



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 14, 1997

Mr. William Treacy
Executive Director
Texas State Board of Public Accountancy
333 Guadalupe, Tower III, Suite 900
Austin, Texas 78701-3900

OR97-1594

Dear Mr. Treacy:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 107180.

The Texas State Board of Public Accountancy (the "Board") received a request for information concerning Professional Service Groups, Inc. ("PSG"). The requestor seeks "copies of any correspondence that has been exchanged between the . . . [Board] and Colmar, Crawford & Parkhouse and/or . . . PSG within the last 24 months" and for "minutes of any meetings at which representatives of Colmar, Crawford & Parkhouse and/or . . . PSG addressed the board." The requestor later clarified her request to exclude individual income statements and balance sheets of prospective and intended founding affiliated practices of PSG. The Board asserts no exception to the required public disclosure of the requested information. PSG asserts that the requested information is excepted from required public disclosure based on sections 552.101, 552.104, 552.110 and 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information considered to be confidential by law. PSG does not specifically address the applicability of this exception to the requested information. We are not aware of any law that makes this information confidential. Therefore, we cannot conclude that the Board may withhold the requested information from disclosure based on section 552.101.

Section 552.104 of the Government Code protects the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Consequently, a third party lacks standing

to raise section 552.104. As the Board does not raise section 552.104, we need not consider its applicability to the requested information. *See* Open Records Decision No. 592 (1991) at 8.

Similarly, section 552.111 protects the interests of a governmental body, rather than a third party. Consequently, the Board, having waived section 552.111, may not withhold the information under that exception.

Section 552.110 excepts from disclosure two categories of information: (1) “[a] trade secret” and (2) “commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” In applying the “commercial or financial information” branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass’n* claim by mere conclusory assertion of a possibility of commercial harm. “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.” Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985)).

We turn to the trade secret branch of section 552.110. 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, . . . [but] 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 (1939).¹ 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.

We have reviewed the requested information and considered the arguments of PSG and those of the requestor. We conclude that section 552.110 excepts from required public disclosure portions of the documents. We have marked the documents accordingly.

We are resolving this matter with this 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 may 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,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 107180

Enclosures: Marked documents

cc: Ms. Julie Lindy
Staff Writer
Public Accounting Report
Postal Drawer 13729
Atlanta, Georgia 30324-0729
(w/o enclosures)

¹The six factors include: 1) the extent to which the information is known outside 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 this information; 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS, § 757 (1939)

