



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 20, 1991

Robert A. MacLean, M.D.
Acting Commissioner of Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR91-584

Dear Dr. MacLean:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 13601.

The Texas Department of Health (the department) has received an open records request for the following information:

- (1) The proposed article, co-authored by department employee Dr. Richard Beauchamp, submitted to the Journal of The American Medical Association regarding the question of an association between bovine collagen implants and polymyositis/dermatomyositis (pm/dm).
- (2) All articles submitted by the Texas Department of Health or any of its employees to any medical or scientific journal regarding the question of an association between bovine collagen implants and pm/dm.
- (3) The results of the survey the department conducted among physicians regarding cases of pm/dm diagnosed subject to bovine collagen implants.

In its first request, the requestor seeks a copy of a proposed article co-authored by Dr. Richard Beauchamp, an employee of the department, and four other persons, none of whom are state employees.¹ The co-authors have submitted the proposed article to the Journal of the American Medical Association (JAMA), which has returned the paper for major revisions and cuts in length. We understand that the co-authors still might withdraw the proposed article from JAMA and submit it to another medical journal. The Department, as well as each of the five co-authors, seeks to withhold the proposed article under section 3(a)(10) of the Open Records Act.

Section 3(a)(10) excepts from required public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The section thus protects two different categories of information: (1) trade secrets and (2) commercial or financial information. Open Records Decision No. 552 (1990) at 2. In this case, the department and the co-authors claim that the trade secret exception applies. Pursuant to section 7(c) of the Open Records Act, the department and all co-authors but one have submitted reasons for withholding the proposed article as a trade secret.

In making trade secret determinations under section 3(a)(10), this office will accept a claim as valid if the claimant establishes a *prima facie* case for its assertion of trade secrets that is unrebutted *as a matter of law*. *Id.* at 5. Whether a claimant makes a *prima facie* case depends on whether its arguments as a whole correspond to the criteria for trade secrets detailed in the Restatement of Torts and adopted by the Texas courts. *Id.* at 2-3. According to section 757 of the Restatement of Torts, a "trade secret" is

any formula, pattern, device or compilation of information
which is used in one's business, and which gives him an

¹Richard A. Beauchamp, M.D., is an environmental public health physician within the Bureau of Disease Control and Epidemiology, Texas Department of Health. Jean Cukier, M.D., is a physician with a private practice in plastic, aesthetic, and reconstructive surgery at Doctors Center in Houston, Texas. Joseph S. Spindler, M.D., is a physician in private practice at the Arthritis Clinic of Houston, Texas. David E. Trentham, M.D., is chief of the division of rheumatology at Beth Israel Hospital in Boston, Massachusetts; Dr. Trentham also is employed by the Harvard Medical School, the Charles A. Dana Research Institute, and the Harvard-Thorndike Laboratory, all in Boston, Massachusetts. Sarah Spindler is not a physician.

opportunity to obtain an advantage over competitors who do not know or use it.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). The Restatement lists six criteria for determining whether particular information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the proprietor's] business;
- (2) the extent to which it is known by employees and others involved in [the proprietor's] business;
- (3) the extent of measures taken by [the proprietors] to guard the secrecy of the information;
- (4) the value of the information to [the proprietors] and [their] competitors;
- (5) the amount of effort or money expended by [the proprietors] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.²

RESTATEMENT OF TORTS § 757, cmt. b (1939).

After considering the Restatement's definition of "trade secret" and the six criteria, we believe that the proposed article constitutes a compilation of information which the co-authors use in their private practices and which, until the article is published, furnishes them an advantage over their competitors. We therefore conclude that the department and the co-authors have established a *prima facie* case entitling them to withhold the information. However, the requestor has

²The requestor contends that the department is the entity whose business relationship and competitive advantage we should use to gauge whether the proposed article constitutes a trade secret. We do not fully agree. While we consider the department's position, we also consider how the proposed article affects the business relationships and competitive advantage of the co-authors.

cited some cases it believes rebut the *prima facie* case as a matter of law.³ We disagree. We find all of the Open Records Decisions and cases the requestor cites to be factually distinguishable. We also reject the requestor's suggestion that we overrule established Texas precedent by adopting, in line with the United States Courts of Appeal for the Tenth District and District of Columbia Circuits, a more restrictive definition of "trade secret."

In its second request, the requestor seeks any other articles concerning the association between bovine collagen and pm/dm that the department or any of its employees has submitted to any medical or scientific journal. You state that the department is unable to comply with the second request for information because, with the exception of Dr. Beauchamp's article, neither the department nor any of its employees has submitted any such articles. The Open Records Act does not require a governmental body to make available nonexistent information. Open Records Decision No. 362 (1983).

In its third request, the requestor seeks the results of a survey the department conducted among physicians regarding cases of pm/dm diagnosed in patients who have had bovine collagen implants. You have submitted to us a copy of the survey, including blank survey forms and a cover letter sent with the forms. You state that the completed survey forms are medical records which are confidential under section 3(a)(1) of the Open Records Act, incorporating section 5.08 of the Medical Practice Act, V.T.C.S. art. 4495b.

The requestor argues that, because the department already has released completed survey forms, findings, and its conclusions to Dr. Beauchamp's co-authors, the department cannot now seek to withhold the information. The department has informed us, however, that none of Dr. Beauchamp's co-authors have seen the completed survey forms or the survey results. In fact, according to Dr. Beauchamp, the proposed article is not based upon the survey or results from the survey; rather, the cases that the co-authors analyze all were known through Dr. Cukier. We must accept the department's and Dr. Beauchamp's statements as true;

³In addition to citing cases the requestor believes rebut the department's and the co-authors' *prima facie* case, the requestor has raised a fact issue as to whether the department or the co-authors already have released the proposed article to a member of the public. We cannot resolve issues of fact in the opinion process. We therefore base our opinion on the co-authors' assertions that they have not released the proposed article to any member of the public.

consequently, the department has not waived its right to claim that the completed survey forms and survey results remain confidential.

As an alternative to disclosing the completed survey forms, the requestor seeks disclosure of data summarizing the results of the survey. However, the department states that it has not compiled aggregate data from its survey. The department has no duty to compile aggregate statistical data in response to a request. Open Records Decision No. 574 (1990) at 7.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-584.

Yours very truly,



Kym Oltrogge
Assistant Attorney General
Opinion Committee

KO/mc

Ref: ID# 13601

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