



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 9, 2016

Mr. Mack T. Harrison
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2016-13234

Dear Mr. Harrison:

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# 611643 (DSHS OR File: 25566).

The Texas Department of State Health Services (the "department") received a request for specified contracts. You state you have released some of the requested information to the requestor. Although you take no position regarding whether the submitted information is excepted from disclosure, you state release of the submitted information may implicate the proprietary interests of Correct Care Solutions, L.L.C. ("Correct Care"); Counseling & Psychotherapy Center, Inc. ("Counseling & Psychotherapy Center"); and the Texas Civil Commitment Office (the "office"). Accordingly, you state, and provide documentation showing, you notified these third parties 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 §§ 552.304, .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 Correct Care and the office. You inform us Counseling & Psychotherapy Center has advised the department that it does not object to release of any

of the submitted information. We have considered the submitted arguments and reviewed the submitted information.¹

You inform us the department inadvertently released some of the requested information to the requestor. The Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the department may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential by law. In this instance, however, the department has not taken any position regarding the public availability of the information at issue, but rather has determined third parties' interests may be implicated. When a third party's proprietary interests are at issue, section 552.305(d) of the Government Code requires a governmental body to notify the third party of its right to submit comments to this office explaining why its information should be withheld from disclosure. *See* Gov't Code § 552.305(d). As a third-party's proprietary interests may result in the information being confidential by law, we will consider whether any of the information must be withheld on that basis.

Correct Care initially asserts portions of the submitted information are marked confidential. However, information is not confidential under the Act simply because the party submitting 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, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

¹We note, and you acknowledge, the department did not comply with section 552.301 of the Government Code in requesting this decision for a portion of the submitted information. *See* Gov't Code § 552.301(b), (e). Nonetheless, because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider the third party interests for the information at issue. *See id.* §§ 552.007, .302, .352.

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. This section encompasses the Texas Homeland Security Act (the “HSA”). As part of the HSA, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 418.176 of the Government Code provides, in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a)(1). Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The office and Correct Care state a portion of the submitted information consists of staffing plans and floor plans for the Texas Civil Commitment Center facility (the “facility”) for the treatment and monitoring of sexually violent clients. The office states review of the submitted staffing plans can provide information regarding areas of the facility or types of activities that do not have direct staff oversight or can reveal shifts during which there are fewer staff members present. The office further states this information could be used to

determine hours in which an attempted breach or other attack may be met with less resistance from staff due to variances in the staffing plan or scheduling of fewer staff members during certain hours. Upon review, we find the information we have marked relates to staffing requirements of a law enforcement agency or a tactical plan of the provider and is maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

The office and Correct Care further assert, and we agree, the facility is critical infrastructure. *See generally id.* § 421.001 (defining “critical infrastructure” to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation”). The office and Correct Care state the submitted floor and site plans reveal the location of control rooms, the type of fencing utilized, the locations of doors within secured areas, the locations of sallyports, and other points of entry and exit. They also assert the submitted floor plans could be used in conjunction with the staffing plans to indicate areas vulnerable to breach or attack or the likely locations of staff members within the facility during a given shift. Based on these representations and our review, we find the release of the information at issue would identify the technical details of particular vulnerabilities of the facility to an act of terrorism. Thus, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.²

Correct Care also claims portions of its information are excepted under section 552.110 of the Government Code, which 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 id.* § 552.110. 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); *see also* Open Records Decision No. 552 (1990). 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.

²As our ruling is dispositive, we need not address the office’s or Correct Care’s additional arguments against disclosure of this information.

. . . 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 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 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 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). We note pricing 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 also Huffines*, 314 S.W.2d at 776; Open Record Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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* Open Records Decision No. 661 at 5-6 (1999).

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

Correct Care asserts section 552.110(b) for portions of its information. Upon review, we find Correct Care has demonstrated its financial statements constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold Correct Care's financial statements, which we have indicated, under section 552.110(b) of the Government Code.⁴ However, we find Correct Care has failed to demonstrate the release of any of the remaining information would cause it 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 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 (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 the contract at issue was awarded to Correct Care. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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 344-345 (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, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Correct Care also argues portions of the remaining information constitute trade secrets under section 552.110(a). Upon review, we find Correct Care has failed to establish a *prima facie* case any of the remaining information meets the definition of a trade secret and has not demonstrated the necessary factors to establish a trade secret claim for this information. *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). Accordingly, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.181 of the Government Code. The department must withhold the information we have indicated

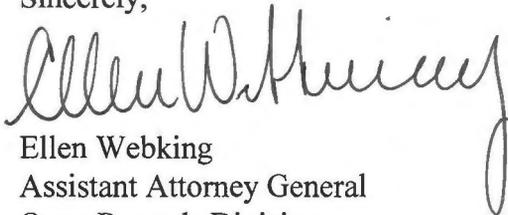
⁴As our ruling is dispositive, we need not address Correct Care's remaining argument against disclosure of this information.

under section 552.110(b) of the Government Code. The department must release the remaining information.

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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 611643

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)