



October 17, 2000

Mr. Tracy A. Pounders
Assistant City Attorney
City of Dallas
1500 Marilla Room 78N
Dallas, Texas 75201

OR2000-4041

Dear Mr. Pounders:

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# 140183.

The City of Dallas (the "city") received a request for information relating to a contract between the city and Aetna U.S. Healthcare ("Aetna"). You inform us that under the contract, Aetna furnishes preferred provider health benefits services to city employees. You explain that the requested information, Exhibit C to the contract, "stipulates the price that the City shall pay to Aetna for each of a number of listed medical procedures and treatments provided to City employees by Aetna's contract physicians and facilities." The city seeks to withhold Exhibit C under section 552.104 of the Government Code. You also believe that Exhibit C contains information that is excepted from disclosure under section 552.110. You indicate that Aetna provided comments to the city as to why the requested information should be withheld from disclosure. We have considered the exceptions you raise and have reviewed the information you submitted.¹

Initially, we note that as the requested information is part of a public contract, that information is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹Your request for this decision does not address other information, relating to the contract between the city and Aetna, to which the requestor seeks access. Therefore, if the city has not released that information already, you must do so at this time. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

.....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Thus, pursuant to section 552.022(a)(3), information contained in a contract that involves the receipt or expenditure of public funds may not be withheld from public disclosure, unless that information is "expressly confidential under other law." Section 552.104 of the Government Code is a discretionary exception to disclosure that protects the interests of, and may be waived by, the governmental body. As such, section 552.104 is not "other law," under section 552.022(a), that makes any of the information enumerated by section 552.022(a) expressly confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discussing discretionary exceptions generally), 592 at 8 (1991) (addressing statutory predecessor to section 552.104). Consequently, the city may not withhold the contractual information in question under section 552.104.

We next consider whether the requested information must be withheld under section 552.110 of the Government Code. 552.110 protects the proprietary 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. *See* Gov't Code § 552.110(a), (b). You indicate that Aetna claims an exception for the information in question under both components of section 552.110. You attribute your arguments that the requested information is excepted under section 552.110 to a representative of Aetna. Aetna has not submitted any separate comments to this office as to why the requested information should be withheld from disclosure. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 at 2-3 (1990).

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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to requested information, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the 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)*.

In this instance, the assertions that you attribute to Aetna generally correspond to the six indicia of a trade secret under section 757 of the Restatement of Torts.² You state that you are unaware of any information that would refute Aetna's contentions. We have considered these comments and have thoroughly examined the information in question. We note, however, that pricing information in a commercial transaction with a governmental body generally is not considered to constitute a trade secret, notwithstanding the fact that the private entity maintains the secrecy of that information. *See Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982)*. Furthermore, the price list in question constitutes "information as to a single or ephemeral event in the conduct of the business," i.e., Aetna's contract with the city, and is not represented to be "a process or device for continuous use in the operation of the business." Thus, we conclude that the pricing information in question does not qualify as a trade secret under *Hyde Corp. v. Huffines* and section 757 of the Restatement of Torts and therefore is not excepted from disclosure under section 552.110(a).

Section 552.110(b) excepts from disclosure "[c]ommercial 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[.]" Gov't Code § 552.110(b). This exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury likely would result

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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)*.

from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). In raising section 552.110(b), you represent only that Aetna "has asserted that disclosure of the information is likely to cause substantial harm to Aetna's competitive position." As this assertion, standing alone, is not a specific factual or evidentiary showing of substantial competitive injury to Aetna, and as Aetna has submitted no further information, we conclude that the requested information is not excepted from disclosure under section 552.110(b). *See* ORD 661 at 5-6 (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm).

In summary, the requested information is subject to required public disclosure under section 552.022(a)(3) of the Government Code, and Aetna has not demonstrated that the information in question must be withheld under either component of section 552.110. Therefore, the requested information is not excepted from disclosure and must be released to the requestor.

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).

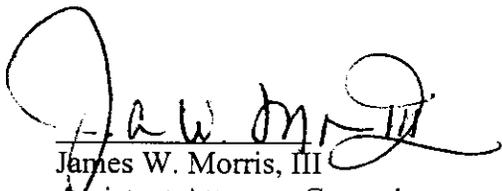
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 140183

Encl. Submitted documents

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