



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2012

Ms. Dawn Burton
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-13477

Dear Ms. Burton:

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# 463169 (ORR# 20419).

The Texas Department of State Health Services (the "department") received a request for information pertaining to Advanced Aesthetic Concepts ("Advanced") and RevecoMED International ("RevecoMED") during a specified time period, including information pertaining to specified medical devices or programs and two specified complaints. You state the department has redacted e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You state the department has provided or will provide some of the responsive information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, although you take no position as to whether the remaining information is excepted under the Act, you state release of the remaining information may implicate the proprietary interests of Advanced, Body Mind and Soul ("Body"), and RevecoMED. Accordingly, you state, and provide documentation showing, you notified Advanced, Body, and RevecoMED of the request for

¹We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

information and of their rights to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Advanced, Body, and RevecoMED. We have also reviewed the Declaration of Evan J. Rae, Special Agent with the Office of Criminal Investigations in the Austin Resident Office of the United States Food and Drug Administration (the "FDA"). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-11972 (2012). In that ruling, we determined (1) to the extent the FDA provided the information at issue to department employees who accepted commissions as FDA officers and who are subject to the same restrictions on disclosure as other FDA employees, and to the extent the FDA considers the information held by these commissioned employees to be the records of the FDA, the decision to release or withhold the information at issue is a decision for the FDA; (2) with the exception of the information we marked for release, the department may withhold the information it marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege; (3) the department must withhold the information we marked under section 552.110 of the Government Code; and (4) the department must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the department may rely on Open Records Letter No. 2012-11972 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will consider your arguments against its disclosure.

The department asserts some of the submitted information is confidential by federal law and thus is excepted from required public disclosure under section 552.101 of the Government

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by federal law. In this instance, the FDA contends the information at issue is not the department’s information, but instead belongs to the FDA.

You inform us the requested information includes confidential information that the FDA provided to department employees who have accepted commissions as FDA officers pursuant to federal law. *See* 21 U.S.C. § 372(a). Mr. Rae states several department employees have signed Acceptance of Commission documents as officials of the United States Department of Health and Human Services (“DHHS”) and the FDA.³ In addition, Mr. Rae has submitted Certificates of Commission for several department employees. Mr. Rae explains these commissions include the ability to review and receive FDA records. You state any information acquired from the FDA is confidential pursuant to section 331(j) of title 21 of the United States Code, which prohibits

[t]he using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the [DHHS], or to the courts when relevant in any judicial proceeding under this chapter, any information acquired under authority of sections 344, 348, 350a, 350c, 355, 360, 360b, 360c, 360d, 360e, 360f, 360h, 360i, 360j, 360ccc, 360ccc-1, 360ccc-2, 374, 379, 379e, 387d, 387e, 387f, 387g, 387h, 387i, or 387t(b) of this title concerning any method or process which as a trade secret is entitled to protection[.]

21 U.S.C. § 331(j). Accordingly, we understand the FDA records the commissioned employees receive are subject to federal law, including the Freedom of Information Act, 5 U.S.C. § 552, which applies only to federal agencies and not state agencies. We further understand the employee is subject to criminal penalties under federal law for the unauthorized release of confidential information.

You state the FDA considers the department’s commissioned officers to be serving in concurrent jurisdiction of the FDA, and any responsive documents remain the FDA’s property. Indeed, Mr. Rae states in his Declaration that the information at issue consists of records belonging to the FDA. Mr. Rae explains department employees have access to the records at issue only in their capacities as commissioned FDA officers and not in their capacities as state officers or employees. Mr. Rae also states a request for the information at issue should have been directed to the FDA rather than the department.

³The FDA is a component of DHHS.

The federal Food, Drug, and Cosmetic Act (“FDC Act”) grants DHHS the authority to conduct examinations and investigations by commissioning employees of any state as officers of DHHS. *See* 21 U.S.C. § 372(a)(1)(A). With regard to the disclosure of confidential information by these commissioned officers, section 20.84 of title 21 of the Code of Federal Regulations provides as follows:

Data and information otherwise exempt from public disclosure may be disclosed to Food and Drug Administration consultants, advisory committees, State and local governmental officials commissioned pursuant to 21 U.S.C. 372(a), and other special government employees for use only in their work with the Food and Drug Administration. Such persons are thereafter subject to the same restrictions with respect to the disclosure of such data and information as any other Food and Drug Administration employee.

21 C.F.R. § 20.84; *see also id.* § 20.88 (stating state or local governmental officer commissioned by FDA pursuant to 21 U.S.C. § 372(a) shall have same status with respect to disclosure of FDA records as any special government employee). Furthermore, section 20.2(a) of title 21 of the Code of Federal Regulations states any request for records of the FDA shall be handled pursuant to FDA procedures and requires compliance with the FDA rules governing public disclosure.⁴ *Id.* § 20.2(a). *See generally id.* pt. 20 (regulations concerning public disclosure of FDA records).

The department states some of the requested information was sent to or received by the commissioned officers from the FDA solely pursuant to their commissions. Under section 372(a) of the FDC Act, “[t]he Secretary [of DHHS] is authorized to conduct examinations and investigations . . . through any . . . employee of any State . . . duly commissioned by the Secretary as an officer of [DHHS].” 21 U.S.C. § 372(a). When an examination or investigation is conducted by an investigator as a commissioned officer of DHHS (or a component of DHHS, in this case, the FDA), it follows that the information gathered pursuant to such an examination is a record of DHHS, the commissioning agency. In other words, the records of such investigation are the records of the agency that authorized the investigation. As noted above, FDA regulation requires commissioned officers to comply with the same federal laws and regulations with respect to disclosure of FDA records in the same way as any other FDA employee. *See* 20 C.F.R. § 20.84. In light of DHHS’s authority to commission as FDA officers the department employees who maintain the information at issue here, and after consideration of the relevant regulations on disclosure of FDA records by commissioned officers, we do not believe the FDA’s position that the records of the commissioned officers require treatment as FDA records is unreasonable.

