



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 19, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701

OR2011-04223A

Dear Ms. Alexander:

This office issued Open Records Letter No. 2011-04223 (2011) on March 28, 2011. Since that date, you have provided new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on March 28, 2011. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 420081.

The Texas Department of Transportation (the "department") received three requests for information pertaining to RFP# Q442010005881000 for employee assistance program services. You state the department is releasing some responsive information. Although you take no position as to the public availability of the submitted information, you state release of this information may implicate the proprietary interests of Alliance Work Partners ("Alliance"); Deer Oaks EAP Services, L.L.C. ("Deer Oaks"); Magellan Behavioral Health, Inc. ("Magellan"); and Optum Health ("Optum"). Thus, pursuant to section 552.305 of the Government Code, you notified those third parties of the request and of the companies' rights to submit arguments to this office as to why their information should not be released. 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 under the Act in certain circumstances). We have received comments from Magellan and Optum. We have reviewed the submitted information.

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, this office has not received comments from Alliance or Deer Oaks explaining why those companies' submitted proposals should not be released. Therefore, we have no basis to conclude Alliance and Deer Oaks have any protected proprietary interests in their 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). Accordingly, the department may not withhold any portion of the proposals pertaining to Alliance or Deer Oaks based upon the proprietary interests of those companies.

Magellan and Optum raise section 552.110 of the Government Code for portions of their respective proposals. 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. 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); 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 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

The 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.

Id.; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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 ORD 552 at 5. 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) of the Government Code protects the proprietary interests of private parties with respect to "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(b). 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 ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Magellan and Optum both claim their customers' identities are trade secrets excepted by section 552.110(a). We agree Optum has explained how its customers' identities in the submitted information qualify as trade secrets, and the department must withhold Optum's customer information, which we marked, under section 552.110(a) of the Government Code. Magellan also has demonstrated how most of its customers' identities are trade secrets, and the department must withhold the information we marked in that company's proposal under section 552.110(a) of the Government Code. However, Magellan has made the identities of the remaining customers identified in its proposal publicly available on its website, and does not explain how information that has been published on a website could also be a trade secret. See ORD 402.

Magellan argues release of its internal website passwords would cause the company substantial competitive harm. However, the information the department has submitted to this office does not contain any passwords. This ruling does not address that information and is

limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Magellan and Optum both argue their respective pricing information should be protected under section 552.110(b). Upon review of the arguments and submitted proposals, we find both Magellan and Optum have demonstrated how substantial competitive injury would result from release of the companies' pricing information. We have marked the portions of these companies' proposals that contain such information, which the department must withhold under section 552.110(b) of the Government Code. Although Magellan and Optum also seek to withhold staffing and organizational information, section 552.110 is generally not applicable to such information. ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel or qualifications and experience). Upon review of the submitted arguments, however, we find neither Magellan nor Optum has made the specific factual or evidentiary showing required by section 552.110(b) demonstrating how substantial competitive injury would result from the release of the remaining information either company seeks to withhold. *See* ORD No. 661 at 5-6. Therefore, the department may not withhold any of the remaining information under section 552.110.

The submitted proposal pertaining to Alliance contains insurance policy numbers that are subject to section 552.136 of the Government Code.¹ 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." Gov't Code § 552.136. This office has determined insurance policy numbers are "access device" numbers for purposes of section 552.136. Accordingly, the department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.²

Finally, we note some of the remaining information 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 (1977). 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.

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

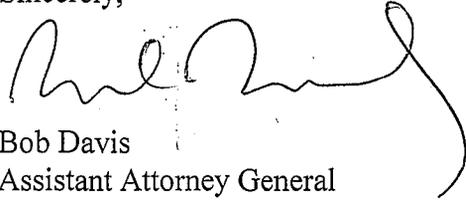
²Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the department must withhold the information we marked in the proposals pertaining to Magellan and Optum under section 552.110 of the Government Code. The department must also withhold the insurance policy numbers we marked in Alliance's proposal under section 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 420081

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Grant Rusin
Optum Health
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Golden Valley, Minnesota 55427
(w/o enclosures)