



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 31, 2002

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2002-7479

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174357.

The University of Texas System (the "system") received three requests for information regarding the system's recent request for proposal for Worker's Compensation Medical Bill Audit and Medical Claims Management Services, RFP No. 2002-W1. You indicate that you have released some of the responsive information. Although you do not take a position with respect to the release of the requested information, you state that some of the requested information may be excepted from disclosure under sections 552.101, 552.110, 552.113, and 552.131 of the Government Code.¹ You indicate, and provide documentation showing, that the system has notified Corvel Corporation ("Corvel"), Forte, Inc. ("Forte"), Medical Business Management Services, Inc. ("MBMS"), and Review Med ("RM") of the request for information in order to afford each entity an opportunity to supply objections to release of the submitted information. *See* 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 Public Information Act in certain circumstances). We have considered all submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code

¹As we did not receive arguments with respect to section 552.113 and 552.131, we need not address these exceptions to disclosure.

§ 552.305(d)(2)(B). As of the date of this letter, RM has not submitted to this office its reasons explaining why its information should not be released. Therefore, RM has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, the information pertaining to RM must be released to the requestor.

On the other hand, Corvel, Forte, and MBMS have submitted comments for our review. Both Forte and MBMS argue that their respective proposals must be withheld from disclosure because they informed the system that the information in their proposals is confidential. However, information that is subject to disclosure under the Public Information Act (the "Act") may not be withheld simply because the party submitting it anticipates or requests confidentiality. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

Forte and MBMS also argue that the submitted information is excepted under section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The purpose of section 552.104 is to protect the purchasing interests of governmental bodies in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* As the system does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Thus, the system may not withhold any of the submitted information under section 552.104.

Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. See Gov't Code § 552.110(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 [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 also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether 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). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we

cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[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[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Corvel argues that portions of its proposal must be withheld under section 552.110. Upon review of Corvel's arguments, however, we find that Corvel has failed to demonstrate the applicability of either prong of section 552.110 to the submitted portions of its proposal.² Thus, the information pertaining to Corvel must be released to the requestor.

Forte argues that its entire proposal constitutes a trade secret and must therefore be withheld under section 552.110(a). In the alternative, Forte argues that portions of its proposal are excepted from disclosure under section 552.110(a). MBMS also argues that portions of its proposal are excepted under section 552.110(a). Upon review of Forte's arguments, we find that it has established the applicability of section 552.110(a) to portions of its proposal. We also find that MBMS has established the applicability of section 552.110(a) to portions of its proposal. Further, no arguments have been submitted that rebut the Forte's or MBMS's claims as a matter of law. Accordingly, the system must withhold the information we have marked in Forte's proposal and in MBMS's proposal under section 552.110(a). We note, however, that we do not believe that pricing information is excepted from disclosure under section 552.110. *See* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see also* Gov't Code §.552.022(a)(3) (information in an account, voucher, or contract relating to the receipt or expenditure of public funds by a governmental body is public information); Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). We further note that, in applying the predecessor statute to section 552.110, this office has held that information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing

²We note that Corvel seeks to withhold its PPO Network Disk. This information was not contained in the information submitted to this office by the system for review. Therefore, this ruling does not address this information, and is limited to the information submitted as responsive by the system. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested).

ordinarily may not be withheld under section 552.110. Open Records Decision No. 319 (1982). Furthermore, we conclude that Forte and MBMS have failed to establish the applicability of section 552.110(a) to the remaining information in their respective proposals.

Forte and MBMS, however, also argue that the financial statements in their proposals are excepted under section 552.110(b). Upon review of Forte's and MBMS's arguments, we find that they have established the applicability of section 552.110(b) to portions of their respective proposals. Thus, we have marked the information in Forte's proposal and MBMS's proposal that must be withheld under section 552.110(b).³

Next, we note that the submitted proposals contain information that must be withheld under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An 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 this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The system must, therefore, withhold e-mail addresses of members of the public under section 552.137. Thus, we have marked the types of e-mail addresses that must be withheld under section 552.137.

Finally, we note that Forte's proposal contains a social security number that may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990.⁴ See Open Records Decision No. 622 (1994). It is not apparent to us that the social security number contained in the information at issue was obtained or maintained by the system pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the system

³As we are able to make this determination, we need not address Forte's remaining arguments against disclosure.

⁴Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number at issue was obtained or is maintained pursuant to such a statute and is, therefore, confidential under section 405(c)(2)(C)(vii)(I). We caution the system, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you should ensure that this number was not obtained or is not maintained by the system pursuant to any provision of law enacted on or after October 1, 1990.

To summarize: (1) we have marked the information in Forte's proposal that must be withheld under section 552.110(a) or section 552.110(b); (2) we have marked the information in MBMS' proposal that must be withheld under section 552.110(a) or 552.110(b); (3) we have marked the types of e-mail addresses in the submitted proposals that must be withheld under section 552.137; and (4) the social security number in Forte's proposal may be excepted from required public disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). The remaining requested information must be released.

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 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID#

Enc: Submitted documents

c: Ms. Mundy Hebert
Vice President, Sales & Marketing
Forte, Inc.
7600 Chevy Chase Drive, Suite 400
Austin, Texas 78752
(w/o enclosures)

Ms. Heather Straub
Account Executive
Corvel Corporation
3721 Executive Center Drive, Suite 201
Austin, Texas 78731
(w/o enclosures)

Ms. Shelly Bordonaro, V.P.
Review Med
8026 Vantage, Suite 222
San Antonio, Texas 78230
(w/o enclosures)

Mr. Ronald Habitzreiter
Attorney at Law
1208 West Avenue
Austin, Texas 78701
(w/o enclosures)

Ms. Joyce Maxam
President
Medical Business Management Services, Inc.
4635 Southwest Freeway, Suite 600
Houston, Texas 77027
(w/o enclosures)