



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 10, 2013

Mr. Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701

OR2013-00628

Dear Mr. Gilman:

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# 475584.

The Texas Health Services Authority (the "authority") received a request for the contract and responses related to request for qualifications numbers ("RFQ Nos.") 2010-HCC01 and A1548-11-00001.¹ You state the authority has withheld or released the information pertaining to RFQ No. 2010-HCC01 in accordance with Open Records Letter Ruling No. 2010-10926 (2010).² You state the authority has released some information pertaining to RFQ No. A1548-11-00001. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified the affected third parties of the request and of their right to submit arguments to this office explaining why their information

¹We note the authority sought and received clarification of the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

should not be released.³ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments submitted by ANX, GSI, Harris, Secure, Surescripts, and Weno. Thus, we have considered these arguments and reviewed the submitted information.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from AHC, Cerner, HIT, Inpriva, MaxMD, MedPlus, My Direct, or TORCH. Thus, none of these third parties has demonstrated it has a protected proprietary interest in any of the submitted information. See *id.* § 552.110(a)-(b); 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 authority may not withhold the submitted information pertaining to these third parties on the basis of any proprietary interests they may have in the information.

ANX, Secure, and Surescripts all assert their information is excepted from disclosure based on non-disclosure or licensing agreements. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Harris and Secure each argue its submitted information is generally confidential. Section 552.101 of the Government Code excepts from disclosure “information considered

³The affected third parties are: ANXeBusiness Corp. (“ANX”); Axolotl Healthcare Connected (“AHC”); Cerner Corp. (“Cerner”); GSI Health (“GSI”); Harris Corp. (“Harris”); HIT Services Partners (“HIT”); Inpriva, Inc. (“Inpriva”); MaxMD; MedPlus; My Direct HISP, Inc. (“My Direct”); Secure Exchange Solutions (“Secure”); Surescripts; Texas Organization of Rural & Community Hospitals (“TORCH”); and Weno Healthcare, Inc. (“Weno”).

to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, neither Harris nor Secure has directed our attention to any confidentiality provision that would make the entirety of its information confidential under section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the authority may not withhold the entirety of the information pertaining to either Harris or Secure under section 552.101 of the Government Code.

Section 552.101 of the Government Code encompasses section 6103(a) of title 26 of the United States Code, which makes tax return information confidential. Surescripts asserts a federal tax identification number is excepted from disclosure under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders “tax return information” confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as:

a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589 F.2d 827, 840–41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). The federal tax identification number Surescripts seeks to withhold does not fall under the definition of tax return information. *See* 26 U.S.C. § 6103(b)(2)(A). Accordingly, this information is not confidential under section 6103(a) of title 26 of the United States Code and may not be withheld under section 552.101 of the Government Code on that basis.

Harris asserts a telephone number is private. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. We note, however, the names, addresses, and telephone numbers

of members of the public are not excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers not protected under privacy). However, this office has found personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600, 545 (1990). AHC's and Weno's proposals contain the personal financial information of a member of the public. Upon review, we find the release of this personal financial information is of no legitimate public interest. Accordingly, the authority must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Secure and Weno assert section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). As the authority does not seek to withhold any information under section 552.104, we find this exception is not applicable to Secure's and Weno's information. The authority may not withhold any of the submitted information on that basis.

ANX, GSI, Harris, Secure, and Surescripts each assert section 552.110 of the Government Code, which 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.⁴ 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. *See id.*; *see also* ORD 661 at 5.

