



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2010

Ms. Peggy Scheffler
Records Management Coordinator
Bexar Metropolitan Water District
P.O. Box 245994
San Antonio, Texas 78224

OR2010-13352

Dear Ms. Scheffler:

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# 392592.

The Bexar Metropolitan Water District (the "district") received a request for the proposals submitted in response to Request for Proposal ("RFP") 2009-055 for Pharmacy Benefit Management as well as information reflecting who received the award related to that RFP. You state the district has released a portion of the requested information. Although you take no position with respect to the public availability of the submitted information,¹ you state release of the information submitted in Exhibit C may implicate the proprietary interests of PTRX, Inc. ("PTRX") and Script Care, Ltd. ("Script Care"). You have notified PTRX and Script Care of the request for information and of those companies' rights to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *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 to disclosure in certain circumstances). We have received comments from both PTRX and Script Care. We have considered the submitted arguments and reviewed the submitted information.

Both PTRX and Script Care raise section 552.110 of the Government Code for portions of their proposals. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a

¹Although you cite to sections 552.101, 552.104, 552.110, and 552.114 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that sections 552.101, 552.104, 552.110, and 552.114 apply to the submitted information. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide written comments stating the reasons why the stated exceptions apply), .302.

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.” See Gov’t Code § 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 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 person’s claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. See Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² Open Records Decision No. 402 (1983).

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

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) (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).

We have marked the client information in the proposals for both PTRX and Script Care that the district must withhold under section 552.110(a) of the Government Code. Having reviewed these companies' arguments, we have also marked the portions of the proposals that reveal the proprietary claims administration and pricing methods and processes of PTRX and Script Care. Because these companies have shown how this marked information meets the definition of a trade secret and is protectable as such, the district must withhold the information we marked under section 552.110(a). Some of the remaining information that PTRX and Script Care marked as trade secret information reflects it was developed for this particular solicitation or contract. Such information 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." *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. The other information PTRX and Script Care have marked pertains to the companies' staffing, organization, pricing, experience, and general qualifications. Section 552.110 is generally not applicable to these types of information. *See* Restatement of Torts § 757 cmt. b.; ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, pricing and qualifications and experience). Thus, we conclude PTRX and Script Care have not established any of the remaining information in the companies' proposals meets the definition of a trade secret, and the district may not withhold any of the remaining information on that basis.

PTRX and Script Care also raise section 552.110(b). Upon review, we agree PTRX has shown how release of its pricing information would cause the company substantial competitive injury. Thus, the district must withhold the information we marked in PTRX's proposal under section 552.110(b). Script Care also raises section 552.110(b) for its pricing information. However, the Script Care was the winning bidder of the RFP at issue. Pricing information of a winning bidder is generally not excepted under section 552.110(b) because 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, the district may not withhold Script Care's pricing information under section 552.110(b). Neither Script Care nor PTRX specifically explain how competitive harm would result from release of the companies' remaining information, which consists of information that has been tailored for this particular proposal and general information regarding the companies' staffing and qualifications. *See* Open Records

Decision No. 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). Thus, we find these companies have not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORD Nos. 661 at 5-6, 509 at 5.

Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”³ Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). This office has determined insurance policy numbers are “access device” numbers for purposes of section 552.136. Thus, we conclude the insurance policy numbers we have marked in PTRX’s proposal must be withheld under section 552.136 of the Government Code.⁴

Finally, we note some of the materials at issue may 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 copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, 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.

In summary, the district must withhold the information we marked under subsections 552.110(a) and (b) of the Government Code, as well as the insurance policy numbers we marked under section 552.136 of the Government Code. The remaining information must be released; however, in releasing the information that is copyrighted, the district must comply with applicable copyright law.

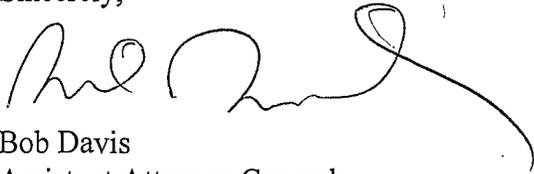
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tp

Ref: ID# 392592

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Michael E. Norris
Chief Operations Officer
PTRX
4590 Lockhill Selma
San Antonio, Texas 78249
(w/o enclosures)

Mr. John W. Johnson
Creighton, Fox, Johnson, & Mills, PLLC
P.O. Box 5607
Beaumont, Texas 77726
(w/o enclosures)