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

August 13, 2013

Mr. Ralph Longmire
Assistant General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

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

OR2013-14105

Dear Mr. Longmire:

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# 496188.

The Texas Health and Human Services Commission (the "commission") received a request for the bid proposals from RFP No. 529-13-0008 and the resultant contract with Health Management Systems, Inc. ("HMS").[1] Although you take no position with respect to the public availability of the requested information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified CGI Federal, Inc. ("CGI"); Cognosante, L.L.C. ("Cognosante"); Connolly, Inc. ("Connolly"); HMS; Performant Recovery, Inc., formerly known as Diversified Collection Services, Inc. ("Performant"); and PRGX USA, Inc. ("PRGX") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990)

[1]You indicate the commission sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if 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); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

(determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from CGI, HMS, Performant, and PRGX. Thus, we have considered their arguments and reviewed the submitted information.

Initially, we note you have not submitted for our review the requested contract. To the extent any such information was maintained by the commission on the date the commission received the request, we assume you have released it. *See* 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). If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Cognosante or Connolly. Thus, Cognosante and Connolly have failed to demonstrate that they have a protected proprietary interest in any of the 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, the commission may not withhold the submitted information on the basis of any proprietary interests Cognosante or Connolly may have in the information.

Next, we note a portion of the information Performant seeks to withhold was not submitted by the commission 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 the commission, this ruling does not address Performant's argument against its disclosure.

Next, we understand HMS and PRGX to assert their information should be withheld because they expected confidentiality when the information was submitted to the commission. 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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. While HMS generally asserts its submitted information is subject to section 552.101, it has not directed our attention to any confidentiality provision, nor are we aware of any, that would make any of the submitted information confidential under section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the commission may not withhold any portion of the information at issue under section 552.101 of the Government Code.

CGI and PRGX assert their information is excepted from public disclosure under section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the commission, not the proprietary interests of private parties such as CGI and PRGX. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the commission does not raise section 552.104 as an exception to disclosure. Therefore, the commission may not withhold any of the submitted information under section 552.104 of the Government Code.

CGI, HMS, Performant, and PRGX assert portions of the submitted information are protected by section 552.110 of the Government Code. 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, 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] 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 rebuts the claim as a matter of law. *See* ORD 552 at 5. 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.*; *see also* ORD 661 at 5.

In advancing its arguments, we understand HMS to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that

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[2]The 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; *see* Open Records Decision Nos. 319 at 2 (1982), 306 at2 (1982), 255 at 2 (1980).

the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only HMS's interest in the submitted information.

CGI, HMS, Performant, and PRGX claim portions of the submitted information constitute commercial or financial information that, if released, would cause the companies substantial competitive harm. Upon review, we find CGI, HMS, and PRGX have demonstrated some of the information at issue, which we have marked, would cause substantial competitive harm. Thus, the commission must withhold this information under section 552.110(b) of the Government Code. We note, however, CGI has made the customer identities it seeks to withhold publicly available on its website. Because CGI published the customer identities on its website, it has failed to demonstrate how release of this information would cause the company substantial competitive harm. Further, we find CGI, HMS, Performant, and PRGX have made only conclusory allegations the release of the remaining information at issue would cause the companies substantial competitive injury. *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), 319 at 3. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

CGI, HMS, Performant, and PRGX claim portions of the remaining information constitute trade secrets. As previously noted, CGI has published the customer identities it seeks to withhold on its website. Therefore, CGI has failed to demonstrate this information is a trade secret. Further, CGI, HMS, Performant, and PRGX have not demonstrated how any of the remaining information at issue meets the definition of a trade secret, nor have the companies demonstrated the necessary factors to establish a trade secret claim. *See* 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 are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note 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 Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, the commission may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

In summary, the commission must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

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, 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,

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 496188

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Filed in The District Court
of Travis County, Texas
MR
MAY 25 2016
At 8:40 A.M.
Velva L. Price, District Clerk