⁴In particular, Mr. Rae states the requested records contain non-public information that is protected from disclosure by the deliberative process and open investigatory privileges, as well as protected personal information, trade secrets, and other confidential commercial information. *See* 20 C.F.R. §§ 20.61-.64.

Therefore, to the extent the FDA provided the information at issue to department employees who have accepted commissions as FDA officers and who are subject to the same restrictions on disclosure as other FDA employees, and to the extent the FDA considers the information held by these commissioned employees to be the records of the FDA, we conclude for purposes of responding to a request for information from a member of the public, the decision to release or withhold the information at issue is a decision for the FDA. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (agency interpretations in formats such as opinion letter are entitled to respect under decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), if persuasive). Thus, neither the department nor this office may determine the extent to which the information at issue is subject to required public disclosure. Upon receipt of a request for the information, the FDA must make that determination in accordance with federal laws and regulations.⁵

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. We note the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2.

You state portions of the submitted information, which you have marked, identify a complainant who reported possible violations of the Texas Food, Drug, and Cosmetic Act to the department. *See generally* Health & Safety Code ch. 431 subch. J. You explain the department is responsible for enforcing the relevant portions of the Texas Food, Drug, and

⁵Mr. Rae states some responsive documents may be available on the FDA's internet site without the need for a written request. Mr. Rae also invites the requestor to submit his request to the following address:

Food and Drug Administration
Division of Freedom of Information (HFI-35)
12420 Parklawn Drive
Rockville, Maryland 20857

Cosmetic Act, and you inform us violations are subject to civil and criminal penalties. We have no indication the subject of the complaint knows the identity of the complainants. However, you have failed to demonstrate a portion of the information you have marked identifies an individual who made the initial report of a criminal violation to the department for purposes of the informer's privilege. Thus, we conclude the department has not demonstrated the applicability of the common-law informer's privilege to this information, which we have marked for release, and it may not be withheld under section 552.101 of the Government Code on that basis. Accordingly, with the exception of the information we marked for release, the department may withhold the information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

We now turn to the arguments submitted by Advanced, Body, and RevecoMED against disclosure of portions of the submitted information. Advanced, Body, and RevecoMED argue portions of the information at issue consist of medical records. Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient

by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Upon review, we find Advanced, Body, and RevecoMED have not demonstrated how any portion of the information at issue consists of medical records for purposes of the MPA, and the department may not withhold any of the information at issue under section 552.101 on that basis.

Advanced, Body, and RevecoMED also argue portions of the information at issue are excepted under section 552.101 of the Government Code in conjunction with common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find Advanced, Body, and RevecoMED have not demonstrated how any portion of the information at issue is highly intimate or embarrassing and not of legitimate public concern, or the information pertains to business entities. Thus, none of the information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Next, Advanced, Body, and RevecoMED argue the information at issue is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). We note section 552.103 is a discretionary exception that is designed to protect only the interests of governmental bodies rather than third parties. As such, section 552.103 may be raised or waived by a governmental body at its discretion. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475 (Tex. App.—Dallas 1999, no pet.) (noting that section 552.007 provides that governmental body may choose not to raise exception and may voluntarily disclose information that is not confidential by law); *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (noting that government agency may waive permissive exception and release information unless release is expressly prohibited by law or information is confidential under law); Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 522 at 4 (1990) (discretionary exceptions in general). Because the department has not raised section 552.103, we find section 552.103 is inapplicable to the submitted information, and no portion of the information at issue may be withheld on that basis.

Next, Advanced, Body, and RevecoMED state portions of the information at issue are excepted from disclosure under section 552.110 of the Government Code. 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 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.⁶ 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 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. Open Records Decision No. 402 (1983). 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 the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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 (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).

Advanced, Body, and RevecoMED each assert portions of the information at issue constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Advanced, Body, and RevecoMED have established a *prima facie* case that the submitted

⁶The 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).

customer information, which we have marked, constitutes trade secret information. Therefore, the information we have marked must be withheld under section 552.110(a) of the Government Code. However, we conclude Advanced, Body, and RevecoMED have each failed to establish a *prima facie* case that any portion of the remaining information at issue meets the definition of a trade secret. We further find neither Advanced, Body, nor RevecoMED have demonstrated the necessary factors to establish a trade secret claim for any of the remaining information at issue. *See* ORD 402. Therefore, none of the remaining information at issue may be withheld under section 552.110(a).

Advanced, Body, and RevecoMED each argue portions of the remaining information at issue consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Advanced, Body, and RevecoMED have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold the submitted pricing information, which we have marked, under section 552.110(b) of the Government Code. However, we find Advanced, Body, and RevecoMED have made only conclusory allegations that the release of any of the remaining information at issue would result in substantial harm to their competitive position. *See* ORD 661. Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the department may rely on Open Records Letter No. 2012-11972 as a previous determination and withhold or release the identical information in accordance with that ruling. To the extent the FDA provided the information at issue to department employees who have accepted commissions as FDA officers and who are subject to the same restrictions on disclosure as other FDA employees, and to the extent the FDA considers the information held by these commissioned employees to be the records of the FDA, the decision to release or withhold the information at issue is a decision for the FDA. With the exception of the information we marked for release, the department may withhold the information you marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The department must withhold the information we marked under section 552.110 of the Government Code. The remaining information must be released.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 463169

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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