



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2012

Ms. Lisa Ayers
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OR2012-10838

Dear Ms. Ayers:

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# 458819.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System ("Parkland") received a request for information pertaining to eight specified purchases. You state Parkland has released some information to the requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Cymetrix Corporation; Deloitte, L.L.P.; Endosoft; FTI Consulting, Inc.; KPMG, L.L.P.; Maxim Health Information Services; MedAssets Net Revenue Systems, L.L.C.; Navigant Consultant, Inc.; Olympus America, Inc. ("Olympus"); Pinnacle Technical Resources, Inc.; Protiviti, Inc.; ProVation Medical, Inc.; Summit Imaging, Inc.; Workforces United; Ernst & Young, L.L.P. ("Ernst"); CraneWare, Inc.; CareFusion Solution, L.L.C. ("CareFusion"); Hospira Worldwide, Inc.; Baxter Health Care Corporation; StreamLine Health; McKesson Provider Technologies; MedPlus Inc.; Cerner Corporation; Edco Group Inc.; Health Data Specialists, L.L.C.; Solo Learning; Virtelligence, Inc.; Managed Staffing; Plan B Solutions; S & R Professionals, L.P.; CTG Healthcare Solutions; Affiliated Computer Services, Inc.; and Morgan Healthcare Inc. Accordingly, you notified these third parties of the request for information and of their right to submit arguments to this office as to why their 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 Olympus, Ernst, and CareFusion. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address Parkland's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). In this instance, you state Parkland received the request for information on April 16, 2012. Accordingly, Parkland's ten-business-day deadline was April 30, 2012. The envelope in which Parkland submitted its request for a ruling request bears a postmark of May 4, 2012. *See id.* § 552.308 (providing ten-day requirement met if request bears post office cancellation mark indicating time within ten-day period). Consequently, we find Parkland failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *see also* *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302 of the Government Code); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third party interests are stake, we will consider the submitted arguments against disclosure of the requested information.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have only received correspondence from Olympus, Ernst, and CareFusion. Thus, we find the remaining third parties have not demonstrated that they have a protected proprietary interest in any of their submitted information. *See id.* § 552.110(a)-(b); 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, Parkland may not withhold any of the remaining third parties' information on the basis of any proprietary interests these third parties may have in their information.

We note a portion of the information CareFusion seeks to withhold was not submitted by Parkland 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 Parkland, this ruling does not address CareFusion's arguments against its disclosure.

Next, we address CareFusion's argument that some of its information should not be disclosed because of a confidentiality agreement. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Ernst asserts that some of its information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Chapter 901 of the Occupations Code, the Public Accountancy Act, addresses the licensing and regulation of accountants. Section 901.457(a) pertains to the accountant-client privilege and provides the following:

A license holder or a partner, member, officer, shareholder, or employee of a license holder may not voluntarily disclose information communicated to the license holder or a partner, member, shareholder, or employee of the license holder by a client in connection with services provided to the client by the license holder or a partner, member, shareholder, or employee of the license holder, except with the permission of the client or the client's representative.

Occ. Code § 901.457(a). Likewise, section 501.75 of title 22 of the Texas Administrative Code provides, in part:

Except by permission of the client or the authorized representatives of the client, a person or any partner, officer, shareholder, or employee of a person shall not voluntarily disclose information communicated to him by the client relating to, and in connection with, professional accounting services or professional accounting work rendered to the client by the person. Such information shall be deemed confidential.

22 T.A.C. § 501.75. Ernst argues that a portion of its information is protected by the accountant-client privilege. We note, however, that section 901.457 of the Occupations Code and section 501.75 of title 22 of the Texas Administrative Code only govern the circumstances under which licensed accountants may disclose information communicated to them by their clients in connection with the accountants' services. *Id.* Upon review, we find Ernst has failed to demonstrate how any portion of its submitted bid proposal contains information communicated to Ernst by its clients in connection with Ernst's services. We therefore conclude that Parkland may not withhold any of Ernst's information under section 552.101 of the Government Code on the basis of section 901.457 of the Occupations Code or section 501.75 of title 22 of the Texas Administrative Code.

Olympus, Ernst, and CareFusion claim some of their information is excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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(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 a "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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts 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.¹ 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 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CareFusion asserts some of its information is protected by section 552.110(a). Upon review, we find CareFusion has not demonstrated how any of its information meets the definition of a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (trade secret “is not simply information as to single or ephemeral events in the conduct of the business”); ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, Parkland may not withhold any of CareFusion’s information under section 552.110(a) of the Government Code.

Olympus, Ernst, and CareFusion claim some of their information is protected by section 552.110(b). Upon review, we find Olympus and Ernst have established release of the pricing, customer, and other technical information we have marked would cause them substantial competitive injury. Therefore, Parkland must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Olympus, Ernst, and CareFusion have made only conclusory allegations that release of their remaining information would result in substantial harm to their competitive positions and have provided no specific factual or evidentiary showing to support such allegations. *See* ORD 661 (for

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 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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); *see also* ORD 319 at 3 (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). Furthermore, we note CareFusion was a winning bidder in this instance and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, Parkland may not withhold any of Olympus's, Ernst's, or CareFusion's remaining information under section 552.110(b) of the Government Code.

Section 552.136(b) of the Government Code 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are “access device” numbers for purposes of section 552.136. Upon review, we find Parkland must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.²

We note that some of the submitted information is 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, Parkland must withhold the information we have marked under section 552.110(b) of the Government Code. Parkland must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. Parkland must release the remaining submitted information; however, any information subject to copyright only may be released in accordance with copyright law.

²The 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).

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,



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SN/bhf

Ref: ID# 458819

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