



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2011

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

OR2011-01746

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# 408109.

The Texas Health and Human Services Commission (the "commission") received five requests for the responses to Request for Proposals 529-07-0178 (the "RFP"), the scoring and evaluations of the responses to the RFP, and the winning bidder's contract for the RFP.

Although you take no position with respect to the public availability of the submitted information, you state that the proprietary interests of certain third parties might be implicated. Accordingly, you provided notice to OptumHealth Public Sector ("Optum"), McKesson Health Solutions, L.L.C. ("McKesson"), ValueOptions, Inc. ("Value"), U.S. Preventive Medicine, Inc. ("Preventive"), IFMC, APS Healthcare Midwest ("APS"), and MedAssurant, Inc. ("Assurant") of the request and of their right to submit arguments to this office explaining why their 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 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 arguments from McKesson, Value, IFMC, APS, and Assurant. We have considered their arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the request for the scoring, evaluations, and contract. To the extent such information exists, we presume the commission has released it. If not, the commission must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Optum or Preventive explaining why any portion of the submitted information should not be released. Therefore, we have no basis to conclude that either Optum or Preventive has any protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5–6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Consequently, the commission may not withhold any of the submitted information on the basis of any proprietary interest Optum or Preventive may have in the information.

McKesson, Value, IFMC, APS, and Assurant claim section 552.110 of the Government Code for portions of their information.¹ Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which 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 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 single or ephemeral events in the conduct of the

¹We note Assurant seeks to withhold information that the commission has not submitted to this office for our review. This ruling does not address that information and is limited to the information submitted as responsive by the commission. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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 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.² Restatement of Torts § 757 cmt. b (1939). 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 Open Records Decision No. 552 at 5 (1990)*. 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)*.

Section 552.110(b) protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure 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. *Id.*; *see also Open Records Decision No. 661 at 5*.

Upon review, we find that Assurant has established a *prima facie* case that the information we have marked under section 552.110(a) constitutes trade secret information and must be withheld on that basis. However, we find that Assurant has failed to demonstrate how its remaining information constitutes a trade secret, and we further find that Value, McKesson, and APS have failed to demonstrate how their information constitute trade secrets under

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

section 552.110(a). Accordingly, the commission must withhold under section 552.110(a) of the Government Code only the information we have marked on that basis.

Upon further review, we find, Value, IFMC, and McKesson have established the information we have marked under section 552.110(b) constitutes commercial or financial information, the release of which would cause the companies substantial competitive harm. We also find Value has established the customer information we have marked constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. We note, however, that Value has made some of its customer information publicly available on its website. Because Value has published this information, it has failed to demonstrate how release of this information would cause substantial competitive harm under section 552.110(b). We further find that Value, IFMC, and McKesson have not demonstrated how release of their remaining information would cause them substantial competitive harm, or they have made only conclusory statements that release of their information would cause them substantial competitive harm. Further, we find that neither APS nor Assurant have demonstrated how release of the information at issue would cause substantial competitive harm. *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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, the commission must withhold under section 552.110(b) of the Government Code only the information we have marked on that basis.

We note that some of the information being released 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 copyrighted. Open Records Decision No. 180 at 3 (1977). However, 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 commission must withhold the information we have marked under section 552.110(a) of the Government Code and the information we have marked under section 552.110(b) of the Government Code. The remaining information must 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 408109

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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