



November 9, 1999

Mr. Steve Aragon  
General Counsel  
Texas Health and Human Services Commission  
4900 North Lamar, Fourth Floor  
P.O. Box 13247  
Austin, Texas 78711

OR99-3174

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 129282.

The Health and Human Services Commission (the "commission") received a request for a copy of the successful offer submitted in response to a Request for Offers issued by the commission in December 1998. The vendor that submitted the successful offer, Consultec, L.L.C. ("Consultec"), marked a portion of its offer confidential. Thus, you believed that Consultec might claim that portions of its offer are excepted from disclosure under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, you notified Consultec of the request for information. You take no position as to whether any of the requested information is excepted from required public disclosure.

Consultec responded to the notice by arguing that its staff resumes were protected from disclosure under section 552.110. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

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 a single or ephemeral event 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); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). 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 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 (1990).<sup>1</sup> However, as in this case, where no demonstration of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.110 is applicable. Open Records Decision No. 402 (1983). Consequently, the commission may not withhold the staff resumes under the trade secret prong of section 552.110. *See also* Open Records Decision No. 319 (1982) (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information).

As for the commercial or financial information prong of section 552.110, the governmental body or interested third party must provide a specific factual or evidentiary showing, not a conclusory or generalized allegation, that substantial competitive injury would likely result from disclosure. Act of May 25, 1999, 76th Leg., R.S., ch 1319, § 7, 1999 Tex. Sess. Law Serv. 4500, 4503 (Vernon) (to be codified as an amendment to TEX. GOV’T CODE § 552.110); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Neither the commission nor Consultec has provided specific factual evidence that disclosure would cause Consultec substantial competitive harm. Therefore, the staff resumes at issue

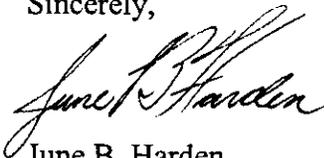
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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other 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 (1982), 306 at 2 (1982), 255 at 2 (1980).

may not be withheld under the commercial or financial information prong of section 552.110. Accordingly, the commission must disclose the submitted information to the requestor.

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.

Sincerely,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/ljp

Ref: ID# 129282

Encl. Submitted documents

cc: Ms. Marjorie Fortner  
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