ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2009

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

OR2009-16391

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# 361777.

The Texas Health and Human Services Commission (the "commission") received a request for the winning proposals pertaining to a specified request for proposals. You state the commission is releasing most of the requested information. Although you take no position with respect to the public availability of the remaining information, you state that release of this information may implicate the proprietary interest of a third party. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the commission has notified Clifton Gunderson LLP ("CG") of the request and of its right to submit arguments to this office explaining why the submitted information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). Pursuant to section 552.305(d), CG has submitted comments to this office objecting to the release of its information. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that CG argues against the disclosure of more information than was submitted for review by the commission. The commission has only submitted to this office section 3 of CG's proposal, which consists of CG's project plans. Accordingly, this ruling will only address the information that the commission submitted to this office. *See* Gov't Code § 552.301(e)(1)(D).

CG asserts that the submitted information is excepted from disclosure under section 552.110 of the Government Code.[1] Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. *Id.* § 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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *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 must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case

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[1]Although you also raise sections 552.101 and 552.102 of the Government Code, you do not present any arguments against disclosure under these sections. Accordingly, we do not address these exceptions to disclosure. *See* Gov't Code §§ 552.301,.302.

[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).

for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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). We also note that pricing information pertaining to a particular contract is generally not a trade secret because 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." RESTATEMENT OF TORTS § 757 cmt. b; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) of the Government Code 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. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of section 552.110(b) by Seventy-sixth Legislature).

Having considered your arguments, we find that CG has failed to demonstrate how any of its information at issue meets the definition of a trade secret. Thus, CG has failed to establish that any portion of the submitted information constitutes a protected trade secret under section 552.110(a) of the Government Code, and none of the submitted information may be withheld on that basis.

However, upon review, we find that CG has established that release of some of its information at issue would cause the company substantial competitive harm. Therefore, the commission must withhold this information, which we have marked, under section 552.110(b) of the Government Code. We find that CG has failed to establish that release of the remaining information it seeks to withhold would cause the company substantial competitive harm. *See* Gov't Code § 552.110; ORD No. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, we conclude that none of the remaining information at issue may be withheld under section 552.110(b) of the Government Code. Therefore, the commission must withhold only the information we have marked under section 552.110(b) of the Government Code. The remaining submitted information must be released to the requestor.

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, toll free, at (888) 672-6787.

Sincerely,

Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 361777

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc Mr. John A. Shutkin
General Counsel
Clifton Gunderson, LLP
10001 Innovation Drive, Suite 201
Milwaukee, Wisconsin 53226
(w/o enclosures)