



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2009

Ms. Lisa Ott Laky
General Counsel
Austin Travis County
Mental Health Mental Retardation Center
P.O. Box 3548
Austin, Texas 78764-3548

OR2009-07331

Dear Ms. Laky:

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# 344431.

The Austin Travis County Mental Health Mental Retardation Center (the "center") received a request for all proposals submitted in response to a request for proposals for an employee insurance agent of record. You indicate the center has provided some of the responsive information to the requestor. Although you take no position with respect to the public availability of the submitted proposals, you indicate their release may implicate the proprietary interests of Frost Insurance Agency, Inc. ("Frost"); McQueary Henry Bowles Troy, LLP ("MHBT"); Complete Benefit Services ("CBS"); and Gallagher Benefit Services, Inc. ("GBS"). Accordingly, you state, and have provided documentation showing, you notified Frost, MHBT, CBS, and GBS of the request and of each company's right to submit arguments to this office as to why the submitted proposals should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered comments submitted by MHBT and GBS, and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why

information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Frost or CBS explaining why their submitted proposals should not be released. Therefore, we have no basis to conclude Frost and CBS have protected proprietary interests in their submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the center may not withhold Frost's and CBS's proposals on the basis of any proprietary interest they may have in the information.

MHBT asserts its proposal information at issue is confidential because the information was "specifically denoted as confidential" when the information was submitted to the center. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [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 of the Government Code). Consequently, unless MHBT's proposal information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

MHBT and GBS claim some of their proposal 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: (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." *See* Gov't Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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 the 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 person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.¹ 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

MHBT and GBS contend some or all of their respective proposal information is protected as trade secret information under section 552.110(a). MHBT and GBS, however, have not provided any arguments explaining how their information meets the definition of a trade secret. Furthermore, neither company has demonstrated the factors necessary to establish a trade secret claim. Consequently, MHBT and GBS have failed to demonstrate their

¹The 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 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).

information is protected as a trade secret. Accordingly, the center may not withhold any of MHBT's or GBS's information under section 552.110(a) of the Government Code. As no other exceptions to disclosure have been claimed for MHBT's information, it must be released.

GBS asserts specified portions of its proposal are excepted under section 552.110(b). Upon review, we find GBS has established release of its client and pricing information would cause it substantial competitive injury. Therefore, the center must withhold this information, which we have marked, under section 552.110(b). We find, however, GBS has failed to provide specific factual evidence demonstrating release of the remaining information it seeks to withhold, including sample publications and data taken from a national survey regarding a different company, would result in substantial competitive harm to GBS. *See* ORD 661 (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). Therefore, the center may not withhold any of the remaining information GBS seeks to withhold under section 552.110(b).

We note GBS's remaining information contains an insurance policy number. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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 § 552.136.² We conclude the insurance policy number we have marked constitutes an access device number for purposes of section 552.136. Thus, the center must

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the marked insurance policy number in GBS's proposal under section 552.136 of the Government Code.

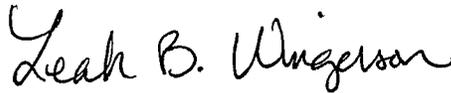
We note part of GBS's remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of 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). Accordingly, the GBS's remaining information must be released to the requestor in accordance with copyright law.

In summary, the marked client and pricing information must be withheld under section 552.110(b) of the Government Code. The marked insurance policy number must be withheld under section 552.136 of the Government Code. The remaining information must be released, but GBS's information may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 344431

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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