Upon review, we find ANX has made a *prima facie* case the customer information we have marked constitutes a trade secret. The authority must withhold this information under section 552.110(a) of the Government Code. ANX has posted its remaining customer information on its web site. As ANX has made this information publicly available, we find it is not a trade secret. Although Harris asserts some of its pricing information is a trade secret, we note pricing information pertaining to a particular proposal or 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d

⁴The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

at 776; Open Records Decision Nos. 319 at 3, 306 at 3. Upon further review, we find none of the other third parties has established the remaining information constitutes a trade secret. Accordingly, the authority may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Upon further review, we find ANX, GSI, and Surescripts have demonstrated the information we have marked consists of financial or commercial information, the release of which would cause substantial competitive harm. The authority must withhold this information under section 552.110(b) of the Government Code. However, we note Harris was one of the selected entities with respect to the contract at issue, and the pricing information of a winning bidder 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* Dep't of Justice Guide to the Freedom of Information Act 344–45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the authority may not withhold any of Harris's pricing information under section 552.110(b). Upon further review, we find none of the third parties has demonstrated the release of the remaining information would cause substantial competitive harm, and the authority may not withhold it under section 552.110(b) of the Government Code.

Secure and Weno claim section 552.131(a) of the Government Code for some of their information. Section 552.131(a) provides:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (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.

Gov't Code § 552.131(a). This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)–(b); Open Records Decision Nos. 661 at 5–6, 552 at 5. In this instance, neither of these third parties has demonstrated any of the remaining information constitutes a trade secret or that release of any of the information at issue would cause it substantial competitive harm. Accordingly, the authority

may not withhold any of the remaining information under section 552.131(a) of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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.”⁵ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the authority must withhold the account number we have marked in HIT’s information under section 552.136 of the Government Code.

Surescripts raises section 552.147 of the Government Code, which provides, “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Surescripts’ information does not contain social security numbers. Accordingly, the authority may not withhold any of Surescripts’ information under section 552.147 of the Government Code.

We note some of Cerner’s information is 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). However, 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 authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy in AHC’s and Weno’s proposals; the information we have marked under section 552.110 of the Government Code in ANX’s, GSI’s, and Surescripts’ proposals; and the information we have marked under section 552.136 of the Government Code in HIT’s proposal. The remaining information must be released, but any information subject to copyright in Cerner’s proposal may be released only in accordance with copyright law.

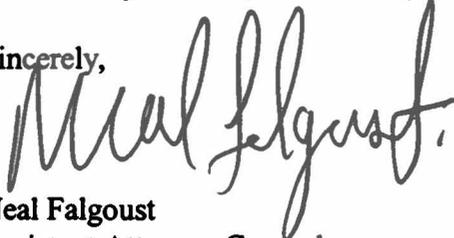
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁵The 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).

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 475584

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. James W. Koessler
Vice President and General
Counsel
ANXeBusiness Corp
2000 Town Center, Suite 2050
Southfield, Michigan 48075-1135
(w/o enclosures)

Mr. Leroy Jones
GSI Health
7715 Crittenden Street, #242
Philadelphia, Pennsylvania 19118
(w/o enclosures)

Mr. Aaron Giachetti
Contracts Manager
Harris
7799 Leesburg Pike, Suite 800N
Falls Church, Virginia 22043
(w/o enclosures)

Mr. Jeremy P. Levine
For Secure Exchange Solutions, Inc.
The Levine Law Firm
221 West Sixth Street, Suite 960
Austin, Texas 78701
(w/o enclosures)

Ms. Stephanie L. Trunk
For Surescripts, LLC
Arent Fox LLP
1050 Connecticut Avenue NW
Washington, DC 20036-5339
(w/o enclosures)

Ms. Tina Goodman
Weno Healthcare
P.O. Box 170877
Austin, Texas 78729
(w/o enclosures)

Axlotl Healthcare
c/o Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701
(w/o enclosures)

Cerner
c/o Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701
(w/o enclosures)

HIT Services
c/o Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701
(w/o enclosures)

Inpriva
c/o Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701
(w/o enclosures)

MaxMD
c/o Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701
(w/o enclosures)

MedPlus
c/o Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701
(w/o enclosures)

My Direct HISP
c/o Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701
(w/o enclosures)

**Texas Organization of Rural and
Community Hospitals**
c/o Tony Gilman
Chief Executive Officer
Texas Health Services Authority
221 East Ninth Street, Suite 201
Austin, Texas 78701
(w/o enclosures)