



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2010

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

OR2010-11027

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# 387933.

The Texas State Board of Pharmacy (the "board") received a request for "the score sheets, evaluator notes, competitor proposals, and any other pertinent documents related to the award decision" pertaining to a specified request for qualifications. You state the board has released some of the requested information. Although you take no position as to whether the submitted information must be released to the requestor, you state that the submitted documents may contain proprietary information subject to exception under the Act. Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the board has notified the Pharmacy Technician Certification Board ("PTCB") 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 PTCB. We have considered the submitted arguments and reviewed the submitted information.

PTCB claims that portions of its examination information and data are excepted from public disclosure under section 552.110 of the Government Code.¹ Section 552.110 protects the

¹We note that while PTCB seeks to withhold certain specified information in section IV.b.i-iv, 2L Development of its materials, that page does not contain the specified information.

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).

Section 552.110(a) of the Government Code exempts 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, 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); *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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). This office must accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* claim for the exception and no one submits an argument that rebuts the claim as a matter of law.² See Open Records Decision No. 552 at 5-6 (1990). However,

²The 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 also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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. *See* 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* 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).

PTCB asserts that portions of its examination information and data constitute trade secrets because the information in question consists of “unique data and operational information directly related to the development, content, administration, and analysis of the PTCB Certification Examination.” Having considered PTCB’s arguments and reviewed the information at issue, we find that PTCB has presented a *prima facie* claim that the information at issue qualifies as a trade secret under section 552.110(a). We have received no arguments that rebut PTCB’s claim as a matter of law. We therefore conclude that the board must withhold the information at issue, which you have highlighted, under section 552.110(a). As we reach this conclusion, we need not address PTCB’s claim under section 552.110(b) of the Government Code.

Finally, we note that some of the submitted materials appear 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 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 board must withhold the highlighted information under section 552.110(a) of the Government Code. The remaining information must be released to the requestor, but any copyrighted 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, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 387933

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Richard A. Goldberg
Legal Counsel
Pharmacy Technician Certification Board
170 Scotch Road
Ewing, New Jersey 08628-2507
(w/o enclosures)