



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 16, 1995

Ms. Lavergne Schwender
Assistant County Attorney
Harris County
1001 Preston, Suite 634
Houston, Texas 77002-1891

OR95-280

Dear Ms. Schwender:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code.¹ Your request was assigned ID# 30554.

The Harris County Purchasing Agent (the "county") received a request for the proposals submitted for the county's Workers' Compensation Third Party Administration, Job. No. 94/0446. Although the county has no objections to the release of this information and has not raised any exceptions to required public disclosure, you state that the county has not released the requested information pursuant to section 552.305 of the Government Code.

Section 552.305 provides the following:

(a) In a case in which information is requested under this chapter and a third party's privacy or property interests may be involved, including a case under Section 552.101, 552.104, 552.110, or 552.114, a governmental body may decline to release the information for the purpose of requesting an attorney general decision.

¹The Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

(b) A person whose interests may be involved under Subsection (a), or any other person, may submit in writing to the attorney general the person's reasons why the information should be withheld or released.

(c) The governmental body may, but is not required to, submit its reasons why the information should be withheld or released.

Under the Open Records Act, all information held by governmental bodies is open unless it falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). However, in cases such as this one, where a third party's privacy or property interests are implicated, the governmental body may rely on the third party to establish that the information should be withheld under applicable Open Records Act exceptions. Gov't Code § 552.305(a), (c); Open Records Decision No. 542 (1990). The act does not require that this office raise and consider exceptions that have not been raised.

Pursuant to section 552.305(b) of the Government Code, this office notified the thirteen companies that submitted proposals to the county of the third party request for information and offered each entity an opportunity to address the availability of the records relating to it. We have received responses from two of the thirteen companies: Health Benefit Management, Inc., ("HBM") and CorVel Corporation ("CorVel").

Both companies claim that portions of their proposals are excepted from required public disclosure under section 552.110 of the Government Code. Section 552.110 excepts "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." For information to be excepted from required public disclosure as "commercial or financial information," the information must be privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991). The companies do not raise, nor are we aware of, any statutory law that would make the requested information confidential. Accordingly, the county may not withhold the requested information under section 552.110 as "commercial or financial information . . . privileged or confidential by statute or judicial decision."

Section 552.110 also excepts information that may constitute a trade secret. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

(1) the extent to which the information is known out side of [the company's] business; (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 to [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.

Id. The governmental body or the company whose records are at issue must make a *prima facie* case for exception as a trade secret under section 552.110. *See* Open Records Decision No. 552 (1990) at 5.

HBM claims that the release of Appendix IX of its proposal "would most certainly be detrimental to the operation of [its] companies." CorVel claims that the release of certain specified portions of its proposal "is likely to cause substantial harm to the competitive position CorVel holds both locally and nationally." Neither company addresses the six factors listed by the Restatement. The companies have thus not established a *prima facie* case that the requested records are trade secrets under section 552.110. Accordingly, the county may not withhold any of the requested records.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/LBC/rho

Ref: ID# 30554

Enclosures: Submitted documents

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