



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 11, 2004

Mr. Steve Aragón
General Counsel
Texas Health & Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2004-7596A

Dear Mr. Aragon:

This office issued Open Records Letter No. 2004-7596 (2004) on September 7, 2004. We have examined this ruling and determined that an error was made in its issuance. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on September 7, 2004. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")).

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208609.

The Texas Health and Human Services Commission (the "commission") received a request for the "proposals received for the Pharmacy Prior Authorization Services . . . and the subsequent contract offered" and "the proposals received in response to the RFP for Prior Authorization of High-Cost Medical Services." Although you take no position with respect to the requested information, you claim that portions of the requested information may contain proprietary information subject to exception under the Act. Pursuant to section 552.305(d) of the Government Code, you have notified third parties GHS Data Management ("GHS"), Health Information Designs, Inc. ("HID"), Heritage Information Systems, Inc. ("HIS"), Public Consulting Group, Inc. ("PCG"), ACS State Healthcare, LLC ("ACS"), MedSolutions, and MediView Operations ("MediView") of the request and of their

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). We have considered the submitted arguments and reviewed the submitted information.

Initially, you note that some of the information responsive to this request is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2004-3843 (2004), we reviewed a request that the commission received for a copy of the proposals submitted to the commission by ACS and First Health Services Corporation in connection with a Request for Proposals for Preferred Drug List and Prior Authorization Services. You indicate that some of the information responsive to the present request will be withheld or released in accordance with our previous ruling. Assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that you must continue to rely on our decision in Open Records Letter No. 2004-3843 (2004) with respect to the information requested in this instance that was previously ruled upon in that decision.¹ *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). To the extent that the information requested in this instance was not the subject of that prior ruling, we will now address that information.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither GHS, HID, HIS, PCG, nor MediView has submitted comments to this office explaining why any portion of the submitted information relating to them should not be released to the requestor. We thus have no basis for concluding that any portion of the submitted information relating to GHS, HID, HIS, PCG, or MediView would implicate their proprietary interests. *See, e.g.*, Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the commission may not

¹ 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).

withhold any portion of the submitted information pertaining to GHS, HID, HIS, PCG, or MediView.

We note, however, that some of the information contained in these proposals 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).

MedSolutions asserts that portions of its information are excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Thus, section 552.101 protects information that is deemed to be confidential under other law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). MedSolutions has not directed our attention to any law, nor is this office aware of any law, under which any of the submitted information is deemed to be confidential by law for purposes of section 552.101. Therefore, MedSolutions has not demonstrated that any of its submitted information is excepted from disclosure under section 552.101 of the Government Code.

Next, MedSolutions claims that portions of its proposal are excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). We note, however, that section 552.104 only protects the interests of a governmental body and is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). The commission has not argued that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Accordingly, we conclude that the commission may not withhold any portion of the MedSolutions proposal under section 552.104 of the Government Code.

MedSolutions also raises section 552.110 of the Government Code for portions of its information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret 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.” Gov’t Code § 552.110(a)-(b). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990). However, the private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

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).

Section 552.110(b) of the Government Code 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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). After carefully reviewing the arguments presented to us by MedSolutions and the information at issue, we find that MedSolutions has not adequately demonstrated that any portion of its proposal qualifies as a trade secret under section 552.110(a). We find, however, that the company has made a specific factual or evidentiary showing that the release of certain portions of the submitted information would cause the company substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b). With respect to the remaining information MedSolutions seeks to withhold, however, we determine that MedSolutions has only provided conclusory statements that release of this information would harm its competitive interests, and has not provided specific factual evidence to substantiate the claim that release of this information would result in competitive harm to the company. Accordingly, the remaining information may not be withheld from disclosure under section 552.110(b) of the Government Code. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (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 is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

In summary, to the extent that the documents at issue here are precisely the same records that we addressed in Open Records Decision No. 2004-3843 (2004), we conclude that the commission must continue to rely on that letter ruling as a previous determination. The commission must withhold the information we have marked in MedSolutions proposal pursuant to section 552.110 of the Government Code. The remaining submitted 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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Open Records Division

LEK/jev

Ref: ID# 208609

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