



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1997

Ms. Amy L. Whitt
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR97-0970

Dear Ms. Whitt:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105429.

The City of Lubbock (the "city") received a request for copies of all relevant contracts with First Health, Insumational Insurance Administrators, Inc., the current agreement with the current provider of physician, clinic and hospital services, and the financial statements of the city's self insurance fund for fiscal years 1994-95, 1995-96 and 1996-97. You state that the city released to the requestor the requested financial statements. You suggest that the release of the requested contracts may implicate the privacy and property rights of third parties.

Since the property and privacy rights of third parties may be implicated by the release of the requested information here, this office notified those parties of this request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We notified five third parties of the request: Advance Paradigm, Inc. ("API"), Lubbock County Hospital District dba University Medical Center ("University Medical Center"), St. Mary of the Plains Hospital, First Health and Insumational Insurance Administrators, Inc. ("Insumational"). The notification states that if the third party does not explain why an exception applies to the requested information, this office will assume that the third party has no privacy or property interest in the information. Two third parties, St. Mary of the Plains Hospital and First Health, did not respond to our notification. We assume these two parties have no privacy or property interest in the information. The city may not withhold the requested information pertaining to St. Mary of the Plains Hospital or First Health.

The three remaining third parties each assert that section 552.110 of the Government Code applies to certain pricing information.¹ Section 552.110 of the Government Code excepts from required public disclosure two types of information, a “trade secret” and “commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” The Texas Supreme Court has adopted the definition of a trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). The Restatement 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, . . . [but] 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.

See RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 552 (1990) at 2. The Restatement also lists six factors to consider in determining whether information is a trade secret.² *See id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

¹API also asserts that, as it provides managed pharmacy benefit services, its information is not responsive to the request. Since we believe the question of whether the API information is the subject of the request is best resolved by the city seeking clarification from the requestor, we will assume that the information is responsive and rule on the exception API raises.

²The six trade secret factors are as follows:

- 1) the extent to which the information is known outside of [the company’s] business;
- 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 to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Insumational asserts that certain pricing information constitutes its trade secrets. In addressing the six trade secret factors, Insumational states that its “[f]ees are determined on a client-by-client basis relative to the specific requirement of each situation. . . . [Its] contracts are intended to document the understanding between [Insumational] and its clients for a specific situation.” Based on these comments, we do not believe the pricing information is within the Restatement definition of a trade secret. The pricing information seems to relate to just this contract, that is, “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.” Accordingly, the city may not withhold the Insumational pricing information from public disclosure as a trade secret. *See* Open Records Decision Nos. 319 (1982) at 3, 306 (1982) at 3.

The University Medical Center and API assert that their pricing information is within the commercial or financial information branch of section 552.110. In applying this branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass’n* claim by mere conclusory assertion of a possibility of commercial harm. “To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985).

Both University Medical Center and API assert that the release of certain pricing information will cause substantial harm to their competitive positions. University Medical Center maintains that disclosure of its list of rates for services will damage its competitive position in similar contracts with the city and other entities because University Medical Center’s competitors will be able to estimate and undercut University Medical Center’s future bids.

We observe that a patient who receives a hospital service is entitled to disclosure of the cost of that service. Where information can be relatively easily ascertained from another source, release of the information is unlikely to cause substantial competitive harm. *See* Open Records Decision No. 496 (1988) at 6; *cf.* Open Records Decision No. 592 (1991) (hospital charge master held not trade secret where hospital failed to demonstrate competitive advantage over those who do not know or use it). Furthermore, federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 (1988) at 6; *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995)

for hospital services. We conclude that University Medical Center's rates for services are not excepted from public disclosure under section 552.110 of the Government Code.

University Medical Center also raises section 552.104 of the Government Code. Section 552.104 states that:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Consequently, University Medical Center lacks standing to raise section 552.104. *See id.* at 8.

API asserts that competitive harm will result from public disclosure of four pieces of information: the amount of the fee the city pays to API for each claim, the percentage of the rebate from the drug manufacturer that API retains, the rates for prescription claims, and the rate per in-house man-hour of programming time for producing "special reports," which are reports requested by the city other than the standard reports. API asserts that disclosure of the information will enable API's competitors to estimate its profit margins on this account and enable competitors to undercut API's bids for services.

We do not believe API has explained how the disclosure of the four pieces of information would directly reveal its profit rates. We also find API's argument that the release of the pricing information would allow its competitors to undercut its bid in future procurements to be too speculative. Furthermore, we note that federal cases applying the analogous FOIA exemption to prices in awarded government contracts have denied protection for such prices, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152. Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Accordingly, we conclude that the city may not withhold the API information from public disclosure based on section 552.110 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 105429

Enclosures: Submitted documents

cc: Mr. Dennis K. Howard, President
Lubbock Professional Fire Fighters
Association, Local 972, IAFF
P.O. Box 1541
Lubbock, Texas 79408
(w/o enclosures)

Ms. Kim J. Spiegel
Corporate Counsel
Advance Paradigm, Inc.
545 East John Carpenter Freeway
Suite 1900
Irving, Texas 75062
(w/o enclosures)

Ms. Lois A. Wischkaemper
Galey & Wischkaemper, PLLC
P.O. Box 1019
Lubbock, Texas 79408-1019
(w/o enclosures)

Mr. Patrick J. Earley
Senior Vice President
First Health
222 West Las Colinas Blvd., Suite 1360
Irving, Texas 75039
(w/o enclosures)

Mr. Ronald P. Sowell, President
Lubbock Professional Police Officers
Association
P.O. Box 1541
Lubbock, Texas 79408
(w/o enclosures)

Mr. Jeffrey L. Steward
Associate General Counsel
UICI Administrators, Inc.
4001 McEwen, Suite 200
Dallas, Texas 75244
(w/o enclosures)

St. Mary of the Plains Hospital
ATTN: President & CEO
4000 24th Street
Lubbock, Texas 79410
(w/o enclosures)

