



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2003

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West 7th Street
Austin, Texas 78701-2902

OR2003-6917

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 188494.

The University of Texas System (the "System") received a request for twenty-two categories of information relating to MEGA Life & Health Insurance Company ("MEGA"). You inform us that the System sought and received from the requestor clarification regarding the scope of his request for information.¹ See Gov't Code § 552.222(b) (providing that governmental body should help requestor clarify request by advising requestor of types of information available). You inform us that the System does not maintain some of the requested material, noting that the time period encompassed by the request is outside the scope of your retention schedule.² You advise us that the System will release most of the responsive information requested; however, you assert the documents in Tab 7 are excepted from disclosure under section 552.111 of the Government Code. Further, though you take no position on the release of MEGA's information, you state, and provide supporting

¹ We note that the requestor does not seek any personally identifiable information and requests that the System redact all such information.

² The Act does not require a governmental body to disclose information that does not exist at the time a request is received or to create new information in response to a request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

documentation showing, that the System notified MEGA, an interested third party, of the System's receipt of the request and of MEGA's right to submit arguments to this office explaining why its information should not be released to the requestor. See Gov't Code § 552.305(d); see also 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 under Act in certain circumstances). In response to your notification, we have received comments from MEGA. We reviewed the information you submitted and considered the exceptions claimed by the System and MEGA.

Initially, we address your arguments under section 552.111 of the Government Code. This provision excepts from required public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 5 (1993).

Upon review of the information in Tab 7, we agree that most of this information consists of advice, opinions, or recommendations regarding policymaking, and therefore, we conclude that the System may withhold the information we have marked pursuant to section 552.111 of the Government Code. However, we find some of the information is purely factual, and thus, the System may not withhold this information under section 552.111. As the System claims no other applicable exceptions to required public disclosure, it must release this information to the requestor.

Next, we address arguments asserted by MEGA. First, MEGA objects to the overall breadth and scope of the request. We note that the fact that it may be burdensome to provide the information at issue does not relieve a governmental body of its responsibility to comply with the Act. *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (1976), *cert. denied*, 430 U.S. 931 (1977) (cost or difficulty in complying with predecessor of Act does not determine availability of information); Open Records Decision No. 497 (1988). Moreover, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds or to which it has access. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 561 at 8 (1990).

Second, MEGA claims certain portions of the requested material are excepted under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets

and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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).

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;
- (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 must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[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 to disclosure 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. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

In this instance, MEGA requests that this office withhold some of the requested information in accordance with an earlier ruling from this office, Open Records Letter No. 2001-1635 (2001). In this ruling, we concluded that certain information pertaining to MEGA's 2000/2001 proposal was excepted from disclosure under section 552.110 of the Government Code. Regarding this previous ruling, we note that the System states the following:

After review of U.T. System files, I have found OR2001-1635 whereby your office issued a ruling on some MEGA information. Since this request is over two years old, there is no file copy of the submitted documents to correspond with this ruling. From the footnote on page 4 of the ruling your office outlines the information deemed confidential; however, this does not exactly correspond with the RFP submittal for 2000/2001 currently at issue. Some page references appear to be the same, but others do not. There is no indication in our file, or in the ruling that this new request references the same material addressed in OR2001-1635. Because I cannot reconstruct the circumstances of the previous ruling, I am submitting MEGA's RFP response dated 2000/2001 and referring your office to the earlier ruling so that you will know of its existence and may consider its applicability.

We note that MEGA has submitted what it states is a copy of its 2000/2001 proposal; however, the System has submitted a copy of information pertaining to MEGA's 2000/2001 proposal that differs from MEGA's submission. Therefore, this ruling does not address

whether any portion of the 2000/2001 proposal submitted by MEGA, but not submitted by the System, may be withheld; this ruling is limited to the information submitted by the System.³ Further, based on the System's representations, we find that the criteria for a previous determination, as established by this office in Open Records Decision No. 673 (2001), has not been met in this case.⁴ Therefore, we conclude that the System may not withhold any of the submitted information on the basis of Open Records Letter No. 2001-1635.

However, we note that MEGA incorporates its 2001 arguments by reference and applies them to any similar information in the submitted 1994 and 1996 proposals as well as the 2001 proposal. After reviewing these arguments and the information at issue, we are unable to conclude that release of such information would result in substantial competitive injury at this time. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see generally* Freedom of Information Act Guide & Privacy Act Overview 136-138, 140-141, 151-152 (1995) (disclosure of prices is cost of doing business with government); Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 184 (1978).

Further, MEGA seeks to withhold certain information it refers to as "Utilization Reports" under section 552.110. Based on MEGA's representations regarding this information, we determine that it has made a sufficient specific factual or evidentiary showing that release of such information would result in substantial competitive injury. *See* Gov't Code § 552.110(b). Therefore, we conclude that the System must withhold the information we have marked under section 552.110(b) of the Government Code.

³ Additionally, we note that, according to MEGA, "[a]lthough the UT System allowed MEGA to inspect responsive documents gathered to date, it also advised that there are thousands of other documents responsive to the Request that had not yet been identified." MEGA states it "reserves the right to inspect all documents UT System identifies in the future and to submit supplemental briefing to this Office prior to the release of documents containing MEGA's trade secrets or confidential and proprietary information." As noted, this ruling is limited to information the System has submitted as responsive to the request.

⁴ The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

In summary, the System must withhold some of the submitted information, which we have marked, under section 552.110(b) of the Government Code. The System must release the remainder of the submitted information 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 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 188494

Enc: Submitted documents

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