



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 29, 2003

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

OR2003-3627

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181275.

The Texas Health and Human Services Commission (the "commission") received a request for the following information relating to a request for proposals concerning medicaid claims administration:

Agreement entered into between the State of Texas and ACS State Healthcare LLC, subsidiary of Affiliated Computer Systems, Inc. (ACS) as a result of the PCCM RFP

Business Solution and Cost proposal submitted by (ACS) in response to the RFP.

Any and all evaluation materials used to score the ACS and EDS proposals submitted in response to the RFP, including but not limited to directions to evaluators and preliminary and final score sheets.

Copies of all correspondence, response to questions, clarification or other written materials sent to or received from ACS related to the Procurement, including but not limited to copies of letters, memoranda and presentations.

Copies of all notes taken by or in the possession of any employee of the Commission or any third party under contract to the Health and Human Services Commission related to the Procurement.

You inform us that you have released some information to the requestor but claim that other requested information is excepted from disclosure under sections 552.107, 552.111, 552.136, and 552.137 of the Government Code. In addition, you have notified third party ACS State Healthcare ("ACS") of the request and of its opportunity to submit comments to this office. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In its correspondence with this office, ACS asserts that portions of the requested information are excepted under section 552.110 of the Government Code. We have considered all claimed exceptions and reviewed the submitted information.¹

Initially, we address the commission's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

In this instance, you state that the request was received on March 4, 2003. Therefore, the commission was required to submit the requested information no later than March 25, 2003. The requested information was hand delivered to this office on March 26, 2003. Thus, the requested information was not submitted within the fifteen-day deadline as required by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; 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 section 552.302); *Open*

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Records Decision No. 319 (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977).

In this instance, you assert that some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions that protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information. *See* Open Records Decision Nos. 630 at 4 (1994) (predecessor to section 552.107(1) may be waived), 473 (1987) (governmental body may waive predecessor to section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). However, because a third party's interests are at stake and because sections 552.136 and 552.137 can provide compelling reasons to overcome the presumption of openness, we will address the remaining arguments.

Because ACS's claims are the broadest, we address them first. We note that some of the requested information has been designated as confidential or proprietary. However, information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We now address ACS's arguments regarding section 552.110. This section 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 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).

Section 552.110(b) of the Government Code exempts 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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having reviewed ACS’s arguments, we conclude that the company has established that some of the information it seeks to withhold is excepted pursuant to section 552.110. This

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).

information, which we have marked, must be withheld.³ However, much of the remainder of the information consists of general information about the company, its qualifications, and its employees and is not excepted under section 552.110 in this instance. *See* Open Records Decision Nos. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor). Furthermore, we note that pricing information is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business.” Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp.*, 314 S.W.2d at 776; *see also* Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contracts with governmental body expressly made public); *see also* Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency); *see generally* Freedom of Information Act Guide & Privacy Act Overview 213-221 (2000) (disclosure of prices is cost of doing business with government); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Thus the remaining information may not be withheld pursuant to section 552.110.

The commission claims that portions of the submitted information are excepted from disclosure pursuant to section 552.136 of the Government Code. This section provides:

- (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security or to the design, operation, or defense of a computer network.
- (b) The following information is confidential:
 - (1) a computer network vulnerability report; and
 - (2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the

³We note that under Tab 13 of Binder 3 of its brief, ACS seeks to withhold a document entitled “Summary of Outstanding Issues: Legal, Non-Legal, and Guarantee.” However, it does not appear that the commission submitted a copy of such document for our review. Therefore, this ruling does not address this information and is limited to the information submitted as responsive by the commission. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from this office must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.136. You assert that portions of the submitted information relate to the security of the commission's computer system. To support your assertion you have provided a statement from an individual with experience in computer security who identifies those portions of the submitted information that relate to computer security. Because much of the information that the individual identifies is excepted from disclosure on the basis of section 552.110, we need not consider whether it is also excepted under section 552.136. We have reviewed the remaining identified information and conclude that only a small portion of it relates to the security of the commission's computer. This information, which we have marked, must be withheld pursuant to section 552.136. However, the remaining identified information does not constitute reports or assessments of the extent to which the commission's computer network systems are vulnerable to unauthorized access or harm or otherwise relate to the security of the commission's computers. Consequently, none of this information may be withheld under section 552.136 of the Government Code.

The commission also points out that the requested information includes e-mail addresses of members of the public. Section 552.137 of the Government Code provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]." We note that section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or website address. Unless the individual members of the public have affirmatively consented to release of their e-mail addresses, the commission must withhold the types of e-mail addresses that we have marked. *See* Gov't Code § 552.137(b).

In addition, we note that the submitted information includes social security numbers, which may be excepted from disclosure under section 552.101 of the Government Code.⁴ The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the city should ensure that such numbers are not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990.

⁴ Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statutes outside of the Act.

Finally, we note that some of the submitted information is protected by copyright. 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).

In summary, the commission must withhold the information we have marked as being excepted under section 552.110. We have marked the computer security information that must be withheld under section 552.136 and the types of e-mail addresses that must be withheld pursuant to section 552.137. Social security numbers must be withheld if obtained or maintained pursuant to a law enacted on or after October 1, 1990. All other information must be released in accordance with applicable copyright laws.

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 Dep't of Pub. 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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 181275

Enc. Submitted documents

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