



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 3, 1997

Mr. Dan Fontaine
Chief Legal Officer
The University of Texas
M.D. Anderson Cancer Center
Texas Medical Center
1515 Holcombe Boulevard
Houston, Texas 77030

OR97-1529

Dear Mr. Fontaine:

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# 106927.

The University of Texas M.D. Anderson Cancer Center (the "center") received a request for five categories of information, including three contracts between the center and the Hyslop Group, Dr. Asit Choksi, and Dr. Roger Rodgers. You have released most of the requested information to the requestor. However, you request our decision whether the three contracts are excepted from disclosure pursuant to Government Code sections 552.103, 552.104, and 552.110. You have submitted the information at issue to this office for review.

First, you assert that Dr. Choksi's and Dr. Rodgers' contracts are excepted from disclosure under section 552.104 because release of the information will be detrimental to the center's efforts in obtaining future contracts. Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. However, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *See, e.g.,* Open Records Decision No. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. We note that the contracts at issue have already been awarded. Additionally, you have not demonstrated how release of the contracts presents potential specific harm in any other particular competitive situation. Therefore, section 552.104 will not except Dr. Choksi's and Dr. Rodgers' contracts from required public disclosure.

Next, you state that the contracts implicate the private and proprietary interests of third parties. Pursuant to section 552.305 of the Government Code, we notified the Hyslop Group, Dr. Choksi, and Dr. Rodgers of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure. The Hyslop Group did not respond to our notice; therefore, we have no basis to conclude that the Hyslop Group's contract is excepted from disclosure. *See* Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. The Hyslop Group's contract must therefore be released to the requestor.

Dr. Rodgers' response asserts that the information responsive to portions of the request is a trade secret or commercial or financial information that is excepted from public disclosure. Although he cites to section 552.104, we assume he is asserting an exception under section 552.110. Additionally, he asserts that the financial information is excepted by section 552.101.¹ Similarly, Dr. Choksi argues that the information responsive to request item number two is protected by section 552.110. The center has submitted the two doctors' practice management agreements only; therefore, we limit our ruling to the agreements and we do not address any other records for which Dr. Rodgers and Dr. Choksi claim are exempt from disclosure.

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. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act, 5 U.S.C. § 552, when applying the second prong of section 552.110. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a

¹Section 552.110 is redundant with section 552.101. To the extent that statutes confer confidentiality on commercial or financial information, such confidentiality will be incorporated into the Open Records Act by either section. Dr. Rodgers cites to *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), and argues that a person's net worth is not discoverable in judicial proceedings unless exemplary damages may be recovered. Information that may be privileged from discovery is not necessarily protected from required public disclosure under the Open Records Act. Whether such information is subject to disclosure under the act will depend entirely upon whether one of the act's exceptions to disclosure applies. *See generally* Open Records Decision Nos. 575 (1990), 574 (1990).

mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

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). 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. *Id.*² This office has held that if a governmental body takes no position with regard to the 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.

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

After a review of the agreements and the doctors' arguments, we conclude that neither doctor has demonstrated that the information is protected by section 552.110. Thus, Dr. Rodgers' contract must be released to the requestor. Dr. Choksi's contract is subject to further discussion below.

Lastly, you contend that Dr. Choksi's contract is excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The center has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. Section 552.103 applies only when a lawsuit has been filed or if litigation is reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). The section 552.103 exception was designed to protect the interests of the state in adversary proceedings or in negotiations leading to the settlement thereof. Open Records Decision No. 301 (1982) (construing predecessor to section 552.103).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). The mere fact that an individual hires an attorney and alleges damages does not serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform us that:

M.D. Anderson is currently involved in confidential settlement negotiations with Dr. Choksi and the Choksi Clinic, P.A.[] Although a lawsuit has not yet been filed, Dr. Choksi has retained at least two attorneys to assist him in challenging the agreements and terminating the obligations made pursuant to this contract and has sent demand letters to M.D. Anderson.

After considering your arguments, we conclude that you have not demonstrated that the settlement negotiations are being conducted in anticipation of litigation as required for the application of section 552.103. Thus, you may not withhold Dr. Choksi's contract under section 552.103.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

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Ref.: ID# 106927

Enclosures: Submitted documents

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