



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2004

Ms. Sylvia N. Salazar
Employees Retirement System of Texas
P. O. Box 13207
Austin, Texas 78711-3207

OR2004-10165

Dear Ms. Salazar:

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# 214085.

The Employees Retirement System of Texas (the "system") received a request for a copy of the proposal submitted by Advance Pharmacy Concepts ("APC") for advisory services. You assert that the information may be excepted from disclosure under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, you have also notified interested third party APC of the request and of its opportunity to submit comments to this office.¹ In correspondence to this office, APC contends that some of the information in its proposal is excepted from disclosure under sections 552.102 and 552.110 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we address APC's assertion that the submitted proposal is excepted from disclosure based on the confidentiality statement included in the proposal. We note that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *See Indus. Found. v.*

¹ See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Tex. 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. See Attorney General Opinion JM-672 (1987); see also Open Records Decision Nos. 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.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the submitted information is encompassed by an exception to disclosure, it must be released to the requestor, notwithstanding any expectation or agreement to the contrary.

APC claims that information pertaining to the company’s employees is excepted under section 552.102. Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). This exception only applies to information in personnel files of governmental employees. As the submitted proposal does not pertain to a government employee, no portion of the submitted proposal may be withheld under section 552.102.

Both the system and APC claim that portions of the submitted proposal are excepted under section 552.110 of the Government Code. 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 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.² *Id.* 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). 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).

Based upon our review of the arguments submitted by APC and the information at issue, we conclude that APC has established a *prima facie* claim that its client references qualify as a trade secret under section 552.110(a). However, APC has neither shown that any of the remaining information in its proposal that it seeks to withhold meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim for this information. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if 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"); *see also* Open Records Decision Nos. 552 at 5-6 (1990), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications, and experience). Thus, we are unable to conclude that section 552.110(a) applies to any of the remaining information that APC seeks to withhold.

Although APC does not assert a section 552.110(b) claim, the system argues that portions of APC's proposal should be excepted from disclosure on that basis. 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. In Open Records Decision No. 639 (1996), this office announced that it would

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).

follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial or financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial or financial prong of section 552.110. Under the *National Parks* test, commercial or financial information is confidential "if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks*, 498 F.2d at 770 (footnote omitted).

However, pursuant to a decision by the Third Court of Appeals and a change made to section 552.110 by the Texas Legislature in 1999, this office no longer applies the federal test in determining whether commercial or financial information is excepted from disclosure under section 552.110. See Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 7, 1999 Tex. Gen. Laws 4500, 4503; *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied to commercial and financial information and requires that the governmental body or third party whose information is at issue make a specific factual or evidentiary showing that disclosure of the information would likely result in substantial competitive injury to the third party. See Gov't Code § 552.110(b); Open Records Decision No. 661 at 5-6.

Upon review, we find that the system has not provided specific factual evidence to support the allegation that release of the submitted information would cause APC substantial competitive injury. See Open Records Decision Nos. 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 was entirely too speculative). Accordingly, no portion of the submitted information may be withheld pursuant to section 552.110(b).

Lastly, we note that some of the submitted information is subject to section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136.³ The system must, therefore, withhold the information we have marked under section 552.136.

³ The Office of the Attorney General will raise mandatory exceptions like section 552.136 on behalf of a governmental body but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the system must withhold the information we have marked under sections 552.110(a) and 552.136. The remaining information in the proposal must be released.

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,



Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/krl

Ref: ID# 214085

Enc. Submitted documents

c: Mr. Tim Lee
c/o Sylvia N. Salazar
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(w/o enclosures)