



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 23, 1997

Ms. Kate Harrington
Open Records Coordinator
Texas Department of Mental Health
& Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR97-1697

Dear Ms. Harrington:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 107480.

The Texas Department of Mental Health & Mental Retardation (the "department") received a request for various information related to the department's request for proposals concerning the Enterprise Data Delivery System Project. You assert that a certain two-page document entitled "Letter 112 Bid or Disclosure of Unannounced Product(s) to State of Texas - MHMR (Recipient)" marked as "Exhibit A" is excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code.¹ You also raise section 552.305 which provides that where a third party's privacy or property interests are implicated, the governmental body may rely on the third party to establish that the information should be withheld under applicable exceptions intended to protect those interests. Gov't Code § 552.305, Open Records Decision No. 542 (1990). You inform us that the department declines to take a position on whether the information should be withheld or released.

Pursuant to section 552.305 of the Government Code, we notified IBM Corporation ("IBM") of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. IBM responded by arguing that the "unannounced product information" contained in the submitted document is excepted from disclosure as trade secret and commercial or financial information under section 552.110.

¹We note in your letter to this office dated May 12, 1997, you also raised section 552.104 to protect the requested information from disclosure. However, in your letter dated May 15, 1997, you only briefed our office on sections 552.101 and 552.110. Therefore, we do not address section 552.104 in this ruling.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) 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 trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. 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 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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² 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.

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

Upon review of the argument submitted by counsel for IBM and the accompanying affidavit by IBM's Business Unit Executive for Government Systems in the State of Texas, we conclude IBM has met its burden for withholding a portion of the information contained in Exhibit A under the trade secret prong of section 552.110. The department must therefore withhold this information from the requestor. We have marked the information that must be withheld.

We are resolving this matter with an 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 should 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/glg

Ref.: ID# 107480

Enclosures: Marked documents

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