



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2013

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

OR2013-02142

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# 478774.

The Texas Health and Human Services Commission (the "commission") received a request for (1) the commission's evaluation materials in relation to RFP No. 529-12-0073, Medicaid Drug Use Review; (2) the proposals submitted by Xerox Heritage, LLC ("Xerox") in response to that request for proposal; and (3) the contract between the commission and Xerox. You state the commission has released some information to the requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Xerox. Accordingly, you notified Xerox of this request and of its right to submit arguments to this office stating 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 Xerox. We have considered the submitted arguments and reviewed the submitted information.

Xerox raises section 552.110 of the Government Code for portions of the submitted information. 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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See 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* 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 [one] 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, as, for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). 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 This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted

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

that rebuts the claim as a matter of law. ORD 552 at 2. 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).

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.*; Open Records Decision No. 661 (1999).

Xerox contends portions of the submitted information are excepted under section 552.110(b) of the Government Code. Upon review, we find Xerox has established release of the information we have marked constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, the commission must withhold this information under section 552.110(b). However, we find Xerox has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the company substantial competitive harm. *See* Gov’t Code § 552.110(b); *see also* Open Records Decision Nos. 509 at 5 (1988) (stating that because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications, and experience), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). We therefore conclude the commission may not withhold any of the remaining information under section 552.110(b).

Xerox also argues the remaining information at issue constitutes trade secrets. Upon review, we find Xerox has failed to demonstrate any of the information for which it asserts section 552.110(a) of the Government Code meets the definition of a trade secret, nor has Xerox demonstrated the necessary factors to establish a trade secret claim for this information. *See* 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 3, 175 at 4. Accordingly, the commission may not withhold any of the information at issue on the basis of section 552.110(a).

In summary, the commission must withhold the information we have marked under section 552.110(b) of the Government Code. As no further exceptions to disclosure are raised, the commission 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 478774

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. James Haddow, Jr.
Associate Corporate Counsel
Xerox
8260 Willow Oaks Corp. Drive, Suite 600
Fairfax, Virginia 22031
(w/o enclosures)