



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 23, 2010

Ms. Gay Dodson
Executive Director/Secretary
Texas State Board of Pharmacy
333 Guadalupe Street, Suite 3-600
Austin, Texas 78701-3943

OR2010-04094

Dear Ms. Dodson:

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# 373391.

The Texas State Board of Pharmacy (the "board") received a request for any contractual agreements between the board and the Professional Recovery Network ("PRN") of the Texas Pharmacy Association. You state the board has released some of the requested information. You claim that portions of the submitted information are not responsive to the request and, in the alternative, that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. In addition, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the board has notified PRN of the request and of its right to submit arguments to this office explaining why its 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). We have received comments from PRN. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address the board's assertion that the information submitted as Attachment 3 is not responsive to the present request for information because it does not consist of the requested contractual agreements. Upon review of the submitted information, we agree that Attachment 3 is not responsive to the instant request. The board need not release

nonresponsive information in response to this request, and this ruling will not address that information.¹

Next, we address PRN's arguments under section 552.101 of the Government Code, in conjunction with section 564.002 of the Health and Safety Code, and section 552.110 of the Government Code for Attachment 4. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes. Section 564.001 of the Occupations Code provides, in part, that "[a] committee of a professional society composed primarily of pharmacists, the staff of the committee, or a district or local intervenor participating in a program established to aid pharmacists . . . impaired by chemical abuse or mental or physical illness may report in writing to the board the name of an impaired pharmacist . . . and the relevant information relating to the impairment." Occ. Code § 564.001(b). Section 564.002 of the Occupations Code provides that "[t]he records and proceedings of the board, an authorized agent of the board, or a pharmaceutical organization committee described under [s]ection 564.001(a) or (b), in connection with a report under [s]ection 564.001(a) or (b), are confidential and are not considered public information for purposes of [the Act]." *Id.* § 564.002.

PRN asserts that the responsive information "consists of records created and maintained by PRN pursuant to its role as a peer assistance program under [s]ection 564.001(b) . . . [and], therefore, made confidential by law." However, we note the responsive information consists of a contract created by the Texas Comptroller of Public Accounts on behalf of the board. PRN has not explained, and the documents do not reflect, how this contract is a record or proceeding made in connection with a report under section 564.001(a) or (b). Thus, we find that PRN has failed to establish that the responsive information is subject to section 564.002(b), and this information may be not be withheld under section 552.101 of the Government Code on that basis.

Section 552.110 of the Government Code 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

¹As we are able to make this determination, we need not address the board's arguments against disclosure of Attachment 3.

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 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. Open Records Decision No. 552 at 5-6 (1990). 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) of the Government Code 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." 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 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).

Upon review of PRN's arguments, we find PRN has failed to demonstrate how any portion of the responsive information meets the definition of a trade secret, nor has PRN demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* Open Records Decision Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel,

²The 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).

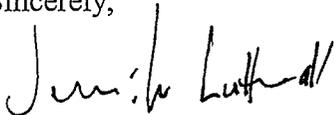
market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, the board may not withhold any of the responsive information pursuant to section 552.110(a) of the Government Code.

Further, we find that PRN has made only conclusory allegations that release of the information at issue would result in substantial damage to PRN's competitive position. Thus, PRN has not demonstrated that substantial competitive injury would result from the release of any of the responsive information. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Furthermore, we note that the pricing information contained in a contract with a governmental body, such as the contract at issue, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, no portion of the responsive information may be withheld under section 552.110(b). As no further exceptions are raised, the responsive information must be released in its entirety.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 373391

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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