CodeRyte, Plato, and PlatoCode have failed to establish a *prima facie* case that any portion of the submitted information meets the definition of a trade secret. We further find CodeRyte, Plato, and PlatoCode have not demonstrated the necessary factors to establish a trade secret claim for any of the submitted information. *See* ORD 402. Therefore, none of the information at issue may be withheld under section 552.110(a).

CodeRyte, Plato, and PlatoCode further argue portions of their information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Plato and

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- (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).

PlatoCode have demonstrated their submitted pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the system must withhold Plato and PlatoCode's pricing information, which we have marked, under section 552.110(b) of the Government Code. However, we find CodeRyte and PlatoCode have made only conclusory allegations that the release of any of the remaining information would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 661, 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), 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). Further, 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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

We note the remaining information contains medical records. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."³ Gov't Code § 552.101. Section 552.101 encompasses information made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in relevant part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

³The 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).

Id. § 159.002(a)-(c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; ORD 598. We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Upon review, we find portions of the remaining information, which we have marked, constitute records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient’s medical records. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Accordingly, the marked medical records must be withheld under section 552.101 of the Government Code in conjunction with the MPA.

In summary, the system must withhold Plato and PlatoCode’s pricing information, which we have marked, under section 552.110(b) of the Government Code. The system must also withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The remaining submitted information must be released.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 448056

Enc. Submitted documents

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(w/o enclosures)

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Filed in The District Court
of Travis County, Texas

SC OCT 29 2015
At 3:00 P.M.
Velva L. Price, District Clerk

Cause No. D-1-GN-12-001153

CODERYTE, INC.,
Plaintiff,

v.

THE HONORABLE GREG ABBOTT,
ATTORNEY GENERAL OF THE STATE
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT
§
§
§ 200th JUDICIAL DISTRICT
§
§
§
§
§ TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act ("PIA"), Tex. Gov't Code ch. 552, in which in 3M Health Information Systems, Inc. ("3M HIS"), as the successor to Coderyte, Inc., sought to withhold certain information, which is in the possession of The University of Texas System ("UT System") from public disclosure. All matters in controversy between Plaintiff, 3M HIS, and Defendant, Ken Paxton¹, Attorney General of Texas ("Attorney General"), arising out of this lawsuit have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent a certified letter to the requestor, Ms. Caitlin Doe of Commerce Analysts, on Oct 2, 2015, informing her of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that UT System will be instructed to withhold the designated portions of the information at issue. The requestor was also

¹Because Greg Abbott was sued in his official capacity, Ken Paxton is now the appropriate defendant.



informed of her right to intervene in the suit to contest the withholding of this information. A copy of the certified mail receipt is attached to this motion. The requestor has not filed a motion to intervene.

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. Pursuant to Tex. Gov't Code § 552.110, UT System will be instructed, that that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Tex. Gov't Code §552.110(b) and must be withheld. 3M HIS will provide UT System with a copy of bates-stamped pages 001-112 of the information at issue with the agreed upon information redacted.

UT System will also be instructed that after redaction, the remaining information on these pages must be released to the requestor, and the remainder of the information at issue must be released or withheld in accordance with Attorney General open records letter ruling OR2012-04021.

2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between 3M HIS and the Attorney General and is a final judgment.

SIGNED the 29TH day of December, 2015.

Agreed Final Judgment
Cause No. D-1-GN-12-01153

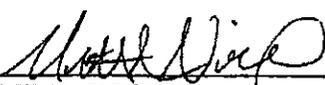

PRESIDING JUDGE
KARIN CRUM

PRESIDING JUDGE

AGREED:


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INFORMATION SYSTEMS, INC. f/k/a CODERYTE, INC.

Agreed Final Judgment
Cause No. D-1-GN-12-01153