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Office of the Attorney General
State of Texas

August 14, 1991

Ms. Susan Kelley
General Counsel
Texas Workers' Compensation
Commission
200 East Riverside Drive
Austin, Texas 78704-1287

Open Records Decision No. 592

Re: Whether hospitals' lists of charges submitted to Workers' Compensation Commission are trade secrets or "commercial and financial information" under section 3(a)(10) of the Open Records Act (RQ-9)

Dear Ms. Kelley:

You ask whether certain information submitted to the Workers' Compensation Commission by hospitals is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. The requested information consists of the "base chargemaster" filed by certain Houston area hospitals with the commission pursuant to title 28, section 42.110(g), of the Texas Administrative Code.¹ Essentially, a chargemaster is a list of all the goods and services provided by a hospital, and the price (or prices) the hospital charges for each of those goods and services.

You assert that the requested information is excepted from required public disclosure under sections 3(a)(1), 3(a)(4) and 3(a)(10) of the Open Records Act. The affected hospitals were notified of this request, and two of them, as well as the Texas Hospital Association, have responded with reasons why the requested information should not be released. See V.T.C.S. art. 6252-17a, § 7(c).

¹A hospital that fails to submit this information receives discounted reimbursements for services provided to worker's compensation patients. 28 T.A.C. § 42.110(g)(3).

Sections 3(a)(1) and 3(a)(10)

Section 3(a)(1) of the Open Records Act excepts from public disclosure

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

The requested information is not made confidential by statutory or constitutional law. As the common law is also subsumed in section 3(a)(10), for our purposes here we may combine our consideration of the common law with our consideration of the applicability of section 3(a)(10).

Section 3(a)(10) of the Open Records Act excepts from public disclosure

trade secrets and commercial or financial information obtained from a person and privileged or confidential *by statute or judicial decision*. (Emphasis added.)

Section 3(a)(10) refers to two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person. We will first consider whether the requested information constitutes a trade secret.

Trade Secret

The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939), *q.v. Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). The determination of whether any particular information is a trade secret is a determination of fact.

In Open Records Decision No. 552 (1990), this office noted that it is unable to resolve disputes of fact and must rely on the facts alleged to us, or upon those facts that are discernible from the documents submitted for our inspection. For this reason, we will accept a claim for exception as a trade secret as valid when a *prima facie* case is made that the information in question constitutes a trade secret, and no

argument is made that rebuts that assertion as a matter of law. *Id.* In this instance, we think that the *prima facie* case has not been, and indeed cannot be, made.

The Restatement definition states, in part:

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. *Matters which are completely disclosed by the goods which one markets cannot be his secret.* (Emphasis added.)

The information in question here consists of the prices charged by a hospital for goods and services. Anyone expected to pay for receipt of such goods or services must be advised of the amount charged in order to do so. See Health & Safety Code § 311.002. Presumably, a client or patient is entitled to know how much he will be expected to pay for a good or service before taking receipt of the good or accepting the service and becoming liable for payment. Consequently, the charge for an item is subject to disclosure every time that item is provided or proposed to be provided.

We recognize that the disclosure of a complete price list is somewhat different from the disclosure of individual prices in, for example, an itemized billing statement. However, while the base chargemasters may reflect different marketing strategies adopted by the respective hospitals, there has been no showing, or even suggestion, that any method or technique used in setting prices is not generally known within the industry. Moreover, any competitor interested in discovering the prices charged by a hospital for certain items would have no difficulty discovering this information through legitimate means. See *Brooks v. American Biomedical Corp.*, 503 S.W. 2d 683 (Tex. Civ. App.--Eastland 1973, writ ref'd n.r.e.).

The hospitals submitting arguments with respect to this request for an open records decision have asserted reasons that do not further the claim that the requested information constitutes their trade secret. For example, St. Luke's Episcopal Hospital states, in part:

A hospital's chargemaster is a misleading source of informa-

tion because the individual items are inter-related and cross-subsidizing, and because the individual item charges may or may not be related to costs. Analysis of charges for individual items is likely to neglect the development of the chargemaster over time, and the intentional and unavoidable underwriting of a loss on one item by a gain on another. . . .

The true cost of healthcare is the cost per case and is not accurately reflected on a hospital's base chargemaster. Release of St. Luke's chargemaster data would cause substantial competitive injury to St. Luke's by significantly misinforming those paying for healthcare services. (Emphasis in original.)

AMI Park Plaza Hospital makes a similar argument.

