



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2012

Ms. Connie Crawford
Assistant County Attorney
El Paso County Hospital District
4815 Alameda Avenue, 8th Floor, Suite B
El Paso, Texas 79905

OR2012-12461

Dear Ms. Crawford:

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# 461269 (File Nos. HO-12-157, HO-12-170, HO-12-183, HO-12-185, HO-12-187).

The El Paso County Hospital District d/b/a University Medical Center of El Paso (the "district") received five requests for information pertaining to a specified request for proposals.¹ Although you take no position as to whether the submitted information is excepted under the Act, you inform us that release of this information may implicate the proprietary interests of CORE Business Technologies, Inc. ("Core"); Emdeon Business Services LLC; ESI Healthcare Business Solutions LLC; JP Morgan Chase Bank; and Siemens Medical Solutions USA, 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 the information at issue 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

¹You state the district sought and received clarification of one of the requests for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

exception in Act in certain circumstances). We have received comments from Core. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has only received comments from Core. Thus, we have no basis to conclude that the release of any portion of the requested information would implicate the interests of any of the remaining third parties. *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, we conclude that the district may not withhold any of the submitted information on the basis of any interest the remaining third parties may have in the information.

Core raises section 552.110 of the Government Code for portions of its information.² 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. *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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957). 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.

²We note that although Core raises section 552.101 of the Government Code, based on its arguments we understand Core to raise section 552.110.

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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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* 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code 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 conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Core claims portions of the submitted information are trade secrets that should be protected by section 552.110(a). Upon review, we find Core has demonstrated some of its client information constitutes trade secrets. We have marked the client information the district must withhold under section 552.110(a) of the Government Code. We note Core has published the identity of one of its clients it now seeks to withhold on its website. In light of Core’s own publication of such information, we cannot conclude the identity of this published client qualifies as a trade secret. Further, upon review, we find Core has not demonstrated any of the remaining information at issue meets the definition of a trade secret, nor has the company demonstrated the necessary factors to establish a trade secret claim.

³The 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).

Accordingly, the district may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Core claims some of its remaining information constitutes commercial information that, if released, would cause Core substantial competitive harm. Upon review, we find Core has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining information at issue would cause Core substantial competitive harm. *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 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), 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). Consequently, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Core asserts that its remaining information is excepted under section 552.133 of the Government Code, which excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." *See* Gov't Code § 552.133(b). Section 552.133 only protects the competitive interest of a public power utility. This exception does not protect the interests of third parties. *See* Open Records Decision No. 666 at 2 (2000) (statutory predecessor to section 552.133 enacted to protect municipally owned utilities from public disclosure of competitive matters). Core is not a public power utility. *See* Gov't Code § 552.133(a)(1) (defining "public power utility"). Thus, we find Core has failed to demonstrate the applicability of section 552.133 to its remaining information. Therefore, the district may not withhold any of the information at issue under section 552.133.

We note some of the submitted information appears to 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 district must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining submitted information must be released; however, 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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/ag

Ref: ID# 461269

Enc. Submitted documents

c: 5 Requestors
(w/o enclosures)

Ms. Cidalia Desantis
Core Business Technologies
2224 Pawtucket Avenue
East Providence, Rhode Island 02914
(w/o enclosures)

Mr. Carl Dimattesa
Siemens Healthcare USA, Inc.
51 Valley Stream Parkway, M/S K7A
Malvern, Pennsylvania 19355
(w/o enclosures)

Ms. Margaret Davis
ESI Healthcare Client Services
4144 North Central Expressway, Suite 210
Dallas, Texas 75204
(w/o enclosures)

Mr. Don Bales
Emdeon
1183 Alisa Drive
Connersville, Indiana 47331
(w/o enclosures)