ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2008

Mr. Carey Smith
General Counsel
Health and Human Services Commission
P.O. Box 12548
Austin, Texas 78711-2548

OR2008-10156

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# 317014.

The Texas Health and Human Services Commission (the "commission") received a request for "any correspondence between [the commission] and Accenture regarding the wind-down" of a specified contract. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. You also claim that the information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you notified Accenture, LLP ("Accenture") of the commission's receipt of the request for information and of Accenture's right to submit arguments to this office as to 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) (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 considered the exception you claim and comments submitted by Accenture, and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code 552.101. This section encompasses information that is made confidential by statute. Both the commission and Accenture claim that the submitted information is confidential

under section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code. Section 154.073 provides in relevant part the following:

> (a) Except as provided by Subsections (c), (d), (e), and (f),[1] a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
>
> (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Similarly, section 2009.054 provides as follows:

> (a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the impartial third party and the parties.
>
> (b) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:
>
> > (1) a communication relevant to the dispute, and a record of the communication, made between an impartial third party and the parties to the dispute or between the parties to the dispute during the course of an alternative dispute resolution procedure are confidential and may not be disclosed unless all parties to the dispute consent to the disclosure; and
> >
> > (2) the notes of an impartial third party are confidential except to the extent that the notes consist of a record of a communication with a party and all parties have consented to disclosure in accordance with Subdivision (1).

Gov't Code § 2009.054. Further, this office has found that communications during a formal settlement process were intended to be confidential. Open Records Decision No. 658 at 4 (1998); *see also* Gov't Code § 2009.054(c). Sections 154.073 and 2009.054 pertain only to

---

[1]Subsections 154.073(c), (e), and (f) are inapplicable in this instance.

communications made during an actual ADR procedure. Both the commission and Accenture contend that the information at issue consists of communications that were made during settlement negotiations; however, the commission acknowledges that the information at issue is not part of a formal ADR procedure. Because the commission did not participate in a formal ADR procedure under either chapter 154 or chapter 2009, neither provision applies. Therefore, you may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code or section 2009.054 of the Government Code.

Section 552.101 also encompasses sections 12.003 and 21.012 of the Human Resources Code, which Accenture states excepts a portion of the submitted information. Section 12.003 provides in relevant part:

> (a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information* concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." *Id.* at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977). Upon review, we find that Accenture has failed to demonstrate how the information at issue discloses information concerning individual applicants and recipients of commission benefits. Therefore, the commission may not withhold any portion of the submitted information under section 552.101 in conjunction with sections 12.003 and 21.012 of the Human Resources Code.

Accenture asserts that some of its information is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 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); *see also Huffines*, 314 S.W.2d at 776. 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] RESTATEMENT OF TORTS § 757 cmt. b (1939). 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. ORD 552 at 5-6. 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) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely

---

[2]The following are the six factors that the Restatement gives 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 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).

result from release of the requested information. *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).

We find Accenture has established that the release of some of the information at issue would cause it substantial competitive injury; therefore, the commission must withhold this information, which we have marked, under section 552.110(b). However, we find that Accenture has made only conclusory allegations that release of the remaining information at issue would cause substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. We note that 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 addition, we conclude that Accenture has failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See* ORD 402. Thus, the commission may not withhold any of the remaining information under section 552.110.

In summary, the commission must withhold the information we have marked under section 552.110 of the Government Code. The remaining submitted information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,

Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 317014

Enc. Submitted documents

c: Ms. Corrie McLaggan
Austin American-Statesman
c/o Mr. Carey Smith
General Counsel
Health and Human Services Commission
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)

Mr. David McCurley
Accenture LLP
1501 South MoPac Expressway, Suite 300
Austin, Texas 78746
(w/o enclosures)

Mr. Jon Niermann
Baker Botts, L.L.P.
98 San Jacinto Boulevard
Austin, Texas 78701-4078
(w/o enclosures)