



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2010

Ms. Carey E. Smith  
Mr. Robert W. Patterson  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2010-08266

Dear Ms. Smith and Mr. Patterson:

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# 381853.

The Health and Human Services Commission (the "commission") received two requests from two different requestors. The first request was for any contracts concerning the Medicaid Program Integrity (Fraud and Abuse), Medicaid Third Party Liability, and Credit Balance Recovery awarded during a specified time period. You state you are releasing much of the information to the first requestor. The second request was for the commission's Medicaid Fraud and Abuse Detection contract. Although you take no position as to whether the submitted information is excepted under the Act, you state that releasing the submitted information may implicate the interests of third parties. Accordingly, you have notified Electronic Data Systems, now known as HP Enterprise Services, LLC, ("HPES") of the request and of its opportunity to submit arguments to this office. *See Gov't Code* § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have received comments from HPES and reviewed the submitted information.

Initially, we note HPES seeks to withhold Section 1, Executive Summary, and Section 2.1, Vendor Specific Solution, of its Business and Technical Proposal. However, the commission has not submitted these documents for our review. By statute, this office may only rule on

the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from the Attorney General must submit a copy of specific information requested). Therefore, this ruling does not address these documents, and is limited to the information submitted as responsive by the commission.

We understand HPES to assert that the submitted information is confidential because its documents were marked as such when they were submitted to the commission. 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.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to 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.” Gov't Code § 552.110(a)-(b).

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). This office will accept a private party's claim for exception as valid under section 552.110(a) if the party establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>1</sup> Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors 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." 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* 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).

HPES generally asserts that its entire proposal is excepted from disclosure under section 552.110(a). Additionally, HPES asserts that portions of its proposal are excepted from disclosure under section 552.110(b) of the Government Code. Upon review of HPES's arguments and the information at issue, we find that HPES has established that release of portions of the submitted information, which we have marked, would cause HPES substantial competitive injury and must be withheld under section 552.110(b). However, we find that HPES has made only conclusory allegations that release of the remaining information would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *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). Thus, HPES has not demonstrated that substantial competitive injury would result from the release of this

---

<sup>1</sup>The 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 other 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information. *See* ORD 661 at 5-6. Although HPES specifically argues against release of its pricing information, we note that the submitted contract was awarded to HPES by the commission. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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). Moreover, 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). Accordingly, the commission must withhold only the information we have marked under section 552.110(b) of the Government Code.

We also find that HPES has failed to establish a *prima facie* case that any of the remaining information at issue qualifies as a trade secret under section 552.110(a). *See* ORD 402. We 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 business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, the commission may not withhold any of the submitted information under section 552.110(a) of the Government Code.

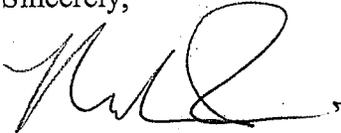
We note that a portion of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, 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).

In summary, the commission must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released to the requestor, but any information subject to copyright may only be released in accordance with federal 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](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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/jb

Ref: ID# 381853

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

Mr. William A. Van Blarcum  
Managing Counsel  
State, Local and Healthcare  
Hewlett-Packard Company  
5400 Legacy Drive  
MS H3-3A-05  
Plano, Texas 75024  
(w/o enclosures)