



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 15, 1994

David R. Smith, M.D.
Commissioner of Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR94-363

Dear Dr. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 25031.

The Texas Department of Health (the "department") has received a request for information relating to a proposal submitted to the department for an integrated client encounter system monitoring contractor. You have submitted the requested information to us for review and claim that section 552.110 of the Government Code excepts some of it from required public disclosure.

Pursuant to section 552.305 of the Government Code, we have notified the party whose proprietary interests are implicated by this request. We have received a response from DPRA. Without expressly citing any of the exceptions to disclosure enumerated in subchapter C of the Open Records Act, DPRA claims that some of the requested information includes "confidential and proprietary information which has a commercial and/or financial value." Specifically, DPRA seeks to protect the total cost and estimated hours in Item 10, page 6, the technical proposal in chapter 3, pages 69 through 94, the cost proposal in chapter 4, pages 94 through 101, and the Organizational Conflict of Interest Plan, pages 114 through 143.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. 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. [Emphasis added.]*

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.¹ Material which is essentially technical in nature and which relates to the substance of a proposal is ordinarily excepted under the trade secrets branch of section 552.110. *See, e.g.,* Open Records Decision Nos. 319 (1982) at 3; 296 (1981) at 4; 175 (1977) at 4. Pricing proposals, however, may generally be withheld only during the bid submission process. *See* Open Records Decision Nos. 319 at 4; 306 (1982) at 3. Under the "commercial or financial information" branch of section 552.110, information may be withheld if it is privileged or confidential by Texas statute or judicial decision. *See* Open Records Decision No. 592 (1991) at 7.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (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, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

The department advises us that it has awarded a contract in response to the request for proposals at issue here. We conclude that the respondent has made a prima facie case that some of the requested information constitutes trade secrets. Specifically, we conclude that DPRA has made a prima facie case that the technical proposal in chapter 3, pages 69 through 94, constitute trade secrets. We conclude, however, that DPRA has not made a prima facie case with respect to the remaining information that it seeks to withhold under section 552.110. For instance, DPRA has not explained what measures it has taken to insure the secrecy of this information, nor has it shown how this information would be difficult for others to acquire or duplicate. Moreover, we are unaware of any Texas statute or judicial decision that makes any of the requested information privileged or confidential. Accordingly, except as noted above, the department must release the requested information in its entirety.

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 contact this office.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/GCK/rho

Ref.: ID# 25031

Enclosures: Submitted documents

cc: Ms. Cynthia S. Sheridan
Branch Manager
David Mitchell & Associates, Inc.
8701 Mopac Boulevard, Suite 105
Austin, Texas 78759-8364
(w/o enclosures)

Mr. Thomas R. Eyestone
Senior Vice President
DPRA Incorporated
P.O. Box 727
Manhattan, Kansas 66502
(w/o enclosures)

Mr. David L. Stutzman
Arthur, Green, Arthur, Conderman & Stutzman
P.O. Box 248
Manhattan, Kansas 66502-0002
(w/o enclosures)