



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2010

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

OR2010-01986

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# 368422.

The Texas Health and Human Services Commission (the "commission") received a request for the proposals submitted in response to a specified request for proposals.¹ 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 requested information, you state that release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the commission has notified the following interested third parties: Driscoll Children's Health Plans ("Driscoll"); FIRSTCARE Health Plans ("FHP"); and Vista Health Plans ("Vista"), of the request and of their 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

¹ You inform us, and provide documentation showing, that the requestor narrowed his request to exclude proposals submitted by Physicians Health Choice. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). In a letter dated January 22, 2010, you state the commission wishes to withdraw its request for an open records decision with regard to the information pertaining to Physicians Health Choice. Accordingly, this information is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request.

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). You inform us Vista does not object to the release of its information. We have received comments from Driscoll and FHP. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the commission's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). In this instance, you state the commission received the request for information on October 30, 2009. Although you submitted most of the responsive information by the fifteen-business-day deadline, a portion of the responsive information was not submitted until December 10, 2009. Consequently, with respect to the information submitted on December 10, 2009, we find that the commission failed to comply with the procedural requirements of section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Accordingly, we will consider whether the interests of the notified third parties provide a compelling reason to withhold any portion of the information that was not timely submitted. We will also address the third parties' arguments for the information that was timely submitted.

Next, we understand FHP to assert that some of its submitted information is confidential because FHP submitted the documents at issue to the commission with the understanding that the information would remain confidential. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests

that 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). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

FHP argues that a portion of its information is excepted from disclosure under sections 401.057 and 401.058 of the Insurance Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 401.051 of the Insurance Code requires the Texas Department of Insurance (the “department”), or an examiner appointed by the department, to visit each insurance carrier and examine the carrier’s financial condition, ability to meet liabilities, and compliance with the laws affecting the conduct of the carrier’s business. Ins. Code § 401.051(a), (b). In connection with this examination process, section 401.057 provides, in part:

(b) In conducting an examination under this subchapter, the department shall use audits and work papers that the carrier makes available to the department and that are prepared by an accountant or accounting firm meeting the qualifications of Section 401.011. The department may conduct a separate audit of the carrier if necessary. Work papers developed in the audit shall be maintained in the manner provided by Sections 401.020(b) and (c).

(c) The carrier shall provide the department with:

(1) the work papers of an accountant or accounting firm or the carrier;
and

(2) a record of any communications between the accountant or
accounting firm and the carrier that relate to an audit.

...

(e) Information obtained under this section is confidential and may not be disclosed to the public except when introduced as evidence in a hearing.

Id. § 401.057(b),(c),(e). Additionally, section 401.058 states:

(a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

Id. § 401.058. FHP asserts that the financial statements and financial reports located at sections 4.3.14.1 and 4.3.14.2 of its proposal were obtained by the department during the course of examinations under chapter 401 of the Insurance Code, and are therefore confidential under sections 401.057 and 401.058. The present request, however, is for information held by the commission, not the department. We note the commission did not obtain the information at issue through an examination conducted under chapter 401. Instead, FHP submitted the information at issue to the commission in response to its request for proposals. Thus, we find section 401.057 and section 401.058 are not applicable to information that FHP submitted to the commission. *See* Open Records Decision No. 640 at 4 (1996) (the department must withhold any information obtained from audit “work papers” that are “pertinent to the accountant’s examination of the financial statements of an insurer” under statutory predecessor to section 401.057). Thus, the commission may not withhold the information at issue under section 552.101 of the Government Code on that basis.

We also understand FHP to assert that the financial statements and financial reports located at sections 4.3.14.1 and 4.3.14.2 of its proposal are excepted from disclosure under section 823.011 of the Insurance Code. Subchapter B of Chapter 823 of the Insurance Code provides that, “[e]ach insurer authorized to engage in the business of insurance in this state that is a member of an insurance holding company system shall register with the [Commissioner of Insurance (the “commissioner”)]...” and further specifies the types of information to be provided to the department. *See* Ins. Code § 823.051 *et seq.* Additionally, Subchapter H of Chapter 823 of the Insurance Code provides for the examination of insurers that are registered under Subchapter B, and states that the commissioner may order an insurer to produce records, books, or other information papers that are necessary to ascertain the insurer’s financial condition or the legality of the insurer’s conduct. *Id.* § 823.351(a). In connection with this registration and examination process, section 823.011 states:

(a) This section applies only to information, including documents and copies of documents, that is:

(1) reported under Subchapter B; or

(2) obtained by or disclosed to the commissioner or another person in the course of an examination or investigation under Subchapter H.

(b) The information shall be treated confidentially and is not subject to subpoena. Except as provided by Subsections (c) and (d), the information may not be disclosed without the prior written consent of the insurer to which it pertains.

Id. § 823.011(a), (b). As previously noted, the present request is for information held by the commission, not the department. We note the information at issue was not reported to or obtained by the commission through the registration or examination process described in Subchapters B or H of chapter 823. Instead, FHP submitted the information at issue to the commission in response to its request for proposals. Thus, we find section 823.011 is not applicable to information that FHP submitted to the commission. Accordingly, we conclude that the information at issue is not confidential under section 823.011 of the Insurance Code and may not be withheld on that basis under section 552.101 of the Government Code.

Next, Driscoll argues that the resumes of key personnel contained in its proposal are excepted from disclosure under the doctrine of common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. We note that education, prior employment, and personal information are not ordinarily private information subject to section 552.101. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Upon review, we find that Driscoll has failed to demonstrate that any of the information in the resumes of its key personnel is intimate or embarrassing and of no legitimate public interest. Accordingly, the commission may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Driscoll also raises section 552.102 of the Government Code, which excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a); *see also* *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.). Section 552.102 only applies to information in a personnel file of an employee of a governmental body. The resumes Driscoll seeks to withhold are not contained in the personnel file of a governmental employee. Thus, we determine that section 552.102 does not apply to any of Driscoll’s information, and it may not be withheld on that basis.

Next, we consider Driscoll's argument to withhold portions of its information under section 552.110(a) of the Government Code. Section 552.110(a) protects the property interests of private persons by excepting from disclosure trade secrets 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.), *cert. denied*, 358 U.S. 898 (1958); *see also* ORD 552 at 2. 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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case 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).

²The 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] 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).

After reviewing Driscoll's arguments and the information at issue, we conclude Driscoll has established a *prima facie* case that the information we have marked pertaining to provider profile metrics constitutes trade secrets. Further, we have received no arguments to rebut this claim as a matter of law. Accordingly, the commission must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, Driscoll has failed to demonstrate any of the remaining information at issue constitutes a trade secret. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

In summary, the commission must withhold the portions of Driscoll's information that we have marked pursuant to section 552.110(a) of the Government Code. The remaining responsive 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,



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ALS/rl

Ref: ID# 368422

Enc. Submitted documents

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