



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

July 13, 2010

Ms. Michelle T. Rangel
Assistant County Attorney
Fort Bend County
301 Jackson Street, Suite 728
Richmond, Texas 77469

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

OR2010-10392

Dear Ms. Rangel:

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# 386247.

The Fort Bend County Attorney's Office (the "county attorney") received a request for the proposals and scoring sheets pertaining to health care services at the county jail. Although you take no position as to whether the submitted information is excepted under the Act, you state that release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Conmed, Inc. ("Conmed"); Correct Care Solutions, L.L.C. ("CCS"); Correctional Healthcare Management ("CHM"); Correctional Medical Services, Inc. ("CMS"); NaphCare, Inc. ("Naphcare"); and Prison Health Services, Inc. ("PHS") of the request for information and of their 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). You also notified the University of Texas Medical Branch at Galveston ("UTMB"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Conmed, CHM, and CMS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the requested information pertaining to CHM was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-09510 (2010). In that ruling, we concluded that: (1) the identifying information of CHM's clients on pages 3-16 through 3-27 of the submitted proposal, as well as its letters

of reference in Appendix B, must be withheld under section 552.110(b) of the Government Code; (2) the insurance policy numbers in Appendix D must be withheld under section 552.136 of the Government Code; and (3) the remaining information must be released. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the county attorney must continue to rely on Open Records Letter No. 2010-09510 as a previous determination and withhold or release the information pertaining to CHM in accordance with that ruling. *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).

We note that you have not submitted for our review any information responsive to the request for scoring sheets. Thus, to the extent the requested scoring sheets existed when the present request was received, we assume this information 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).

Next, we note that as of the date of this letter, this office has not received comments from UTMB. Therefore, the county attorney may not withhold any of the submitted information based upon the interests of this governmental body.

We note that 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, this office has not received comments from CCS, Naphcare, or PHS explaining why each third party's submitted information should not be released. Therefore, we have no basis to conclude that these third parties have a protected proprietary interest in 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 county attorney may not withhold any portion of the submitted information based upon the proprietary interests of CCS, Naphcare, Silverman, or PHS.

Conmed raises section 552.102(a) of the Government Code as an exception to disclosure of a portion of its proposal. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of

personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor). In this instance, the information at issue is related to a private entity, Conmed. Therefore, the county attorney may not withhold any portion of Conmed’s proposal under section 552.102(a) of the Government Code.

Conmed also raises section 552.104 of the Government Code as an exception to disclosure for its proposal. This section excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. 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 county attorney does not seek to withhold any information pursuant to section 552.104, no portion of Conmed’s information may be withheld on this basis.

Conmed and CMS raise section 552.110 of the Government Code as an exception to disclosure of portions of their proposals. 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. Gov’t Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A “trade secret”

may consist of any 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining 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 (1939); *see also* ORD 232. This office must accept a claim that information subject to the Act is excepted 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. Open Records Decision No. 552 at 2 (1990). 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.

Upon review of the arguments submitted by Conmed and CMS, we find CMS has made a *prima facie* case that some of its client information is protected as trade secret information. Accordingly, the county attorney must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, CMS publishes the

identities of some of its clients on its website. In light of CMS's own publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. Furthermore, CMS has failed to demonstrate that any portion of its remaining information constitutes a trade secret and Conmed has failed to demonstrate that any of its information constitutes a trade secret. Thus, none of the remaining information may be withheld under section 552.110(a).

Upon review of Conmed's and CMS's arguments under section 552.110(b), we find that both third parties have established that some of the information in their proposals constitutes commercial or financial information, the release of which would cause the companies substantial competitive injury. Therefore, the county attorney must withhold the information we have marked, consisting of some of Conmed's client and pricing information and CMS's pricing information, under section 552.110(b) of the Government Code. However, Conmed publishes the identities of some of its clients on its website. Thus, Conmed has failed to demonstrate release of this published information would cause it substantial competitive harm. In addition, we find Conmed and CMS have failed to provide specific factual evidence demonstrating that release of any of their remaining information would result in substantial damage to the companies' competitive positions. Thus, neither Conmed or CMS have demonstrated that substantial competitive injury would result from the release of any of their 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 Conmed's or CMS's remaining information may be withheld under section 552.110(b).

We note that portions of the remaining information are subject to section 552.136 of the Government Code.¹ Section 552.136 states that "[n]otwithstanding 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." Gov't Code § 552.136. Accordingly, we find that the county attorney must withhold the insurance policy numbers and bank account number we have marked under section 552.136 of the Government Code.²

¹The 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).

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers and bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Finally, we note that some of the remaining information at issue is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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. *See* Open Records Decision No. 550 (1990).

