



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2012

Ms. Connie Crawford
Assistant County Attorney
Legal Department
El Paso County Hospital District
4815 Alameda Avenue, 8th Floor, Suite B
El Paso, Texas 79905

OR2012-17272

Dear Ms. Crawford:

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# 469156 (File No. HO-12-243).

The El Paso County Hospital District d/b/a University Medical Center of El Paso (the "district") received a request for four categories of information pertaining to a specified request for proposals: (1) any documents showing the rates that all vendors submitted; (2) a list of vendors that submitted a response; (3) a list of vendors that requested a copy of the procurement documents; and (4) any performance reports over any time period. You inform us the district has released the information requested in category two of the request. You state the district does not possess information responsive to categories three or four.¹ Although we understand the district takes no position as to whether the submitted information is excepted under the Act, the district states the release of this information may implicate the proprietary interests of Alegis Revenue Group, L.L.C. ("Alegis"), and Cardon Outreach ("Cardon"). Accordingly, the district notified these third parties of the request for information and of their 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) (statutory predecessor to section 552.305 permits governmental

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received comments from Aegis. We have considered the submitted arguments and reviewed the submitted information.

We note 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, Cardon has not submitted comments to this office explaining why the submitted information should not be released. Therefore, we have no basis to conclude Cardon has a protected proprietary interest in this 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. Accordingly, the district may not withhold any portion of the submitted information based upon the proprietary interests of Cardon.

Next, we note Aegis seeks to withhold information the district has not submitted to this office for our review. This ruling does not address information beyond what the district has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the district submitted as responsive to the request for information. *See id.*

Aegis raises section 552.110 of the Government Code for some of its information. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret 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. 1958); *see also* ORD 552 at 2. Section 757 provides 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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) 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). This section 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 ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm)*.

Alegis raises section 552.110(a) for some of its information. Upon review, we find Alegis has established its customer information constitutes trade secrets. Therefore, the district must withhold this information, which we have marked, under section 552.110(a) of the Government Code. We conclude, however, Alegis has not demonstrated how any of its remaining information meets the definition of a trade secret, nor has Alegis demonstrated the necessary factors to establish a trade secret claim. *See RESTATEMENT OF TORTS § 757 cmt. b; ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim); 319 at 2 (information relating to organization and personnel, professional references,*

²The 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.

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)*.

market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note pricing information pertaining to a particular proposal or 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." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Thus, the district may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Alegis also raises section 552.110(b) for some of its information. Upon review, we find Alegis has established that the pricing information we have marked constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the district must withhold this information under section 552.110(b) of the Government Code. However, Alegis has not demonstrated how any of its remaining information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. See Gov't Code § 552.110; ORD 319 at 3. Therefore, the district may not withhold any of the remaining information under section 552.110(b).

In summary, the district must withhold the customer information we have marked under section 552.110(a) of the Government Code and the pricing information we have marked under section 552.110(b) of the Government Code. The district must release the remaining information.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 469156

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Douglas Turek
Chief Operating Officer
Alegis Revenue Group
Suite 4024
1201 Lake Woodlands Drive
The Woodlands, Texas 77380
(w/o enclosures)

Ms. Emily Fisher
Cardon Outreach
Suite 200
4185 Technology Forest Boulevard
The Woodlands, Texas 77381
(w/o enclosures)