



July 10, 2000

Mr. Steve Aragón
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2000-2562

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136877.

The Texas Health and Human Services Commission (the "commission") received a request for "a copy of the winning proposal (including the cost/budget proposal) from the Institute for Child Health Policy" and the "evaluation sheets for the 5 different bidders." You have submitted for our review the information that is responsive to the request. You assert that the requested information is excepted from disclosure under section 552.104 of the Government Code. In accordance with section 552.305 of the Government Code, you notified a representative of the Institute for Child Health Policy ("the institute") of the current records request and invited the institute to submit arguments to this office as to why its information should not be released. The institute responded to the notice, and asserts that a portion of its information is excepted from disclosure under section 552.110 of the Government Code. We have considered the asserted exceptions and have reviewed the submitted information.

We note that the commission received the request for information on April 18, 2000 and that the commission's request for an opinion from this office was sent by courier on May 4, 2000 and received by this office that same day. Thus, the commission failed to request an open records decision from this office within ten business days as required under Government Code section 552.301. *See* Gov't Code § 552.301(b). This failure to timely request a decision results in the legal presumption that the requested information is open to the public. Gov't Code § 552.302; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). The presumption of openness can be overcome only by a compelling demonstration that the information must not be released, *e.g.*, where it is made confidential by other law or where third party interests are at issue. Open Record Decision No. 150 (1977). Because section 552.104 is intended to protect the interests of the governmental body, this exception is waived if it is not timely asserted. By contrast, the application of

section 552.110 of the Government Code is a compelling reason.¹ Thus, we shall consider the section 552.110 assertion.

Section 552.110 protects the interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. *See* Gov't Code § 552.110. In its comments to this office, the institute asserts that a portion of its proposal, specifically the appendices numbered 1, 2, 3, 4, 8, and 9, constitute trade secret information. A "trade secret"

may consist of 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). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). Our review of the information at issue indicates it consists of compilations of information for continuous use in the operation of the institute.

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (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;

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

- (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; and
- (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 No. 232 (1979). 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 the exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commission has taken no position with respect to the section 552.110 assertion. Upon careful consideration of the arguments and representations submitted by the institute, we believe that the institute has made a *prima facie* showing that appendices 1, 2, 3, 4, 8, and 9 of its proposal constitute trade secret information. We therefore conclude that the commission must withhold this information pursuant to section 552.110 of the Government Code. With respect to the section 552.110 assertion, neither the institute nor the commission have submitted arguments pertaining to any other information that is responsive to the request. We therefore additionally conclude that the remaining information is not excepted from required public disclosure.

However, we note that a portion of the remaining information is indicated to be copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). Nonetheless, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the commission must not release appendices 1, 2, 3, 4, 8, and 9 of the institute's proposal. All remaining information that is responsive to the request must be made available to the requestor. As to that portion of the remaining information that is copyrighted, the commission must not copy or assist the requestor in copying this information. The requestor assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

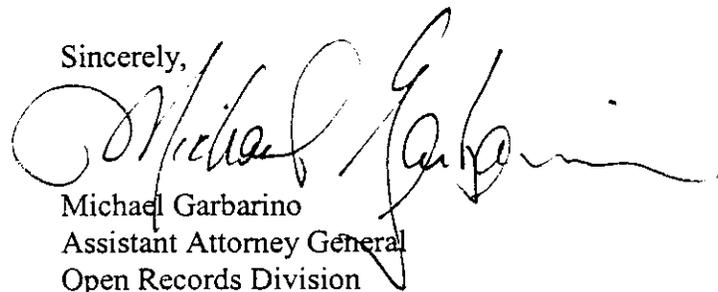
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 136877

Encl. Submitted documents

cc: Ms. Tarren Bragdon
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(w/o enclosures)