The Restatement definition provides that a trade secret is information which gives its possessor "an opportunity to obtain an advantage over competitors who do not know or use it." As the arguments quoted above make clear, the hospitals' concern here is not that the release of the information would deprive the hospitals of an advantage over their competitors, but that it will be misunderstood by potential consumers of medical services. We are aware of no authority or commentary suggesting that the allegation that information is incomplete or misleading may be the basis for a claim that the information constitutes a trade secret.

Commercial or Financial Information

Your claim for exception from public disclosure also relies on the assertion that the requested information is commercial or financial information obtained from a person. This office first considered the scope of the exception found in section 3(a)(10) in Attorney General Opinion H-258 (1974). That opinion stated:

Section 3(a)(10) is similar to the provisions in the federal Freedom of Information Act which excepts from disclosure

under that act 'trade secrets and commercial or financial information obtained from a person and privileged or confidential.' 5 U.S.C.A. § 552(b)(4) (1967). The 'financial information' exception made in the federal act has consistently been interpreted to permit federal agencies to withhold financial information which a private individual wishes to keep confidential for his own purposes but reveals to the government under the express or implied promise by the government that the information will not be released to the public. General Services Administration v. Benson, 415 F.2d 878, 881 (9th Cir. 1969). See also Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Sterling Drug Inc. v. F.T.C., 450 F.2d 698 (D.C. Cir. 1971); and Bristol-Meyers Co. v. F.T.C., 424 F.2d 935 (D.C. Cir. 1970).

But, under § 3(a)(10) of the State Act, it is not enough that the individual supplying the information expect it to be kept confidential; to the requirement in the federal act that the information be 'privileged or confidential' the Legislature tacked on the additional requirement that it be made so 'by statute or judicial decision.' In order to be exempt from disclosure under § 3(a)(10), then, information must be (1) either trade secrets or commercial/financial in nature, (2) obtained from a person, and (3) privileged or confidential by statute or judicial decision. Because of this last requirement, it is unlikely that, as presently written, § 3(a)(10) exempts from disclosure any information not already exempt under § 3(a)(1).

Attorney General Opinion H-258 (1974) at 5-6.

The first open records decisions to consider the exception for commercial and financial information in section 3(a)(10) were consistent with the holding of Attorney General Opinion H-258. Open Records Decision Nos. 95 (1975); 10 (1973). Subsequently, however, this office issued an opinion that took a contrary

view of the relationship between the state open records law and the federal Freedom of Information Act. Open Records Decision No. 107 (1975) stated that the language of the two acts was "virtually identical" and that decisions under the federal law were applicable under the state law.

The subsequent decisions of this office concerning commercial and financial information were inconsistent. One line of decisions followed Attorney General Opinion H-258. See Open Records Decision Nos. 402 (1983); 347, 319 (1982); 271 (1981); 246, 233 (1980); 231 (1979); 180 (1977). Another concurrent line of open records decisions, however, followed the reasoning of Open Records Decision No. 107. Open Records Decision Nos. 401 (1983); 309 (1982); 292 (1981); 256, 238 (1980); 173 (1977); see also Attorney General Opinion JM-48 (1983). Relying on a case construing the federal Freedom of Information Act, those cases applied a test under which commercial or financial information is excepted from public disclosure, i.e. if disclosure is likely either (1) to impair the government's ability to obtain the information in the future, or (2) to cause substantial harm to the competitive position of the person from whom it was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Open Records Decision No. 309 attempted to reconcile the inconsistency between the two lines of opinions. It followed Attorney General Opinion H-258 inasmuch as it recognized that commercial or financial information could be withheld under section 3(a)(10) only if the information were made confidential by a statute or judicial decision. Open Records Decision No. 309 did not, however, reject the progeny of Open Records Decision No. 107. Rather, it stated that the import of that line of decisions was that *National Parks* was a judicial decision for purposes of section 3(a)(10).

