



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2012

Ms. Leena Chaphekar
Assistant General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2012-07506

Dear Ms. Chaphekar:

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# 454011.

The Employees Retirement System of Texas (the "system") received a request for the system's contract with UnitedHealthcare Services ("UHC"). You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. You also state the submitted documents may contain proprietary information of a third party subject to exception under the Act. Accordingly, the system notified UHC of the request and of its right to submit arguments to this office as to why the submitted 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 on behalf of UHC. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments on behalf of the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note some of the information UHC seeks to withhold was not submitted by the system to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the system. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit a copy of specific information

requested). However, we will address UHC's arguments against disclosure of its information submitted by the system.

UHC asserts portions of its submitted information should not be disclosed because they were marked confidential or have been made confidential by agreement or assurances. However, information subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See Attorney General Opinion JM-672* (1987); *Open Records Decision Nos. 541 at 3* (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

UHC asserts the submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the system, not the proprietary interests of private parties such as UHC. *See Open Records Decision No. 592 at 8* (1991) (discussing statutory predecessor). In this instance, the system does not raise section 552.104 as an exception to disclosure. Therefore, the system may not withhold any of the submitted information under section 552.104 of the Government Code.

Although the system argues the submitted information is excepted under section 552.110 of the Government Code, this exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the system’s arguments under section 552.110. We will, however, address the arguments made under this section by UHC. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957). 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.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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) (party must establish *prima facie* case that information is trade secret). 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code 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.” 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 requested information. *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).

UHC claims portions of the submitted information are trade secrets that should be protected by section 552.110(a). Upon review, we find UHC has demonstrated some of its client information constitutes trade secrets. We have marked the client information the system must withhold under section 552.110(a) of the Government Code. We note UHC has published the identity of one of its clients it now seeks to withhold on its website. In light of UHC’s own publication of such information, we cannot conclude the identity of this

¹The 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).

published client qualifies as a trade secret. We note 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); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Upon review, we find UHC has not demonstrated any of the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. Accordingly, the system may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

UHC claims some of its remaining information constitutes commercial information that, if released, would cause UHC substantial competitive harm. As previously stated, UHC has made some of its client information publicly available on its website. Because UHC has published this information, we find it has failed to demonstrate how release of this information would cause it substantial competitive injury. Additionally, we find UHC has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining information at issue would cause UHC 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), 509 at 5 (1988) (because 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), 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). Furthermore, we note the pricing information of a winning bidder, such as UHC, is generally not excepted from disclosure under section 552.110(b). 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* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Consequently, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note some of the submitted information appears 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 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.

In summary, the system must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining submitted information must be

released; however, 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,



Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/em

Ref: ID# 454011

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Filed in The District Court
of Travis County, Texas

SEP 30 2015

At § 41A M.
Velva L. Price, District Clerk

Cause No. D-1-GN-12-001661

UNITED HEALTHCARE
SERVICES, INC.,
Plaintiff,

§ IN THE DISTRICT COURT

§

§

§

§

v.

§ 201st JUDICIAL DISTRICT

§

GREG ABBOTT, ATTORNEY GENERAL
FOR THE STATE OF TEXAS,
Defendant.

§

§

§

§ TRAVIS COUNTY, TEXAS

AGREED ORDER OF DISMISSAL

This cause is an action under the Public Information Act (PIA), Texas Government Code Chapter 552. Plaintiff United Healthcare Services, Inc. (United) and Defendant Ken Paxton¹, Attorney General of Texas, agree that this matter should be dismissed pursuant to PIA section 552.327. A court may dismiss a PIA suit under section 552.327 when all the parties agree to dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request or has abandoned the request. Tex. Gov't Code § 552.327.

The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the requestor, Blue Cross Blue Shield of Texas, has in writing voluntarily withdrawn the request for information, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

¹ Because this lawsuit was brought against Greg Abbott in his official capacity as Attorney General of Texas, Ken Paxton is now the proper Defendant.

IT IS THEREFORE ORDERED that:

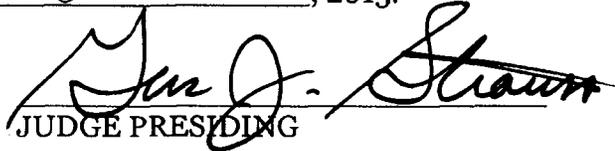
1. Because the request was withdrawn, no information should be released in reliance on Letter Ruling OR2012-07506. Letter Ruling OR2012-07506 should not be cited for any purpose as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the signing of this Final Judgment, the Office of the Attorney General shall notify the Employees Retirement System of Texas in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall instruct the Employees Retirement System of Texas that pursuant to Tex. Gov't Code § 552.301(g), it shall not rely upon Letter Ruling OR2012-07506 as a prior determination under Tex. Gov't Code § 552.301(f) with regard to United's information, nor shall it release any of United's information in reliance on said Ruling, and if the Employees Retirement System of Texas receives any future requests for the same or similar United information, it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2012-07506.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that Plaintiff's cause of action against Defendant is dismissed in all respects;

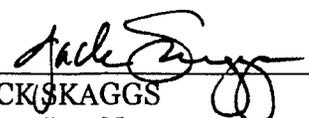
All relief not expressly granted is denied; and

This Order disposes of all claims between the parties as final.

Signed this 30th day of September, 2015.


JUDGE PRESIDING

AGREED:



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