



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2007

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal Services Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2007-13027

Dear Ms. Waitt:

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# 291013.

The Texas Department of Insurance (the "department") received a request for copies of a satisfactory and an unsatisfactory Utilization Review Agent ("URA") application. You state that the department does not maintain a copy of an unsatisfactory URA application.¹ You state that the department will withhold social security numbers under section 552.147 of the Government Code.² You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. In addition, you note that release of the submitted information may implicate the proprietary interests of Oregon Health Systems, Inc. d/b/a Omni Health Systems ("Omni"). Accordingly, you notified Omni of the department's receipt of this request and of its right to submit arguments to this office as to why the requested information should not be released to the requestor. *See*

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. 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).

²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received arguments from an attorney representing Omni. We have considered the submitted arguments and reviewed the submitted information.

Initially, we understand Omni to claim that the submitted information is not responsive to the present request. Omni notes that the requestor did not specifically request its application but, instead, asked for "a satisfactory . . . copy of an URA application." The department then "randomly selected a URA company's application for this request." Omni notes that the department could have asked the requestor to clarify the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). However, the Act places no obligation on the department to seek clarification. Upon review, we find that the department's identification of Omni's application as a document responsive to the request was made in compliance with the Act. We will therefore consider whether the submitted information may be withheld from disclosure under an exception under the Act.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. You claim that the contract you have marked is confidential under section 1305.152(a) of the Insurance Code. Section 1305.152(a) provides "[a] network shall enter into a written contract with each provider or group of providers that participates in the network. A provider contract under this section is confidential and is not subject to disclosure as public information under [the Act]." Ins. Code § 1305.152(a). You explain that the contract you have marked is a provider contract made confidential under section 1305.152(a). Based on your representations and our review, we agree that the contract that you have marked is confidential under section 1305.152(a) of the Insurance Code and must be withheld under section 552.101 of the Government Code.

The department and Omni argue that some of the submitted information is confidential under section 4201.154 of the Insurance Code, which is also encompassed by section 552.101.³ Section 4201.154 provides the following:

(a) A utilization review agent's written screening criteria and review procedures shall be made available for:

³We note that Omni argues that its information is made confidential by the statutory predecessor of section 4201.154, section 4(I) of article 21.58A of the Insurance Code. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1025, 1997 Tex. Gen. Laws 3797, 3799, *repealed by* Act of May 25, 2005, 79th Leg., R.S., ch. 727, § 18, 2005 Tex. Gen. Laws 1752, 2187.

(1) review and inspection to determine appropriateness and compliance as considered necessary by the commissioner; and

(2) copying as necessary for the commissioner to accomplish the commissioner's duties under this code.

(b) Any information obtained or acquired under the authority of this section, Section 4201.153, and this chapter is confidential and privileged and is not subject to [the Act], or to subpoena except to the extent necessary for the commission to enforce this chapter.

Id. § 4201.154. You explain that the information you have marked consists of review procedures and screening criteria that are part of Omni's utilization review plan, and that this information is confidential under section 4201.154. Based on your representations and our review, we agree that the information that you have marked is confidential pursuant to section 4201.154 of the Insurance Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). The department must withhold the personal financial information that you have marked under section 552.101 of the Government Code in conjunction with common law privacy.

We next address Omni's arguments 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(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 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 a 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). 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.⁴ *Id.* This office accepts a claim that information subject to the Act is exempted 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. Open Records Decision No. 552 (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. 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. *See id.* § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Upon review, we conclude that Omni has not demonstrated that any portion of its application for certification qualifies as a trade secret for purposes of section 552.110(a) of the Government Code. *See* Open Records Decision No. 552 at 5-6 (1990); *see also*

⁴The 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] 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).

RESTATEMENT OF TORTS § 757 cmt. b (1939). We also find that Omni has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of its application for certification would likely result in substantial competitive harm. *See* Open Records Decision Nos. 661 (1999) (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, qualifications and experience, and pricing). Accordingly, the department may not withhold any portion of Omni's application for certification pursuant to section 552.110 of the Government Code.

The department notes that the remaining information includes personal e-mail addresses. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses you have marked do not appear to be of the type specifically excluded by section 552.137(c), and you do not inform us that a member of the public has affirmatively consented to the release of any e-mail addresses contained in the submitted information. Therefore, the department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, the department must withhold the submitted provider contract, which you have marked, under section 552.101 of the Government Code in conjunction with section 1305.152(a) of the Insurance Code. The department must withhold the submitted review procedures and screening criteria, which you have marked, under section 552.101 in conjunction with section 4201.154 of the Insurance Code. The department must withhold the submitted personal financial information, which you have marked, under section 552.101 in conjunction with common law privacy. Finally, the department must withhold the e-mail addresses that you have marked under section 552.137 of the Government Code. The remaining information must be released 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, 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,

A handwritten signature in cursive script that reads "Jordan Johnson".

Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/eeg

Ref: ID# 291013

Enc. Submitted documents

c: Ms. Reena Rodgers, C.O.O.
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(w/o enclosures)

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