We think that Open Records Decision No. 309 was in error in finding that the *National Parks* case qualified as a "judicial decision" for purposes of section 3(a)(10). Although it is sometimes appropriate to look to the decisions of sister jurisdictions for guidance in defining the scope of a common law rule that has not been fully developed in Texas courts, the *National Parks* case is in no way an expression of the common law of privilege or confidentiality. As a construction of a

foreign, and significantly different statute, *National Parks* is apposite neither as a guide to the construction of section 3(a)(10) nor as an expression of the common law.²

Because of the inconsistencies in the decisions of this office³ in regard to "commercial and financial information" exception in the Open Records Act, it is important for us to clarify our understanding of that provision. The language added by the Texas Legislature "by statute or judicial decision" is significant and must be given meaning. See generally 2A SUTHERLAND STATUTORY CONSTRUCTION § 52.02 (4th ed. 1984) (when changes are made in the text of a statute adopted from a foreign state by the legislature of the adopting state, it may be presumed that such changes are made for the very purpose of avoiding the construction developed elsewhere); Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1263-67 (1970) (pointing out that a weakness in the federal exemption is its failure to set a standard for determining what is privileged and what is confidential); *The Texas Open Records Act: A Section-By-Section Analysis*, 14 HOUS. L. REV. 398 (1977) (giving a laudatory review of the differences between the federal and state provisions). It sets forth an objective standard by which the scope of the phrase "privileged or confidential" must be measured: the common or statutory law of Texas. Further, *National Parks* is not a judicial decision that makes information confidential under Texas law. Thus, Open Records Decision Nos. 107, 309, and their progeny are expressly overruled to the extent they conflict with this decision.

As noted above, the requested information is not made confidential by statute. We have considered the common-law doctrine of trade secret and found it

²Open Records Decision No. 309 cited *Apodaca v. Montes*, 606 S.W.2d 734 (Tex. Civ. App.--El Paso 1980, no writ) as support for its assertion that *National Parks* was a judicial decision for purposes of section 3(a)(10). We do not think that *Apodaca* imparts to the *National Parks* test any approval by a Texas court. A reading of *Apodaca* makes clear that the court did not consider the applicability of *National Parks* because the appellant had not established a record below that would have supported an application of *National Parks* in any event. *Apodaca* at 736.

³The decisions this office has issued since Open Records Decision No. 309 have carried forward elements of the previous decisions that we have now determined to be erroneous. Open Records Decision Nos. 494 (1988); 402, 401 (1983).

inapplicable. As no other common-law doctrine would serve to impart confidentiality or privilege to the requested information, we find that section 3(a)(10) does not except the information from public disclosure.

Section 3(a)(4)

Section 3(a)(4) excepts from required public disclosure

information which, if released, would give advantage to competitors or bidders.

Individuals and entities often assert the claim that section 3(a)(4) protects their commercial or financial interests. Accordingly, we often see sections 3(a)(10) and 3(a)(4) asserted in tandem. We think these exceptions can be distinguished.

Section 14(a) of the Open Records Act provides:

This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person.

Section 3(a)(10) may not be waived by the governmental body. Information within that exception is, by its terms, "confidential" under statutory or common law found outside the Open Records Act. Section 3(a)(4) is unlike section 3(a)(10) in this respect, and may be waived. Accordingly, we think section 3(a)(4) is designed to protect the interests of governmental bodies and not the interests of private parties submitting information to the government.

Given this context, section 3(a)(4) makes sense when applied to information related to a competition for a government contract or benefit, such as a competitive bidding situation, where the government may wish to withhold information in order to obtain more favorable offers. *See, e.g.,* Attorney General Opinions JM-48 (1983); MW-591 (1982).⁴ As the information in question is not relevant to the protection of

⁴Questions concerning whether and under what circumstances section 3(a)(4) may be

a governmental interest in a competitive situation, we find section 3(a)(4) inapplicable to the information in question.

We have considered the asserted exceptions and find them inapplicable. Accordingly, the requested information must be released.

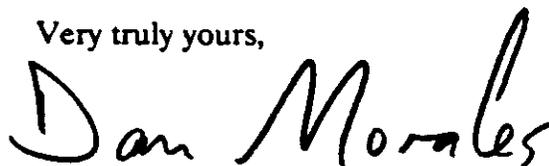
SUMMARY

Hospital "chargemasters" (lists of all the goods and services provided by a hospital, and the price the hospital charges for each of those goods and services) are not "trade secrets" excepted from public disclosure by section 3(a)(10) of the Open Records Act.

In order to be excepted from required public disclosure under section 3(a)(10) of the Open Records Act, "commercial or financial information obtained from a person" must be "privileged or confidential" under the common or statutory law of Texas. Open Records Decision Nos. 107, 309, and their progeny are expressly overruled to the extent they conflict with this decision.

Section 3(a)(4) is designed to protect the interests of governmental bodies and not the interests of private parties submitting information to the government.

Very truly yours,



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applicable to protect governmental interests other than in the competitive bidding process are reserved for appropriate fact situations.

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