Cause No. D-1-GN-13-002957

CONNOLLY, LLC, *Plaintiff,*	§ §	IN THE DISTRICT COURT OF
v.	§ §	
GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS AND THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *Defendants.*	§ § § § § § §	201st JUDICIAL DISTRICT TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This lawsuit is brought under the Public Information Act (PIA), Texas Government Code Chapter 552, by the Plaintiff, Connolly, LLC, (now known as Cotiviti) (Connolly) to challenge a Letter Ruling of the Defendant, Ken Paxton,[1] Attorney General of Texas (Attorney General). The ruling required the Defendant Texas Health and Human Services Commission (HHSC) to produce to the requestor certain information Connolly contends is excepted from disclosure under the PIA. All matters in controversy between Connolly, the Attorney General, and HHSC arising out of this lawsuit have been resolved, and the parties agree to the entry and filing of this Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that in compliance with PIA section 552.325(c), the Attorney General sent a letter by certified mail and

[1] Ken Paxton holds the Office of the Attorney General of Texas and is the proper defendant. Greg Abbott held the Office of Attorney General at the time this case was filed.

electronic mail to the requestor, Ms. Ashley Barlow-Wheaton, on April 19, 2016, providing reasonable notice of this setting. The requestor was informed of the parties' agreement that HHSC must withhold the information at issue. The requestor was also informed of her right to intervene in the suit to contest this Agreed Final Judgment. The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. The information at issue, which consist of certain proprietary and financial information in Connolly's July 2012 response to HHSC's Request for Proposal, is excepted from disclosure under Texas Government Code sections 552.104, 552.110(a), 552.110(b), and 552.147. Connolly has established that portions of the requested information are excepted from disclosure under PIA sections 552.104, 552.110(a), 552.110(b), and 552.147. *See* Tex. Gov't Code §§ 552.104 (competitive bidding information), .110(a) (trade secret information), .110(b) (commercial or financial information), .147 (social security numbers). Those portions of excepted information have been redacted in Exhibit A to the parties' Settlement Agreement. The Attorney General will provide a copy of the information at issue with the excepted information marked for redaction (attached to this Agreement as Exhibit A) to HHSC for the purpose of producing the same information to the requestor for inspection, duplication, or both.

2. HHSC must withhold from the requestor, Ms. Ashley Barlow-Wheaton, the information at issue described in Paragraph 1 of this Agreement that has been redacted in Exhibit A. All other requested information, not redacted in Exhibit A, must be released or withheld in compliance with Letter Ruling OR2013-14105. HHSC may charge for providing a copy of the information at issue to the requestor in accordance with Texas Government Code section 552.261.

3. If the precise information is requested again, HHSC may ask for a decision from the Attorney General under Texas Government Code section 552.301(g) because Letter Ruling OR2013-14105 is not a previous determination for the purposes of Texas Government Code section 552.301(a) and (f). In addition to requesting a decision from the Attorney General, HHSC may refer to this Settlement Agreement and Agreed Final Judgment in its letter requesting a decision.

4. All court costs and attorney fees are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

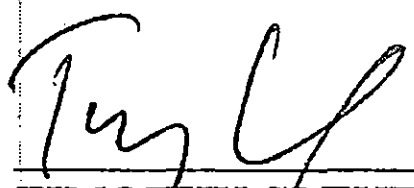
6. This Agreed Final Judgment finally disposes of all claims between Connolly, HHSC and the Attorney General and is a final judgment.

SIGNED the 25TH day of MAY, 2016.

PRESIDING JUDGE

KARIN CRUMP

AGREED:



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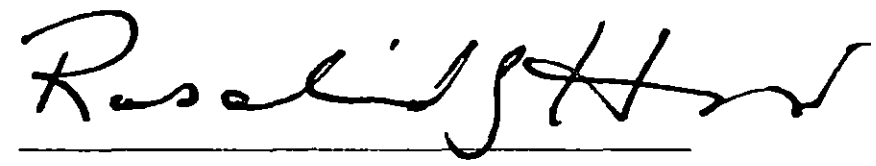

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