



November 1, 1999

Ms. Janine 'Red' Balacki
State Office of Risk Management
P.O. Box 13777
Austin, Texas 78711-3777

OR99-3066

Dear Ms. Balacki:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129398.

The State Office of Risk Management ("SORM") received a request for records concerning SORM's Medical Cost Containment Invitation for Bid. You advise that the requested information may implicate the proprietary interests of third parties, and have notified these third parties pursuant to section 552.305 of the Government Code.¹ Although you make no arguments for withholding the information at issue from disclosure, you ask that we consider the third parties' contentions that the information is proprietary and should be excepted from disclosure.

The following third parties have submitted arguments urging that portions of the requested information are confidential: Forte' Managed Care,² Reviewco, Spectrum Managed Care, Argus Services Corporation, and Corvel Corporation. All of the third parties state or suggest that portions of the requested information are confidential because they are proprietary. In addition, Corvel Corporation claims that some of the requested information is excepted from disclosure under section 552.104 of the Government Code. Finally, Argus Services Corporation claims that some of the requested information is confidential due to privacy concerns for its employees. We have considered the arguments that the third parties raise and reviewed the submitted information.

¹Section 552.305(d) provides: "If release of a person's proprietary information may be subject to exception under Section 552.101, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision."

²Forte' Managed Care is the requestor in this case. Because we assume that Forte' Managed Care is not interested in withholding its own documents from itself, we will not consider its arguments for withholding the requested information.

By claiming that portions of the information at issue is proprietary, the third parties seem to be raising section 552.110 of the Government Code. Section 552.110 provides:

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information.

A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 Corporation 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 party'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

rebutts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).³ However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). Having reviewed the third parties' arguments and the information at issue, we conclude that none of the third parties has made a *prima facie* case that the information is protected under the trade secret aspect of section 552.110.

As for the financial or commercial information prong of section 552.110, the governmental body, or interested third party, raising that exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Act of May 25, 1999, 76th Leg., R.S., ch 1319, § 7, 1999 Tex. Sess. Law Serv. 4500, 4503 (Vernon) (to be codified as an amendment to TEX. GOV'T CODE § 552.110).; *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Here, none of the third parties has demonstrated with specific factual evidence that disclosure would cause substantial competitive harm to the third party from whom the information was originally obtained. Therefore, we find that none of the submitted information constitutes "commercial or financial information," and consequently, none of the information is excepted from disclosure under section 552.110.

Corvel Corporation contends that section 552.104 of the Government Code excepts the submitted information from disclosure. Section 552.104 excepts from required public disclosure information that "if released, would give advantage to a competitor or bidder." We note, however, that section 552.104 protects the interests of governmental bodies, not private third parties. Open Records Decision No. 592 (1991). Since SORM has not raised section 552.104, section 552.104 is not applicable to the information at issue. *Id.* (governmental body may waive its section 552.104 interest).

Finally, Argus Services Corporation ("Argus") claims that information concerning its employees' names, home telephone numbers, and home addresses raises privacy concerns for its employees. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information is protected by the common-law right to privacy if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate

³The 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.

concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We have reviewed the submitted documents that pertain to Argus's employees and note that no addresses or phone numbers of any kind appear in the documents. As for the employee names, we do not believe that this information is so highly intimate or embarrassing as to invoke common-law privacy as encompassed by section 552.101. Therefore, the requested information must be released to the requestor.

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.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\nc

Ref: ID# 129398

Encl: Submitted documents

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