



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2013

Ms. Jena R. Abel
Assistant General Counsel
Texas Board of Nursing
333 Guadalupe Street, Suite 3-460
Austin, Texas 78701

OR2013-00636A

Dear Ms. Abel:

This office issued Open Records Letter No. 2013-00636 (2013) on January 10, 2013. We have examined this ruling and determined Open Records Letter No. 2013-00636 is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2013-00636. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

The Texas Board of Nursing (the "board") received a request for copies of the responses submitted for Request For Proposals #507-12-239 (the "RFP") and a request from a different requestor for the evaluation/tabulation documents for the RFP and the "Scope of Services" section from the response submitted by RecoveryTrek, L.L.C. ("RecoveryTrek"). You state the board has released some information responsive to the second request for information. Although we understand the board takes no position with respect to the submitted information, you believe it may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the board notified the third parties of the request for information and of their right to submit arguments stating why their information should not be released.¹ *See id.* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records

¹The third parties notified pursuant to section 552.305 are: Affinity eHealth ("Affinity"); C.C.I. Therapy Counseling Centers International, P.C.; Decisive Services & Technologies, LLC, d/b/a ARC Point Labs; FirstLab; RecoveryTrek; and Norton Medical Industries.

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 reviewed the submitted information and the arguments submitted by Affinity, FirstLab, and RecoveryTrek.

Initially, we note the second requestor seeks only the "Scope of Services" section of RecoveryTrek's response to the RFP. Thus, any information other than the "Scope of Services" section of RecoveryTrek's response is not responsive to the second request. Accordingly, the board need not release information to the second requestor that is not responsive to her request and this ruling will not address the public availability of the non-responsive information with respect to the second request.

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 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, this office has received comments from only Affinity, FirstLab, and RecoveryTrek explaining why their information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the interest of any of the remaining third parties. *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, we conclude the board may not withhold any of the submitted information on the basis of any interest the remaining third parties may have in the information.

Next, we note some of the information RecoveryTrek seeks to withhold was not submitted by the board for our review. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the board, this ruling does not address RecoveryTrek's argument against its disclosure.

Affinity and FirstLab raise section 552.101 of the Government Code for portions of their information.² Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. However, Affinity and FirstLab have not pointed to any statutory confidentiality provision, nor are we aware of any, that would make this information confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision

²Affinity also raises section 552.305 of the Government Code; however, this section is not an exception to public disclosure under the Act. *See* Gov't Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *Id.*

Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the board may not withhold any of the submitted information under section 552.101 of the Government Code.

Affinity and FirstLab also both raise section 552.104 of the Government Code. This section excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the board does not seek to withhold any information pursuant to this exception, no portion of Affinity's or FirstLab's information may be withheld on this basis.

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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); see also ORD 552 at 2. Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); 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.³ See RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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. *Id.* § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Affinity, RecoveryTrek, and FirstLab claim some of their information constitutes trade secrets. Upon review, we find RecoveryTrek and FirstLab have established *prima facie* cases that their customer information constitutes trade secrets. Accordingly, the board must withhold the information we have marked under section 552.110(a). However, we find RecoveryTrek and FirstLab have failed to demonstrate their remaining information at issue meets the definition of a trade secret. Additionally, we find Affinity has failed to demonstrate any of its information for which it raises section 552.110(a) meets the definition of a trade secret. Furthermore, none of these parties demonstrated the necessary factors to establish a trade secret claim for this information. 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.” RESTATEMENT OF TORTS § 757 cmt. b (citation omitted); see also *Huffines*, 314 S.W.2d at 776. Accordingly,

³There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the board may not withhold RecoveryTrek's or FirstLab's remaining information at issue, or any of Affinity's information at issue, under section 552.110(a).

Affinity, RecoveryTrek, and FirstLab also claim their information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we conclude Affinity, RecoveryTrek, and FirstLab have established the release of some of their information would cause them substantial competitive injury. Accordingly, the board must withhold Affinity's pricing information and some of its client information, RecoveryTrek's software information, and FirstLab's pricing and software information, which we have marked, under section 552.110(b). However, we find Affinity, RecoveryTrek, and FirstLab have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information at issue would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 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 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We note Affinity has published the identity of one of its customers on its website, making this information publically available. As such, the board may not withhold this information under section 552.110(b). Furthermore, we note the pricing information of winning bidders of a government contract, such as RecoveryTrek, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see* ORD 319 at 3. *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. We therefore conclude the board may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Next we note portions of Affinity's remaining information are subject to section 552.130 of the Government Code.⁴ Section 552.130(a)(3) provides information relating to a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a)(3). Upon review, we conclude the board must withhold the Canadian Social Insurance Numbers we have marked in Affinity's information under section 552.130(a)(3).⁵

⁴The Office of the Attorney General will raise a mandatory exception, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵As our ruling is dispositive, we need not address Affinity's remaining argument against disclosure of this information.

Section 552.136 of the Government Code states, "Notwithstanding 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." *Id.* § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. Accordingly, the board must withhold the insurance policy numbers we have marked under section 552.136.

RecoveryTrek raises section 552.147 of the Government Code for some of its remaining information. Section 552.147 excepts from disclosure the social security number of a living person. *Id.* § 552.147. Upon review, we conclude the board may withhold the social security numbers we have marked under section 552.147.⁶

We note 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 (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 board must withhold the information we have marked under section 552.110 of the Government Code, the Canadian Social Insurance Numbers we have marked in Affinity's information under section 552.130 of the Government Code, and the insurance policy numbers we have marked under section 552.136 of the Government Code. The board may withhold the social security numbers we have marked under section 552.147 of the Government Code. The board must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.⁷ Furthermore, information that is not responsive to the second request need not be released to the second requestor.

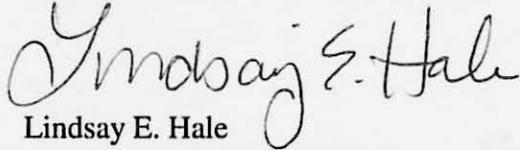
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

⁶We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

⁷We note the remaining information contains social security numbers. As previously noted, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/sdk

Ref: ID# 482639

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Mr. Paul L. Warren
Counsel for RecoveryTrek, L.L.C.
Warren & Associates, P.L.C.
409 Duke Street, Suite 100
Norfolk, Virginia 23510
(w/o enclosures)

Mr. John Steacy
CEO
Affinity eHealth
6066 Leesburg Pike, Suite 900
Falls Church, Virginia 22041
(w/o enclosures)

Mr. John K. Edwards
Counsel for FirstLab
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Ms. Olga Flores
C.C.I. Therapy Counseling Centers
International, P.C.
1001 East Tyler Avenue, Suite B
Harlingen, Texas 78550
(w/o enclosures)

Mr. Marshall Zablen
Norton Medical Industries
6265 Sepulveda Boulevard, #13
Van Nuys, California 91411
(w/o enclosures)

Ms. Kelly R. Broome
Decisive Services & Technologies, L.L.C.
d/b/a ARC Point Labs
Suite 1105-103
20079 Stone Oak Parkway
San Antonio, Texas 78258
(w/o enclosures)