Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 14, 1997

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

OR97-0351

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. Your request was assigned ID# 103884.

The Harris County Purchasing Agent's office (the "county") received a request for information submitted to the Harris County Hospital District in response to a request for proposal regarding pharmacy services. Specifically, the requestor, Randall's Food and Pharmacy, seeks "a copy of the best and final offer of respondents other than Randall's for job number 95/0368," particularly "their cost and fee schedules as well as their on-line capabilities." The only information responsive to the request was the proposal of the Kroger Company ("Kroger"). You inform us that, in accordance with Texas Local Government Code §262.030c, the county has released those portions of the proposal which are not clearly marked "confidential," but seeks an opinion from this office concerning what, if any, of the "confidential" material is protected from disclosure under the Open Records Act.

Pursuant to section 552.305 of the Government Code, we notified Kroger of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. Kroger responded by arguing that the information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We have considered their arguments and have reviewed the information submitted.

Section 552.104 protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 552.104 is generally invoked to except information relating to competitive bidding situations involving specific commercial or contractual matters. Open Records Decision No. 463 (1987). Governmental bodies may withhold bid information while governmental officials are in the process of evaluating the proposals and asking

competitors to clarify their bids. Open Records Decision No. 170 (1977). Section 552.104 does not, however, except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982); 184 (1978). Furthermore, section 552.104 does not protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Therefore, because the bidding process is concluded and because the interests of Kroger, a private party, are being asserted, the county may not withhold the requested information under section 552.104.

We next address Kroger's argument under 552.110. Section 552.110 protects the property interests of private persons by excepting from 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. Kroger argues that the information sought by the requestor, specifically the costs and fee schedules, risk management, quality assurances and claims processing, as well as Kroger's on-line capabilities, constitute Kroger's trade secrets.[1] 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 (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.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).[2] This office has held that if a governmental body takes no position with regard to the

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[1]Kroger also argues that sections 5.2 and 5.3 of the proposal, as well as the content and focus of operational audits, is proprietary information and not subject to disclosure. We note, however, that a letter from Linda Hagens, R.Ph, of Kroger to the county, dated November 22, 1996, indicates that Kroger wishes to withhold only page 1, section 3, paragraph 1 (insurance amounts), and page 6, section 6, paragraph 2 (rebate information) of the requested information. In apparent response, the county submitted for our review only pages one and six of the Kroger proposal, marked "Exhibit B." Our decision is therefore limited to sections 3.0 and 6.0 of the proposal, which are contained on pages one and six.

[2]The 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;

application of the trade secret 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Based on our review of the information contained in Exhibit B, we conclude Kroger has met its burden under 552.110 with regard to certain information contained in section 4.0, "Drug Cost and Dispensing Fee Proposed," which relates to Kroger's cost and fee bid structure. For your convenience, we have marked the information which may be withheld from disclosure. (See red tag). We conclude Kroger has not met its burden under 552.110 with regard to the remaining information contained in section 4.0, nor the information in section 3.0, "Risk Management and Insurance," and thus this information may not be withheld.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Michael A. Pearle

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 103884

Enclosures: Marked documents

cc: Mr. David King
Pharmacy Computer Coordinator
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(w/o enclosures)

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(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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.