



January 15, 2002

Ms. Genevieve G. Stubbs
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OR2002-0249

Dear Ms. Stubbs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157354.

The Texas A&M University System (the "system") received a request for a copy of the winning contract and proposal, and all unsuccessful proposals submitted for the system employee Pharmaceutical Benefit Plan. On October 29, 2001, the requestor narrowed the request to include only the proposals submitted by Aetna, Caremark, Eckerd Health Services, CIGNA, and WHP/Health Initiatives. While the system did not submit a copy of the winning contract, it appears that there is no final contract yet due to ongoing negotiations. Pursuant to section 552.305 of the Government Code, the department notified third parties of the request because their proprietary interests are implicated.¹ This office received responses from Aetna, CIGNA, Caremark, and Eckerd objecting to the release of portions of their proposals. The system did not submit proposals from Aetna or Caremark. Therefore, this ruling does not address whether these proposals are subject to disclosure, and we only address the applicability of section 552.110 in relation to the proposals from CIGNA and Eckerd. WHP/Health Initiatives did not submit any arguments and therefore, this office has no basis for concluding that WHP's proposal must be withheld. Therefore, the requested proposal from WHP/Health Initiatives must be released.

Initially, we must address the system's failure to timely submit to this office, in compliance with section 552.301 of the Government Code, a copy of the written request for information.

¹See 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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances)

Section 552.301(e) provides that not later than the fifteenth business day after the date of receipt of the information request, the governmental body must submit to the attorney general a copy of the written request for information. Gov't Code § 552.301(e)(1)(B). The statutory periods for compliance with section 552.301 have expired. Because the system failed to comply with section 552.301 as to the request for information, the requested information is presumed to be subject to required public disclosure and must be made available to the requestor, unless there is a compelling reason to withhold any of that information. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ). The application of section 552.110 of the Government Code is such a compelling reason.

CIGNA and Eckerd argue that their information is excepted from disclosure under section 552.110. Section 552.110 protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure two types of information: (1) trade secrets, and (2) 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. *See Gov't Code § 552.110(a), (b)*. 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.

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).² If, as is true here, the

²The 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

governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the requested information, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. See Open Records Decision No. 552 at 5 (1990) (addressing statutory predecessor); see also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). Under section 552.110(b), the private entity must provide a specific factual or evidentiary showing, and not conclusory or generalized allegations, that substantial competitive injury likely would result from the release of the information at issue. See Open Records Decision No. 661 at 5-6 (1999) (addressing required showing); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). However, CIGNA has made only conclusory statements in support of its claim that section 552.110 operates to except its information. Thus, we conclude that CIGNA has failed to establish that its information is confidential as either a trade secret under section 552.110(a), or as commercial or financial information the release of which would cause substantial competitive harm under section 552.110(b). Therefore, except for certain e-mail addresses, the CIGNA proposal must be released to the requestor in its entirety.

Eckerd first claims that its information is excepted from disclosure under section 552.110(a) of the Government Code. Eckerd argues that its clinical information and pricing information are trade secrets unique to its business, and release of the information would cause it substantial competitive harm. Although Eckerd states that its entire proposal should be withheld, it makes specific arguments in reference to pricing information on pages 43-45 regarding Costs/Plan Design and pages 85-88 regarding Rebates and Performance Guarantees, and clinical information on page 69 regarding Claims Processing. Eckerd contends that its clinical information such as its retrospective drug utilization review enables it to perform quality medical management with a 24-hour turn-around that is unique to Eckerd and that contracts have been awarded based on this ability. Eckerd claims that it has innovated this drug utilization review for more than seven years, and that the review constitutes its competitive advantage, disclosure of which would deprive it of this advantage. Regarding the pricing information, Eckerd contends that the information is generated by its price formula model. According to Eckerd, the formula model calculates prices based on certain size clients, and competitors could unfairly out-compete Eckerd on similar size clients if the information became known. Eckerd explains that its pricing information is not fact or client specific but is used continuously by Eckerd in other contracts. Finally, Eckerd asserts

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).

that the pricing information contains costs for the clinical information, meaning that to the extent the pricing information is disclosed, elements of the clinical information are at risk of being disclosed, and the clinical information gives Eckerd its competitive advantage. Based on Eckerd's arguments and our review of the submitted information, we conclude that Eckerd has established that some of the information on the specified pages constitutes trade secrets. Therefore, the system must withhold this information, with the exception of the information that we have marked within the referenced pages. Eckerd has not demonstrated that the remaining information is commercial or financial information that may be withheld under section 552.110(b).

Eckerd also claims that certain information in Bid Section 1 of its Appendix A constitutes trade secret information. We have identified two Appendix A's, one entitled "J.C. Penney Company Annual Report" and another that begins with "BBS Instructions." Eckerd's arguments for "Bid Section 1 of Financials-Appendix A" do not appear to correspond to either of these two appendices. Because Eckerd has not met its burden under section 552.110 for this information, it must be released.

Finally, we note that the submitted information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137, recently added to the Public Information Act by the Seventy-seventh Legislature,³ provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." *See* Gov't Code § 552.137(a). As there is no indication that any of the individuals to whom the e-mail addresses belong have consented to their release, the system must withhold the e-mail addresses in the CIGNA and Eckerd proposals that we have marked under section 552.137 of the Government Code. *See* Gov't Code § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release). The system must release all of the remaining submitted information.

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

³Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 614; *see also* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. Laws 974, 975 (adding this exception as § 552.136).

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 Hadassah Schloss at the Texas Building and Procurement 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 157354

Enc. Submitted documents

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