In summary, the county attorney must continue to rely on Open Records Letter No. 2010-09510 as a previous determination and withhold or release the information pertaining to CHM in accordance with that ruling. The county attorney must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright may only be released 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 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 386247

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Richard B. Rosenblatt
Vice President - Governmental Policy & Legal Affairs
Conmed Healthcare Management, Inc. (Conmed)
7250 Parkway Drive, Suite 400
Hanover, Maryland 21076
(w/o enclosures)

Mr. Jason A. Grant
Legal Counsel
Correctional Healthcare Management, Inc. (CHM)
6200 South Syracuse Way, Suite 440
Greenwood Village, Colorado 80111
(w/o enclosures)

Mr. Dennis C. Gardner
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
For Correctional Medical Services, Inc. (CMS)
500 Dallas Street, Suite 3000
Houston, Texas 77002
(w/o enclosures)

Mr. Patrick Cummiskey
Correct Care Solutions, L.L.C. (CCS)
3343 Perimeter Hill Drive, Suite 300
Nashville, Tennessee 37211
(w/o enclosures)

Ms. Catherine Gross
Naphcare, Inc. (Naphcare)
950 22nd Street North, Suite 825
Birmingham, Alabama 35203
(w/o enclosures)

Mr. Rodney Holliman
Prison Health Services, Inc. (PHS)
105 Westpark Drive, Suite 200
Brentwood, Tennessee 37012
(w/o enclosures)

Mr. Jack Smith
UTMB-CMC (UTMB)
301 University Boulevard
Galveston, Texas 77555-1008
(w/o enclosures)

Management, Inc., Correctional Healthcare Management, NaphCare, Inc., Prison Health Services, Inc., Wexford Health Source, Inc., and Advanced Correctional Healthcare have abandoned their requests for information.

Further, Letter Ruling OR2010-01316 will not be considered a "previous determination" by the Office of the Attorney General under Tex. Gov't Code § 552.301(a), (f); and, if the precise information is requested again, Galveston County may ask for a decision from the Attorney General under Tex. Gov't Code § 552.301(g). Accordingly, Galveston County is not required to disclose the requested information subject to release in Letter Ruling OR2010-01316. The parties request that the Court enter this Agreed Order of Dismissal.

The Court is of the opinion that entry of an agreed dismissal order is appropriate.

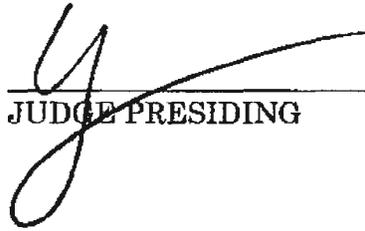
It is **THEREFORE, ORDERED, ADJUDGED and DECREED** that this cause is **DISMISSED** in all respects;

All court costs and attorney fees are taxed to the party incurring same;

All other requested relief not expressly granted herein is denied;

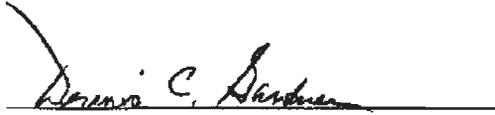
This order disposes of all claims between the parties and is final.

Signed this 13th day of JANUARY, 2016.



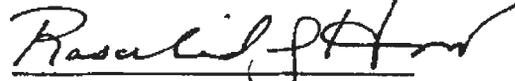
JUDGE PRESIDING

AGREED:



DENNIS C. GARDNER
State Bar No. 07651700
Oaktree Deakins Nash Smoak
& Stewart, P.C.
500 Dallas Street, Suite 3000
Houston, Texas 77002
Telephone: (713) 655-5766
Facsimile: (713) 655-0020
Dennis.Gardner@odnss.com

ATTORNEY FOR PLAINTIFF
CORIZON HEALTH F/K/A CORRECTIONAL
MEDICAL SERVICES, INC.



ROSALIND L. HUNT
State Bar No. 24067108
Assistant Attorney General
Administrative Law Division
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4166
Facsimile: (512) 457-4677
Rosalind.Hunt@texasattorneygeneral.gov

ATTORNEYS FOR DEFENDANT
ATTORNEY GENERAL OF TEXAS



MYRNA S. REINGOLD
State Bar No. 24002822
Galveston County Legal Department
Galveston County Courthouse
722 Moody, 5th Floor
Galveston, Texas 77550
Telephone: (409) 770-5562
Facsimile: (409) 770-5560
Myrna.Reingold@co.galveston.tx.us

ATTORNEY FOR DEFENDANTS
GALVESTON COUNTY JUDGE & GALVESTON
COUNTY PURCHASING AGENT