



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 20, 1998

Ms. Joan Carol Bates
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-1016

Dear Ms. Bates:

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# 113983.

The Texas Department of Health ("TDH") received a request "to review the Request for Applications and the scores submitted by all applicants in the Harris Service Area."¹ You explain that TDH and the Texas Department of Human Services ("DHS") jointly requested applications for medicaid managed care contracts for the Harris County service area. You state that TDH "takes no position as to whether any or all of these documents are excepted from mandatory disclosure under Chapter 552 of the Government Code." However, TDH is "withholding portions of the documents marked 'confidential' by the HMOs and re-submitting them for a decision under § 552.110 of the Government Code."² As you have not raised an applicable exception for the TDH scores, we assume that such information will be released to the requestor. We have considered the exceptions you claim and reviewed the submitted information.

Since their property and privacy rights may be implicated by the release of the requested information, this office notified the companies that submitted to TDH the requested referenced bid information AMERICAID Texas, Inc. ("AMERICAID"),³ PCA

¹As a preface to our discussion, we note that in Open Records Letter No. 97-1498 (1997), this office previously addressed a request for related information under section 552.104 of the Government Code.

²We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

³Although AMERICAID was sent a notice pursuant to section 552.305, we note that AMERICAID is the requestor in this instance.

Health Plans of Texas, MSCH ACCESS Health Plan, Harris Methodist Texas Health Plan, HMO Blue West Texas, Community Health Choice, Inc., and AmeriHealth HMO of Texas, Inc. ("AmeriHealth"), of the request for information. *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 Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. PCA Health Plans of Texas, MSCH ACCESS Health Plan, Harris Methodist Texas Health Plan, HMO Blue West Texas, and Community Health Choice, Inc. did not respond to our notification. Thus, we assume these companies have no property or privacy interest in the information. Therefore, we have no basis to conclude the information about these five companies is excepted from required public disclosure, and conclude it must be released.

AmeriHealth responded to our notification, asserting that several portions of its proposal are excepted from disclosure by sections 552.101 and 552.110 of the Government Code. Section 552.110 excepts from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." AmeriHealth invokes both prongs of section 552.110.

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.), *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).⁴ 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.

Commercial or financial information may be excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 of the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks and 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. *Id.* at 770. Consequently, if a governmental body or other entity can meet the test established in *National Parks*, the information may be withheld from disclosure.

To be held confidential under *National Parks*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks*, 498 F.2d at 766. 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. 639 (1996) at 4. Moreover, "[t]o 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." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). See Open Records Decision No. 639 (1996) at 4.

⁴The 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 submitted information and arguments, we conclude that AmeriHealth has demonstrated how release of much of the requested information would result in substantial competitive harm. Therefore, pursuant to section 552.110, TDH must withhold the information relating to AmeriHealth which we have marked and tagged.

We note, however, some of the information contained in the proposal appears to have been widely distributed, such as brochures, educational material, and general forms. Other information includes publicly available information such as articles of incorporation or corporate by-laws. For information to be protected under section 552.110, it must be information that is not publicly available or readily ascertainable by independent investigation. *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 435 (Tex. App.--Forth Worth 1987, no writ). Accordingly, we have tagged the documents which may not be withheld under the section 552.110 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁵ This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 113983

Enclosures: Marked documents

cc: Mr. James D. Donovan, Jr.
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(w/o enclosures)

⁵AmeriHealth also asserts that portions of the submitted information may be protected by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However, neither TDH nor AmeriHealth has presented statutory or other legal authority which deems this information confidential by law. Therefore, section 552.101 does not except the requested information from required public disclosure.

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