



Office of the Attorney General
State of Texas

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February 26, 1998

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State Office of Risk Management
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OR98-0555

Dear Messrs. Ybarra and Betts:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID# 36791, ID# 36935, ID# 37064, and ID# 112874.

The Office of the Attorney General (the "AG") received three requests for information relating to an award of a contract for medical bill review services from September 1, 1995 through August 31, 1996. All three requests seek:

1. All bid tabulation records relating to [this procurement] including the supporting documentation for scoring;
2. The complete bid file relating to [this procurement]; and
3. All competing bids.

Two requestors seek the work papers of the evaluators. One requestor also seeks:

1. The Invitation for Bids ("IFB") provided by the OAG with respect to [this contract];
2. All documents that pertain to or describe the method and/or criteria used for evaluating bids received in connection with [this contract];

3. All correspondence and documents received from, sent to, and/or pertaining to Health Benefit Management, Inc.;
4. All correspondence and documents received from, sent to, and/or pertaining to CorVel Corporation;
5. All policies, procedures and rules that govern protests of awards of contracts.

The State Office of Risk Management ("SORM") received a request for "a copy of the existing contract and RFP for CorVel Corporation in connection with the business in cost containment services that they currently provide for the States Attorney Generals Office." You both state that you have released some of the requested information to the requestors. The AG claims that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.110, 552.111 of the Government Code. The SORM has released the contract with CorVel, but raises section 552.110 on behalf of CorVel for portions of the requested bid proposal. We address each of your arguments in turn.

Since the property and privacy rights of third parties are implicated by the release of the requested information here, this office notified the third parties of the 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).

Intracorp and Health Care Review failed to respond to the notice. Therefore, we have no basis to conclude that the information contained in their proposals is excepted from disclosure. *See* Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party 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), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. The requested information pertaining to Intracorp and Health Care Review must, therefore, be released to the requestors.

PRNA, Health Benefit Management (HBM), and CorVel contend that section 552.110 excepts portions of their respective proposals from required public disclosure. Section 552.110 protects the property interests of private parties 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 the Restatement of Torts, section 757, which holds a "trade secret" to be:

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 a single or ephemeral event 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 *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No.

¹The 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 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 (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

639 (1996) at 4. 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. *Id.*

We have reviewed CorVel, HBM, and PRNA's arguments for withholding portions of the proposals. We believe that each of the companies has established that certain portions of their proposals are protected under section 552.110. We have marked the information that the AG and SORM must withhold under section 552.110. CorVel also argues that the names and claim numbers of patients whose records were submitted to the AG must be withheld as confidential medical record information under section 5.08(b) of article 4495b, V.T.C.S. We agree. *See* Open Records Decision No. 600 (1992). We have marked similar information in the PRNA proposal. The remaining information in the proposals must be disclosed.

We next address the AG's arguments for withholding certain marked information under section 552.111 of the Government Code. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This provisions excepts from disclosure internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 (1993). However, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Section 552.111 also protects an attorney's work product created in anticipation of litigation if the information reveals the attorney's mental impressions or though processes. Open Records Decision No. 647 (1996). We have reviewed the information that the AG has marked and agree that it may be withheld under section 552.111.²

The AG also argues that section 552.107(1) applies to some of the information. section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. We have reviewed the information that the AG wishes to withhold under section 552.107(1) and agree that the exception applies to the marked information. The remaining information must be released.

²The AG has marked some of the information as attorney work product under section 552.103. That information may be withheld under section 552.111 or section 552.103. *See* Open Records Decision No. 647 (1996).

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 under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Deputy Chief
Open Records Division

LRD/rho

Ref.: ID# 36791, ID# 36935, ID# 37064, ID# 112874

Enclosures: Submitted documents

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