



November 13, 2000

Ms. Linda S. Wiegman
Deputy General Counsel
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2000-4397

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141215, 141602, and 141678.

The Texas Department of Health (the "department") received three requests for the winning proposal and related information for RFO #501-0-3153. You state that you have released or will release much of the requested information. You take no position as to whether most of the remaining information is excepted from disclosure but claim that one document is excepted from disclosure under section 552.107 of the Government Code. However, you do advise this office that the requested information may involve the proprietary or property interests of EpicEdge, Inc. ("EpicEdge"). Section 552.305(d) requires the department to notify parties whose proprietary information is implicated of the request for an attorney general decision. You state that you have notified EpicEdge of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have considered the exception you claim and reviewed the submitted information.

You contend that one submitted document is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(i) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). We find

that the document submitted for which you claim section 552.107 does consist of confidential client communications and the advice of a governmental body's attorney; therefore, you may withhold that document under section 552.107.

As to the remainder of the documents, EpicEdge contends that the following portions of its proposal are excepted from required disclosure by section 552.110 of the Government Code:

Attachments A, B, C, D, E, F, G, J, the following sections of Attachment K: pages 21-54, comprising sections 2.3, 2.4, 2.5, 3, 4, and 5; pages 65-85, comprising section 9; pages 96-98, comprising section 17, and the related cost worksheets; Appendix A (staff résumés); Appendix B (project plan); and Appendix C (financial requirements).

EpicEdge further tells us that it designated attachments to the contract as "proprietary and confidential" and that it included a footnote on each page of the proposal stating "Use or disclosure of data contained on this sheet is subject to restrictions on the title page of this proposal."¹ The department has submitted to us a notebook, which includes a financial statement section and Appendices B and C, and has submitted a variety of other documents and diskettes, including Attachments B, J, and I and diskettes with the technical proposal, staff résumés, and cost worksheets. Some of the documents submitted to us are labeled "proprietary and confidential," but none contain the footnote quoted above. Further, none are labeled "Attachment K" or have page numbers corresponding to the portions of Attachment K which EpicEdge seeks to withhold. We have identified some documents and diskettes which appear to correspond to certain information which EpicEdge describes in its arguments to withhold information. We will address EpicEdge's arguments for withholding those documents and diskettes later in this ruling.

The remaining documents submitted to us by the department which do not appear to correspond to information EpicEdge seeks to withhold must be released. We have marked that information. In addition, responsive information that EpicEdge seeks to withhold but which the department has not submitted to us must be released. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Section 552.302 of the Government Code provides that a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental

¹We note that information that is subject to the Public Information Act is not confidential simply because the party submitting the information anticipates or requests confidentiality. See *Industrial Found. v Texas Indus. Accident Bd.*, 540 S.W.2d 66S, 676-78(Tex.1976), cert. denied, 430 U.S. 931(1977).

body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). A third party's proprietary interests may provide such a compelling reason; however, because the department has not submitted all of the information identified by EpicEdge as proprietary and because we are unable to correlate the information the department has submitted with the information EpicEdge seeks to withhold, we have no basis for finding it confidential. Thus, we have no choice but to find that the information must be released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352.

We note that some of the submitted information which EpicEdge apparently does not seek to withhold appears 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). 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).

Now we address the information before us which we can identify as information EpicEdge seeks to withhold under section 552.110 of the Government Code. This consists of Attachments B and J, Appendices B and C, and staff résumés and cost worksheets within the submitted documents and on diskette. Also included on the diskette labeled "Technical Proposal" are sections that appear to correspond to sections of Attachment K which EpicEdge seeks to withhold. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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 (Tex.), *cert. denied*, 358

U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² 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 at 5-6 (1990).

EpicEdge informs us of the resources used to develop the information and to develop the format in which it is presented in proposals. EpicEdge reuses the format and specified sections of the documents for other procurements and emphasizes to us the value of the information to its competitors. We therefore find that Attachment B, portions of Attachment

²The 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).

J, and Appendices B and C may be withheld under the trade secret prong of section 552.110. In addition, we find that the following portions of the diskette labeled "Technical Proposal" that correspond to some portions of Attachment K that EpicEdge seeks to withhold may be withheld as trade secret information pursuant to section 552.110: 2.3 (Project Organization), 2.4 (Roles and Responsibilities), Services, Project Management, and Customization.

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 Nos. 639 at 4 (1996), 661 (1999). After reviewing the information at issue and the arguments set forth by EpicEdge, we conclude that the cost worksheets may be withheld under section 552.110 as commercial or financial information.

However, we find that some of the information EpicEdge contends is protected by section 552.110 does not constitute either protected trade secret or commercial or financial information and must be released. General staffing information and employee résumés cannot reasonably be said to fall within the definition of "trade secret" or within any other exception of the Public Information Act. *Open Records Decision No. 175 (1977)*. The résumés and staffing information in Attachment J and on diskette must be released. We have also marked additional information in Attachment J which does not constitute either protected trade secret or commercial or financial information and must be released.

In summary, the department may withhold the one document for which it claimed section 552.107. The department must withhold Attachment B, Appendices B and C, the portions of Attachment J not marked for release, the cost worksheets in print and on diskette, and the information we have identified on the diskette labeled "Technical Proposal," pursuant to section 552.110. The department must release the information marked for release, including allowing access to the copyrighted material, and must release the remainder of the diskette labeled "Technical Proposal."

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).

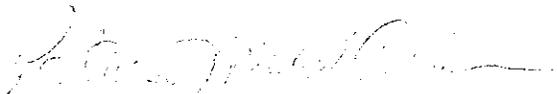
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/seg

Ref: ID# 141215, 141602, 141678

Encl. Submitted documents, diskettes

cc: Ms. Marcia Lemmons
Marketing Communications Manager
Andersen Consulting
4742 North 24th Street, Suite 400
Phoenix, Arizona 85016
(w/o enclosures)

Mr. Jeff Sexton
President & Chief Operating Officer
EpicEdge
1150 Lakeway Drive, Suite 219
Austin, Texas 78734
(w/o enclosures)

Ms. Margaret C. Fitzgerald
Brewer & Pritchard
Three Riverway, 18th floor
Houston, Texas 77056
(w/o enclosures)

Mr. Michael L. Woodward
Hance Scarborough Wright
111 Congress Avenue, Suite 500
Austin, Texas 78701-4043
(w/o enclosures)