



September 20, 2000

Ms. J. O. Khayan Williams
Assistant District Attorney
County of Tarrant
1025 South Jennings, Suite 300
Fort Worth, Texas 76104

OR2000-3638

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 139249.

The Tarrant County Hospital District (the "district") received a request for information which states in pertinent part:

I have information that states [the district is] a contracting provider with Blue Cross Blue Shield of Texas HealthSelect. Since [the district is] a public entity, I am requesting a copy of this contract[.]

You have submitted for our review the information that you indicate to be responsive to the request, consisting of two contracts between the district and Blue Cross and Blue Shield of Texas ("Blue Cross"), marked by you as "Agreement 1" and "Agreement 2."¹ You assert that a portion of each agreement is excepted from disclosure under section 552.110 of the Government Code.

The district has also notified Blue Cross of the request by a letter dated July 18, 2000 in compliance with section 552.305 of the Government Code. *See* Gov't Code § 552.305

¹Blue Cross contends that the submitted information is not responsive to the request because the contracts are not HealthSelect contracts. However, we rely on the district's representations that the submitted information is responsive to the request.

(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 Public Information Act in certain circumstances). Blue Cross responded to the notice. Blue Cross incorporates by reference the arguments submitted by the district, and also asserts that the agreements in their entirety are excepted from disclosure under section 552.110. We have considered the asserted exception and the submitted arguments, and we have reviewed the submitted information.

We note at the outset that the information at issue is subject to section 552.022 of the Government Code. In relevant part, section 552.022 states that certain categories of information "are public information and not excepted from required disclosure under [chapter 552 of the Government Code] unless they are *expressly confidential under other law*[" Gov't Code § 552.022(a) (emphasis added). Among such categories is "information in an account, voucher *or contract* relating to the receipt or expenditure of public or other funds by a governmental body[" *See id.* § 552.022(a)(3) (emphasis added). The submitted documents comprise two contracts between the district and Blue Cross that relate to the expenditure of public or other funds by the district and are thus subject to this provision. Accordingly, by the express terms of section 552.022, the information is not excepted from required public disclosure unless "expressly confidential under other law."

Section 552.110 of the Government Code states:

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].
- (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 [required public disclosure.]

Neither the district nor Blue Cross specify whether the respective section 552.110 assertions are made pursuant to subsection (a), subsection (b), or both. We shall accordingly address both subsections.

We begin by addressing subsection (a). A "trade secret"

may consist of 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). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). This office has stated that information is excepted from disclosure under section 552.110(a) where a *prima facie* showing is made to this office that the information constitutes a trade secret. Open Records Decision No. 552 (1990). In the instant case, however, neither the district nor Blue Cross argues, nor is it apparent to this office, that any of the information contained in the submitted contracts meets the above-quoted definition of a trade secret. For information that meets this definition, we additionally note that there are six factors to be assessed in determining whether the information qualifies as a trade secret:

- (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; and
- (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 No. 232 (1979). Neither the district nor Blue Cross have provided information to this office as the applicability of the above-stated factors to the requested contracts. We therefore have no basis to conclude that any of the responsive information is excepted from required public disclosure as trade secrets. Thus, the information is not excepted by section 552.110(a).

As noted above, we have also considered the submitted arguments in the context of whether any of the information at issue has been demonstrated to be excepted from disclosure under subsection (b) of section 552.110. Among other arguments, the district asserts that the facts in Open Records Decision No. 292 (1981) "are quite similar in nature and the exemption is clearly applicable." In that decision, this office granted an exception to disclosure of information contained in a contract pursuant to the statutory predecessor to section 552.110(b). Unlike the present information, the information at issue in that decision was contained in a contract *between private entities*. See Open Records Decision No. 292 at 1 (1981). Thus, Open Records Decision No. 292 (1981) is distinguishable from the present request.

Both the district and Blue Cross additionally argue that the information at issue here is made confidential by the terms of the contracts. However, this office has long held that a governmental body's promise to keep confidential information that is subject to the Act is not a basis for withholding the information from the public, unless the governmental body has specific statutory authority to keep the information confidential. Open Records Decision Nos. 514 (1988), 479 (1987), 444 (1986). Neither the district nor Blue Cross argues, nor is it apparent to this office, that the district had statutory authority to keep confidential the contracts at issue or any of the information contained in the contracts.

The district and Blue Cross also essentially argue that release of the information might compromise the future ability of *the district* to obtain favorable contractual terms with Blue Cross. This argument, expressing the commercial interests of *the district*, evidently relies on the test announced in *National Parks* pertaining to the applicability of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, we note that standard was overturned by the Third Court of Appeals when the court held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App. - Austin 1999, pet. denied.). Indeed, section 552.110(b) now expressly states the standard to be applied and, as quoted above, the language of subsection (b) requires the *third party* whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that disclosure of its information would likely result in substantial competitive injury to the *third party*. See also Open Records Decision No. 661 at 5-6 (1999). We have therefore considered whether the district or Blue Cross have demonstrated that substantial competitive injury would likely result to *Blue Cross* from disclosure of the submitted contracts. Upon careful consideration of the arguments and our review of the information, we conclude that the submitted comments and arguments do not demonstrate, through a specific factual or evidentiary showing, that release of the information at issue would likely result in substantial

competitive injury to Blue Cross. Thus, the information is not excepted from disclosure by section 552.110(b).

In summary, because neither subsection of section 552.110 has been demonstrated to apply to the submitted information, we conclude that the information must be released to the requestor in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

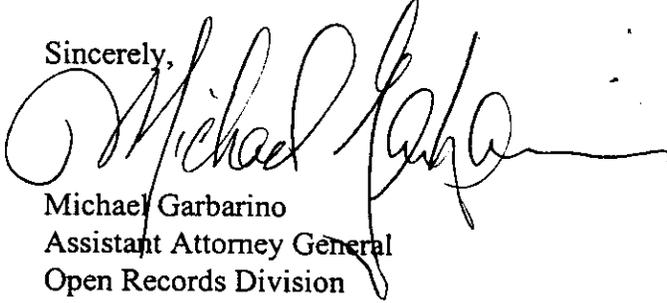
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to the General Services Commission at 512/475-2497

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 139249

Encl. Submitted documents

cc: Ms. Patricia Corbett
10950 Woodmeadow Parkway
Apartment #124
Dallas, Texas 75228
(w/o enclosures)