



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 5, 2007

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2007-06997

Dear Mr. Smith:

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# 282814.

The Texas Health and Human Services Commission (the "commission") received a request for amendments to the commission's Fiscal Agent Contract with ACS State Healthcare, L.L.C. ("ACS") signed after Amendment 28.<sup>1</sup> You take no position with respect to the public availability of the information that you have submitted. You believe, however, that the submitted information may implicate the proprietary interests of ACS. You notified ACS of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.<sup>2</sup> We received correspondence from an

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<sup>1</sup>We note that the requestor also asked the commission to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. See Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. See Open Records Decision No. 561 at 8 (1990). We assume the commission has made a good faith effort to do so.

<sup>2</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

attorney for ACS. We have considered ACS's arguments and have reviewed the submitted information.

Initially, we note that some of the requested information is encompassed by prior open records letter rulings that are now the subject of pending litigation in *ACS State Healthcare, LLC v. Abbott*, No. D-1-GN-07-001012 (261<sup>st</sup> Dist. Ct., Travis County, Tex.). Accordingly, we will not address the public availability of the information that is the subject of the prior rulings and will allow the trial court to determine whether that information must be released to the public.

We next note that ACS raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). ACS has not directed our attention to any law under which any of the submitted information is considered to be confidential for the purposes of section 552.101. Therefore, the commission may not withhold any of the submitted information under section 552.101 of the Government Code.

ACS also raises section 552.110 of the Government Code, which protects the proprietary interests of private parties with respect to 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” aspect of section 552.110 to the information at issue, this office will accept a private party’s claim for exception as valid under section 552.110(a) if the party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.<sup>3</sup> *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable 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) 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).

The information at issue relates to Amendments Thirty through Thirty-Four to ACS’s Texas Medicaid claims/primary care case management agreement with the commission. ACS contends that the submitted information constitutes a trade secret under section 552.110(a) and also is excepted from disclosure under section 552.110(b). Alternatively, ACS argues that portions of the submitted information constitute trade secrets under section 552.110(a) and also are excepted from disclosure under section 552.110(b). Having considered ACS’s arguments and reviewed the information at issue, we conclude that ACS has not demonstrated that any of the submitted information constitutes a trade secret under section 552.110(a). We also conclude that ACS has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the submitted information would cause ACS substantial competitive harm. Therefore, the commission may not withhold any of the submitted information under section 552.110 of the Government Code. With respect to the submitted pricing information, we note that federal cases applying the analogous Freedom of Information Act exemption to prices in awarded government

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<sup>3</sup>The 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).

contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000). Moreover, we believe that the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 514 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

In summary, none of the submitted information is excepted from disclosure under section 552.101 or section 552.110 of the Government Code. The information must be released.

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).

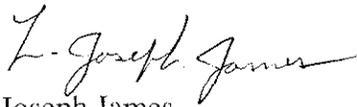
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things; 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 Office of the Attorney General 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,



L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/eeg

Ref: ID# 282814

Enc. Submitted documents

c: Mr. Mike Reitz  
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(w/o enclosures)