



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2011

Ms. Rebecca Brewer
Abernathy Roeder Boyd & Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2011-07037

Dear Ms. Brewer:

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# 417984.

The City of Frisco (the "city"), which you represent, received a request for all proposals submitted in response to request for proposals number 1007-051 for the Employee Health Clinic, with the exception of the requestor's proposal. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. Further, you state release of the submitted information may implicate the proprietary interests of Care ATC, Inc. ("Care ATC"); CareHere, LLC ("CareHere"); CareNow; the Center for Lifestyle Enhancement at the Medical Center of Plano (the "Center"); CIGNA Onsite Health, LLC ("CIGNA"); Concentra Health Services, Inc. ("Concentra"); CRAssociates, Inc. ("CRAssociates"), Healthstat, Inc. ("Healthstat"); and HealthSmart Primary Care Clinics, LP ("HealthSmart"). Accordingly, you state you notified each of these third parties of the request for information and of their rights 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 Care ATC,

CareHere, CareNow; the Center, CIGNA, Healthstat, and HealthSmart. We have considered the submitted arguments and reviewed the submitted information.

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, we have not received comments from CRAssociates explaining why its submitted information should not be released. Further, you have submitted a statement from Concentra indicating Concentra does not intend to submit arguments against release of its submitted information. Therefore, we have no basis to conclude either CRAssociates or Concentra has 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 city may not withhold any of the submitted information on the basis of any proprietary interest Concentra or CRAssociates may have in the information.

CareNow raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the city does not argue section 552.104 is applicable, we will not consider CareNow's claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the city may not withhold any of the submitted information under section 552.104 of the Government Code.

Care ATC, CareHere, CareNow, the Center, CIGNA, Healthstat, and HealthSmart each argue portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code.¹ Although the city also argues portions of the submitted information are excepted under section 552.110, we note that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city's argument under section 552.110. We will, however, address the third parties' arguments under section 552.110.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial

¹Although CareNow also raises section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Accordingly, we do not address CareNow's argument under section 552.101.

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.² 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

²The 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).

rebutts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable 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. 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* ORD 661 at 5 (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).

Care ATC, CareNow, and Healthstat assert their submitted information constitutes trade secret information for purposes of section 552.110(a) of the Government Code. Further, HealthSmart asserts, and we understand CareHere to assert, portions of their information constitute trade secret information for purposes of section 552.110(a). Upon review, we conclude Care ATC, CareNow, Healthstat, CareHere, and HealthSmart have failed to establish a *prima facie* case that any portion of the information they seek to withhold meets the definition of a trade secret. We further find Care ATC, CareNow, Healthstat, CareHere, and HealthSmart have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, none of the submitted information may be withheld under section 552.110(a).

Care ATC, CareNow, and Healthstat argue their submitted information consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Further, the Center, CIGNA, and HealthSmart argue their information contains commercial information the release of which would cause substantial competitive harm under section 552.110(b). Upon review, we find Care ATC, CareNow, the Center, CIGNA, and HealthSmart have established portions of their information constitute commercial or financial information the release of which would cause the companies substantial competitive injury. Therefore, the city must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Care ATC, CareNow, the Center, CIGNA, HealthSmart, and Healthstat have made only conclusory allegations that the release of any of the remaining information would result in substantial harm to their competitive positions. *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 the remaining information may be withheld under section 552.110(b).

The submitted documents also include information that is subject to section 552.136 of the Government Code.³ Section 552.136 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.” *Id.* § 552.136(b). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

We note some of the materials at issue may 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 city must withhold the information we have marked under section 552.110(b) of the Government Code. The city must also withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released; however, any information protected by copyright 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 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,

³The 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).

⁴We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/bs

Ref: ID# 417984

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Thomas J. Hutchison
for Care ATC, Inc.
Gable Gotwals
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4217
(w/o enclosures)

Ms. Bernie Livers
Vice President Sales
CareHere, LLC
215 Jamestown Park Drive, Suite 204
Brentwood, Tennessee 37027
(w/o enclosures)

Mr. Bruce F. Howell
for CareNow
Bryan Cave
JP Morgan Chase Tower
2200 Ross Avenue, Suite 3300
Dallas, Texas 75201
(w/o enclosures)

Ms. Lisa Engel
Director, Center for Lifestyle
Enhancement
The Medical Center of Plano
3901 West 15th Street
Plano, Texas 75075-7738
(w/o enclosures)

Ms. Elizabeth M. George
Senior Counsel
CIGNA Onsite Health, LLC
900 Cottage Grove Road
Hartford, Connecticut 06152
(w/o enclosures)

Ms. Sarah A. Brown
Associate General Counsel
HealthSmart Primary Care Clinics, LP
222 W LasColinas Boulevard, Suite 600N
Irving, Texas 75039
(w/o enclosures)

Mr. Warren A. Hutton
for Healthstat, Inc.
Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, PA
420-B Third Avenue, NW
Hickory, North Carolina 28601
(w/o enclosures)