



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2013

Dr. Fernando C. Gomez
Vice Chancellor and General Counsel
The Texas State University System
208 East 10th Street, Suite 600
Austin, Texas 78701-2407

OR2013-14726

Dear Mr. Gomez:

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# 497199.

The Texas State University-San Marcos (the "university") received a request for the bid proposals to provide electronic medical records software to the university, including the bid proposal submitted by eClinicalworks, and the contract between the university and eClinicalworks. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Medicat, LLC ("Medicat"). Accordingly, you state, and provide documentation showing, you notified Medicat of the request for information and of its 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) (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 Medicat. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us most of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-10171 (2013). In that ruling, we concluded the university must (1) withhold certain information under section 552.101 of the Government Code in conjunction with

section 6103(a) of title 26 of the United States Code and sections 552.110 and 552.136 of the Government Code and (2) release the remaining information at issue, but any information protected by copyright law may only be released in accordance with copyright law. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. According, the university must continue to rely on Open Records Letter No. 2013-10171 as a previous determination and withhold or release the information at issue in that ruling in accordance with Open Records Letter No. 2013-10171. *See* 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 that information is or is not excepted from disclosure).

Next, we note you have not submitted any information responsive to the request for the contract between eClinicalworks and the university. Thus, to the extent the requested contract existed when the present request was received, we assume it has been released. 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).

Medicat claims some of its information is excepted under 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. Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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* Open Records Decision No. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). 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. *See* 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.*; *see also* Open Records Decision No. 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).

Upon review, we find Medicat has established that most of its customer information constitutes a trade secret. Therefore, the university must withhold this information, which we have marked, under section 552.110(a) of the Government Code. We note, however, that Medicat has published the identities of some of its customers on its website. Thus, Medicat has failed to demonstrate that the information it has published on its website is a trade secret. Further, Medicat has failed to demonstrate that any of the remaining information it seeks to withhold meets the definition of a trade secret, nor has Medicat demonstrated the necessary

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 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).

factors to establish a trade secret claim for this information. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, none of Medicat's remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Upon review of Medicat's arguments under section 552.110(b), we find that Medicat has established that its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code. Medicat also seeks to withhold its remaining customer information. However, as previously noted, Medicat has made the remaining customer information it seeks to withhold publicly available on its website. Medicat does not explain how release of any of the information it has made public on its website would cause the company substantial competitive harm. Further, we find Medicat has made only conclusory allegations that the release of any of its remaining information would result in substantial damage to the company's competitive position. Thus, Medicat has not demonstrated that substantial competitive injury would result from the release of any of its remaining information at issue. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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). Accordingly, none of Medicat's remaining information may be withheld under section 552.110(b).

In summary, the university must continue to rely on Open Records Letter No. 2013-10171 as a previous determination and withhold or release the information at issue in that ruling in accordance with Open Records Letter No. 2013-10171. The university must withhold the information we have marked under section 552.110 of the Government Code. The remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 497199

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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