



November 30, 1999

Ms. Deborah C. Hiser
Hilgers & Watkins, PC
San Jacinto Center, Suite 1300
98 San Jacinto Blvd.
Austin, Texas 78701

OR99-3419

Dear Ms. Hiser:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129731.

The Amarillo Hospital District (the "AHD"), which you represent, received requests for proposals submitted by the Texas Tech Department of Pediatrics ("TTDP") and by the Amarillo Area Healthcare Specialists ("AAHS") in response to the AHD's Request for Qualified Pediatric Services. While you raise no arguments for withholding the requested information on behalf of your client, you advise that the requested information involves the privacy or property interests of AAHS. In accordance with section 552.305 of the Government Code, you have notified AAHS of the request.¹ AAHS has responded, claiming that portions of the requested information are excepted under sections 552.101 and 552.110 of the Government Code.² We have reviewed AAHS' arguments and reviewed the submitted information.³

¹You make no mention of having notified TTDP. We note that section 552.305 required you to make a good faith effort to notify TTDP of the request.

²These portions of the requested information generally consist of quality of care policies and procedures, quality improvement information, and patient-satisfaction survey results.

³According to your letter, the remainder of the requested information has already been released to the requestors.

Section 552.110 protects the property interests of third 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 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 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 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) (emphasis added). 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

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

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).

AAHS contends that portions of the documents at issue, submitted to this office within Exhibits A through F, constitute trade secrets. We find that AAHS has established, by a *prima facie* case, that most of the documents at issue contained in Exhibits A through E must be withheld from disclosure under the trade secret prong of section 552.110. However, we note that the customer-satisfaction survey questions contained in Exhibit E have already been made available to the public. Consequently, the survey questions themselves do not qualify as trade secrets under section 552.110. Furthermore, the document submitted to this office as Exhibit F also does not contain information that fits within the Restatement definition of trade secret, and therefore that document is not excepted from disclosure under the trade secret prong of section 552.110.

AAHS also suggests that the customer-satisfaction survey information contained in Exhibit E, and the document contained in Exhibit F fall under the “commercial or financial information” prong of section 552.110. Section 552.110(b) excepts from required public disclosure “[c]ommercial 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.” The governmental body, or interested third party, raising section 552.110 must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. §552.110 Gov’t Code; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). AAHS states that the customer-survey information “could be used by AAHS’ competitors to cause substantive harm to AAHS.” However, the survey questions themselves have already been released to the public, and therefore no interest under the “commercial or financial” prong of section 552.110 exists in regard to these questions. As AAHS raises no other argument regarding the survey questions, AHS must release the list of questions to the requestor. For clarity, we have marked the survey questions in Exhibit E that must be released.

AAHS also states that if the information contained in Exhibit F were released, “it could be utilized by competitors to cause substantial competitive harm to AAHS.” AAHS also refers to a submitted affidavit in which the Senior Managing Partner of AAHS states that competitors could use the information contained in Exhibit F to discredit AAHS and its physicians, “thereby causing substantial competitive harm.” However, after considering these arguments, and reviewing the very limited information contained in Exhibit F, we find that AAHS has not provided adequate and specific factual evidence that disclosure of the information would cause substantial competitive harm to AAHS. Accordingly, AHD may not withhold Exhibit F under either prong of section 552.110.

AAHS also contends that the document submitted as Exhibit F contains medical information about an individual, and is therefore confidential under section 552.101 of the Government Code in conjunction with Rule 509(c) of the Texas Rules of Evidence. We note, however, that chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. Attorney General Opinion JM-1048 (1989); *see* Open Records Decision No. 575 (1990) (section 552.101 does not encompass discovery privileges); Gov't Code § 552.006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552). The evidentiary rule to which AAHS cites regulates discovery in court proceedings and not the availability of information under chapter 552 of the Government Code. Therefore, Rule 509(c) is neither encompassed within section 552.101 of the Government Code, nor does it authorize withholding Exhibit F from public disclosure.

Finally, AAHS seems to argue that Exhibit F is confidential under section 552.101 of the Government Code because the document at issue is a medical record. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality statutes such as section 5.08 of the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b. That statute provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). We have reviewed Exhibit F and find that it does not constitute a medical record created or maintained by a physician. Therefore, Exhibit F is not confidential under the MPA as encompassed by section 552.101 of the Government Code. In conclusion, AHS must release to the requestor the information contained in Exhibit F as well as the marked information contained in Exhibit E.

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# 129731

Encl: Submitted documents

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