



February 24, 1999

Ms. Sharon Alexander  
Office of the General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR99-0530

Dear Ms. Alexander:

You ask this office to reconsider our decision issued to the Texas Department of Health (the "department") in Open Records Letter No. 98-2458 (1998), which concerned a request for documents relating to the department's RFP No. HCF-96-05 including the proposal of Birch & Davis Health Management Corporation ("Birch & Davis"), the evaluation materials used to score the proposals, and materials relating to the RFP prepared for the department by the Lewin Group. Since the issuance of Open Records Letter No. 98-2438, the department has received several requests for the contract between the department and Birch & Davis, which you state is the information at issue in Open Records Letter No. 98-2458.<sup>1</sup> Your request for an open records decision on this matter was assigned ID#s 121383 and 122447.

You state that the department takes no position in regard to the section 552.110 claims of Birch & Davis and the Lewin Group ("Lewin"), two third parties whose proprietary interests were implicated by the release of the requested information. In Open Records Letter No. 98-2458, this office considered the arguments of Birch & Davis that its bid proposal is excepted from public disclosure based on section 552.110 of the Government Code. Birch & Davis now submits additional arguments that portions of its information are excepted from disclosure based on section 552.110. We affirm the conclusions of Open Records Letter No. 98-2458 that the department must withhold from disclosure portions of the Birch & Davis bid proposal that we previously ruled as excepted under section 552.110 and release

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<sup>1</sup>You also ask whether an open records ruling to the department is binding on another state agency that receives a request for the same information. If this office has determined that certain information in the department's possession is excepted from disclosure based on section 552.110 of the Government Code, another governmental body generally may rely on that ruling to withhold the same information from public disclosure based on section 552.110. Gov't Code § 552.301. You additionally ask about a government agency's liability for the inadvertent release of information excepted from disclosure under section 552.110. Questions about liability for the release of information that is excepted from disclosure are beyond the scope of inquiry to this office.

portions of the proposal that we ruled as public. We decline to reconsider the ruling in respect to Birch and Davis' claim for additional protection under section 552.110.

Birch & Davis also maintains that "Sample Reports, Various BDHMC Projects" contains personal, intimate details from health care recipients' medical files that must be protected from disclosure. We do not find the referenced sample reports among the submissions to this office and accordingly cannot decide whether the release of the reports would implicate the privacy or statutory rights of health care recipients. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). While common-law privacy may protect an individual's medical history, it does not protect all medically related information. *See Open Records Decision No. 478 (1987)*. Individual determinations are required. *See Open Records Decision No. 370 (1983)*.

We turn to the Lewin information, interview notes which you state "are basically the working papers of a consultant performing work for the department . . . , [which] were ultimately utilized by the consultant in the development of final reports which did have to be submitted to the department as deliverables." The department contends that the Lewin interview notes are not subject to the Open Records Act (the "act"), because you state that the notes "were never owned by the department, the department has not ever had access to the notes and does not seek access to the notes." Lewin informs us that the notes were taken during interviews by Lewin employees and/or subcontractors on the department's behalf, pursuant to a contract between Lewin and the department. Lewin further states that its contract with the department does not require Lewin to deliver the notes to the department.

Section 552.002(a) of the Government Code states as follows:

(a) In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

The test for whether the act applies to information held by outside parties is whether: (1) the information relates to the governmental body's official duties or business; (2) the consultant acts as the agent of the governmental body in collecting the information; and (3) the governmental body has or is entitled to access to the information. *Open Records Decision Nos. 499 (1986), 462 (1987)*. Because you state that the department does not own the notes and does not have a right of access to the notes, we conclude that the notes are not subject to the act. *See Open Records Decision No. 445 (1986)*.

Next, we address the required public release of a document titled “Managing Integration Problems Between Fee-For-Service & Managed Care,” which you state was at issue in Open Records Letter No. 97-1564 (1997). That letter determined, among other things, that the department may withhold certain consultant’s reports based on section 552.111 of the Government Code. As you state that the document at issue is one of the consultant’s reports held excepted from disclosure in Open Records Letter No. 97-1564, we conclude that the department may continue to withhold the report from disclosure in accordance with the prior ruling.

Finally, we consider the required public disclosure of a document titled “AMISYS, Medical Management Subsystem Configuration Guide, May 1996.” HBO & Company of Georgia (“HBOCO”), a subcontractor of Birch & Davis, argues that this document is a trade secret excepted from disclosure based on section 552.110 of the Government Code. HBOCO’s interests were not raised in Open Records Letter No. 98-2458 (1998).

Section 552.110 of the Government Code excepts a trade secret from required public disclosure. 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, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 at 2 (1990). 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, . . . [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.

RESTATEMENT OF TORTS, § 757 (1939).<sup>2</sup> This office has held that if a governmental body

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<sup>2</sup>The six factors include: 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; 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS, § 757 (1939)

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 at 5-6 (1990).

We have reviewed HBOC's arguments and the document at issue. We conclude that the department must withhold the information from 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.

Sincerely,



Kay Hastings  
Deputy Chief  
Open Records Division

KHH/ch

Ref.: ID#s 121383,122447

Enclosures: Submitted documents

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