



August 29, 2000

Ms. Paula A. Jones
General Counsel
Employees Retirement System of Texas
P. O. Box 13207
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Austin, Texas 78711-3207

OR2000-3347

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 138440.

The Employees Retirement System of Texas ("ERS") received a request for "a copy of the contract between Blue Cross Blue Shield and its network physicians, preferably the one that was in effect when Dr. Cronson was a network provider[.]" and "any pages from the master contract" that would apply to the determination of allowable amount based on "charges made for the same service by providers in the same geographic area with similar training, experience, and facilities[.]" You state that you will provide the requestor with the relevant pages of the master contract, but argue that the contract between Blue Cross and network providers is excepted from disclosure. Blue Cross states that it objects to the release of the information in its entirety. You claim that the remaining information is excepted from disclosure under section 552.103 of the Government Code. You have notified Blue Cross of the request in compliance with section 552.305 of the Government Code. *See* Gov't Code § 552.305(b) (permitting interested third party to submit to attorney general reasons why requested information should not be released). Blue Cross has responded to the notice asserting that the information contains confidential and proprietary information. We have considered the claimed exceptions and reviewed the submitted information.

We begin by addressing Blue Cross's contention that the information contains confidential and proprietary information. Blue Cross asserts that the documents are considered to be confidential trade secrets and disclosure would put Blue Cross at a competitive disadvantage.

Government Code section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which defines 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. 1958). When a governmental body takes no position with regard to the application of the trade secrets prong of section 552.110 to requested information, we accept a private entity's claim for exception as valid under that prong if that entity establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5* (1990).

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;
- (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).

We conclude that Blue Cross has not made a *prima facie* case that the information contains trade secrets. Therefore, ERS may not withhold the submitted information under the trade secrets prong of section 552.110.

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 at 5-6 (1999). In support of the contention that substantial competitive injury would result from the disclosure of the information, Blue Cross presents the following statements:

As I am sure you are aware, the health benefits industry is extremely competitive. Blue Cross Blue Shield contracts with a great number of physicians across the state, and in doing so, competes, both directly and indirectly, with every other health insurer in the state. In furtherance of its relationships with Texas physicians, Blue Cross guards very closely the contents of its contracts with those physicians. If another insurer or third party administrator were to have access to the contracts between Blue Cross and its "network" physicians, that insurer would have the opportunity to undermine the relationships that Blue Cross has worked so hard to develop. Hence, disclosure of the requested contents could have a devastating effect on Blue Cross' business[.]

We have considered Blue Cross's arguments and reviewed the contracts at issue. In our opinion, however, Blue Cross has not shown, based on *specific factual evidence*, that disclosure of the submitted information would cause "substantial competitive harm" to Blue Cross. Thus, ERS may not withhold the submitted information under the commercial or financial branch of section 552.110.

Next, we turn to your section 552.103 claim. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). ERS must meet both prongs of this test for the information to be excepted under section 552.103(a).

You explain that the requestor is an appellant in a contested case, pursuant to ERS rules and the Administrative Procedures Act ("APA"), with ERS and Blue Cross. Contested cases conducted under the APA, Chapter 2001 of the Government Code, are considered litigation under section 552.103. *See* Open Records Decision No. 588 at 7 (1991). Therefore, you have demonstrated that litigation was pending on the date that ERS received the request. Because we agree that the submitted information relates to the pending litigation, we conclude that you may withhold the submitted information under section 552.103(a).

We note that if the opposing party in the litigation has seen or had access to the submitted information, there is no section 552.103(a) interest in withholding that information from the requestor. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982). We note that you have indicated a hearing date of July 25, 2000, which precedes the date of this ruling. Thus, if litigation has concluded you may not withhold the information pursuant to section 552.103(a).

In summary, you may withhold the submitted information pursuant to Government Code section 552.103(a). If litigation has concluded, however, you must release the information to the requestor.

This letter ruling is limited to the particular records at issue in this request and 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,



Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 138440

Encl. Submitted documents

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