



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 24, 2016

Ms. Marcy Madrid  
Vice President  
Planning & Marketing  
Midland Memorial Hospital  
400 Rosalind Redfern Grover Parkway  
Midland, Texas 79701

OR2016-23774

Dear Ms. Madrid:

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# 631748.

The Midland County Hospital District d/b/a Midland Memorial Hospital (the "district") received a request for specified information pertaining to purchase orders and expenditures during a specified period of time. The district does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the district states, and provides documentation showing, it notified interested third parties of the district's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 some of these third parties.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the third parties seek to withhold information that the district did not submit for our review. This ruling does not address information beyond what the district has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the district submitted as responsive to the request for information. *See id.*

We next note CustomInk asserts the district does not possess any information pertaining to CustomInk that is responsive to the request. However, the district has submitted information pertaining to CustomInk. A governmental body must make a good-faith effort to relate to a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Thus, we find the information at issue is responsive to the request and the district must release it, unless it is excepted from release under the Act. We note AAA, CustomInk, and ProMed did not submit arguments to withhold any of the information at issue under the Act. We also note the comptroller's office and Nihon state they do not object to the release of any of the information at issue. Therefore, the district may not withhold any of the submitted information pertaining to these third parties.

Axion, Bethlehem, Biofire, Blood Systems, Cardinal, Covenant, CryoLife, Humana, Kinetic, Language, Medsphere, Morris, Sirtex, Transamerica, Verathon, and Wolters assert some of the information at issue is excepted from disclosure under section 552.104(a) of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, the court concluded a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's

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<sup>1</sup>We have received comments from the following third parties: AAA Affordable Vacuum Services ("AAA"); Axion Health, Inc. ("Axion"); Bethlehem Glass, Inc. ("Bethlehem"); BioFire Diagnostics, L.L.C. ("BioFire"); Blood Systems, Inc. ("Blood Systems"); Cardinal Health 414, Inc. ("Cardinal"); Covenant Medical Group, L.L.P. ("Covenant"); CryoLife; CustomInk, L.L.C. ("CustomInk"); Humana Inc., including its subsidiary, Harris, Rothenberg International, Inc. ("Humana"); Intuitive Surgical, Inc. ("Intuitive"); Kinetic Concepts ("Kinetic"); Language Access Network, L.L.C. ("Language"); Mayo Medical Laboratories ("Mayo"); Medsphere System Corporation ("Medsphere"); Morris and Dickson Co., L.L.C. ("Morris"); Nihon Kohden America, Inc.; Passy Muir, Inc. ("Passy"); PreCheck, Inc. ("PreCheck"); ProMed Recruitment & Staffing Inc. ("ProMed"); Respiroics, Inc. ("Respiroics"); Sirtex Medical, Inc. ("Sirtex"); The Texas Comptroller of Public Accounts (the "comptroller's office"); Transamerica Retirement Solutions, Inc. ("Transamerica"); Verathon Medical ("Verathon"); Watch House International ("Watch House"); and Wolters Kluwer Clinical Drug Information ("Wolters").

information] would be an advantage, not whether it would be a decisive advantage.” *Id.* Axion, Bethlehem, Biofire, Blood Systems, Cardinal, Covenant, CryoLife, Humana, Kinetic, Language, Medsphere, Morris, Sirtex, Transamerica, Verathon, and Wolters state they have competitors. Axion, Bethlehem, Biofire, Blood Systems, Cardinal, Covenant, Cryolife, Kinetic, Language, Medsphere, Morris, Transamerica, Verathon, and Wolters assert release of their pricing information would cause them substantial competitive harm. Humana and Sirtex assert release of all of their information would cause them substantial competitive harm. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to the *Boeing* decision, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find these third parties have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the following under section 552.104(a) of the Government Code: (1) the pricing information pertaining to Axion, Bethlehem, Biofire, Blood Systems, Cardinal, Covenant, Cryolife, Kinetic, Language, Medsphere, Morris, Transamerica, Verathon, and Wolters; and (2) all of the information pertaining to Humana and Sirtex.<sup>2</sup>

Intuitive, Mayo, Passy, PreCheck, Respiroics, and Watch House object to the release of some of the remaining information under section 552.110 of the Government Code.<sup>3</sup> Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763

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<sup>2</sup>As our ruling is dispositive, we do not address the other arguments to withhold this information.

<sup>3</sup>We note Intuitive, Mayo, and Respiroics did not raise any specific section of the Act in their arguments. Nevertheless, we understand these third parties to raise section 552.110 based on their arguments.

(Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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.<sup>4</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We also 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; *see Hyde Corp.*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3.

Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not

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<sup>4</sup>The following are the six factors that the Restatement gives 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 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 [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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). However, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *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 a 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.

Upon review, we find Intuitive, Mayo, Passy, PreCheck, Respiroics, and Watch House have not shown any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.110(a). We also find these third parties have failed to establish release of the information at issue would cause any of them substantial competitive injury. *See id.* § 552.110(b). Therefore, the district may not withhold any of the remaining information pursuant to section 552.110.

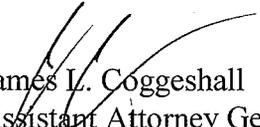
An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, none of the remaining interested third parties has submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of these third parties, and the district may not withhold any portion of it on that basis. *See* ORD 661 at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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.

To conclude, the district may withhold the following under section 552.104(a) of the Government Code: (1) the pricing information pertaining to Axion, Bethlehem, Biofire, Blood Systems, Cardinal, Covenant, Cryolife, Kinetic, Language, Medsphere, Morris, Transamerica, Verathon, and Wolters; and (2) all of the information pertaining to Humana and Sirtex. The district must release the remaining information.

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](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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/bw

Ref: ID# 631748

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

29 Third Parties  
(w/o enclosures)